

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. )  
 ) Witness:  
 UNIVERSITY OF KENTUCKY )  
 ) JAY ZWISCHENBERGER,  
 DEFENDANT ) M.D.

\* \* \* \* \*

The deposition of JAY ZWISCHENBERGER, M.D., was taken before Desiree J. Wright, Court Reporter and Notary Public in and for the State of Kentucky at Large, and also by videotape recording, at the law offices of Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky, on Wednesday, August 17, 2016, commencing at the approximate hour of 9:30 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:

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PAFUNDA LAW OFFICE  
921 Beasley Street - Suite 150  
Lexington, Kentucky 40509

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ATTORNEYS FOR PLAINTIFF

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8

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

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ATTORNEYS FOR DEFENDANT

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ALSO PRESENT:

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Ann LeRoy,  
Certified Legal Videographer

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AN/DOR Reporting & Video Technologies, Inc.

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1 THE VIDEO TECHNICIAN: We're on the  
2 video record. I'm Ann LeRoy, certified  
3 videographer. The court reporter is  
4 Desiree Wright.

5 We're here to take the deposition of  
6 Dr. Jay Zwischenberger, at 333 West Vine  
7 Street, Lexington, Kentucky.

8 The deposition is being taken  
9 pursuant to notice in the Fayette Circuit  
10 Court; styled Paul Kearney M.D. versus  
11 University of Kentucky.

12 The date is August 17, 2016. The  
13 time is 9:27 a.m.

14 Would counsel please introduce  
15 themselves and state who they represent.

16 MR. PAFUNDA: Bernard Pafunda, on  
17 behalf of Dr. Paul Kearney.

18 MR. BEAUMAN: Bryan Beauman, for the  
19 University.

20 The witness, JAY ZWISCHENBERGER,  
21 M.D., after first being duly sworn, was  
22 examined and testified as follows:

23 EXAMINATION

24 By Mr. Pafunda:

25 Q Dr. Zwischenberger, am I pronouncing  
AN/DOR Reporting & Video Technologies, Inc.

1 your last name correctly?

2 A Yes, sir.

3 Q You brought with you a copy of your  
4 CV; is that correct?

5 A Yes.

6 Q And is it a true and accurate copy?

7 A Yes.

8 Q I'll show it to you and I've marked  
9 it as Plaintiff's Exhibit No. 1.

10 (CURRICULUM VITAE WAS MARKED AS  
11 PLAINTIFF'S EXHIBIT NO. 1 FOR PURPOSES OF  
12 IDENTIFICATION.)

13 Q While you're leafing through it, had  
14 you had an opportunity to review it prior to your  
15 deposition, Doctor?

16 A No.

17 Q I'd like to thank you for taking the  
18 time to do that.

19 A That's correct.

20 Q What's correct?

21 A You said for me -- you asked me to  
22 look through it and I just did.

23 Q Where did you obtain your CV from?

24 A Our Manuscript Office keeps track of  
25 it.

AN/DOR Reporting & Video Technologies, Inc.

1 Q And did you -- when I asked you to  
2 produce your CV, did you personally get ahold of  
3 your CV to bring today?

4 A I brought it today, yes.

5 Q When did you first obtain your CV?

6 A It's taken me 35 years to build that  
7 CV.

8 Q No, the hard copy?

9 A This one (indicating)?

10 Q Yes.

11 A Yesterday evening.

12 Q And yesterday evening, did you have  
13 the opportunity to look through it?

14 A I was asked to bring it. I  
15 wasn't -- I wasn't told to look through it.

16 Q I know that. That's not my  
17 question.

18 My question is, did you have the  
19 opportunity yesterday evening to look through it?

20 MR. BEAUMAN: I don't think he could  
21 have, because he gave it to me. I had it  
22 here to make copies for you.

23 Q Well, my question -- before you gave  
24 it to Mr. Beauman, did you look through it?

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

1 Q Is that an up-to-date CV?

2 A Yes.

3 Q And you came to the University of  
4 Kentucky from where?

5 A You mean which was my prior academic  
6 appointment?

7 Q Yes.

8 A University of Texas medical branch  
9 in Galveston.

10 Q And what was your position there?

11 A I was a full professor of surgery,  
12 medicine and radiology.

13 Q And were you engaged in the active  
14 practice of medicine while you were at that  
15 university?

16 A Yes.

17 Q And how much of your workweek was  
18 dedicated to the active practice of medicine while  
19 you were at that university?

20 A I was on call 24/7, 365. I was the  
21 Director of General Thoracic Surgery. I worked  
22 with Interventional Radiology. I worked with  
23 Critical Care and Medicine. And I was the  
24 Director of the ECMO program, so I was engaged in  
25 the practice of medicine 24/7, 365.

AN/DOR Reporting & Video Technologies, Inc.

1 Q While you were employed there, did  
2 you have to undergo performance evaluations?

3 A I'm sure I did.

4 Q No, I'm asking you, did you or did  
5 you not?

6 A Once a year my division chief would  
7 discuss my performance, yes.

8 Q And did you retain copies of those  
9 performance evaluations?

10 A No.

11 Q So those performance evaluations  
12 would be -- would be where, if anywhere at this  
13 time? At that university?

14 A I presume.

15 Q And what brought you to the  
16 University of Kentucky? What triggered that?

17 A I was recruited.

18 Q By whom?

19 A A recruitment firm at the time.

20 Q Who did you interview with at the  
21 University of Kentucky?

22 A I don't recall. I met with a Search  
23 Committee. And then I interviewed multiple times;  
24 visits ranging from one to three days at a time.

25 Q And who is the decision -- who made  
AN/DOR Reporting & Video Technologies, Inc.



1 the decision to hire you?

2 A The dean.

3 Q And the dean at the time was whom?

4 A Dean Perman.

5 Q Did Dr. Karpf, Michael Karpf,  
6 participate in that decision to hire you?

7 A I don't know.

8 Q When you came to the University of  
9 Kentucky in May of 2007 -- am I correct on the  
10 date?

11 A Correct.

12 Q -- you came as chair?

13 A Chair of the Department of Surgery.

14 Q And who placed you in the position  
15 as Chair of the Department of Surgery?

16 A Dean Perman.

17 Q Anyone else participate in that  
18 decision?

19 A Not that I'm aware of.

20 Q Are you at the present time a  
21 tenured -- tenured faculty member?

22 A Yes.

23 Q Do you serve as the chair in a  
24 tenured position or can you be removed at will?

25 A My understanding is I can be removed  
AN/DOR Reporting & Video Technologies, Inc.

1 as chair at any time at the pleasure of the dean.

2 Q Who is your immediate supervisor?

3 A The dean.

4 Q In the -- in the chain of command  
5 above the dean, who would that be?

6 A The dean answers to the provost.  
7 Provost answers to the president.

8 Q Does the Executive Vice President of  
9 Health Affairs play any factor in that chain of  
10 command, and if so, what?

11 A I'm not sure.

12 Q Well, what's your understanding as  
13 to what the Executive Vice President of Health  
14 Affairs does since you've been Chairman of the  
15 Department of Surgery since 2007?

16 A He oversees all of the activities of  
17 the Healthcare Center.

18 Q Do you interact with the Executive  
19 Vice President of Health Affairs?

20 A I do.

21 Q And on what basis, and in what  
22 regard?

23 A Communication.

24 Q Now, that's a pretty general  
25 statement, wouldn't you agree, communication?

AN/DOR Reporting & Video Technologies, Inc.

1           A           It's a direct answer to your  
2 question.

3           Q           Well, let's see how direct it is,  
4 Dr. Zwischenberger.

5                        When you say communication, what do  
6 you specifically mean by communication?

7           A           I participate in multiple  
8 committees. I participate in multiple discussions  
9 in terms of planning, in terms of function, and I  
10 probably meet with him once every other week to  
11 let him know how the OR is going and how patients  
12 are doing, and basically discuss how the Health  
13 Affairs are functioning.

14          Q           And do you report to the Executive  
15 Vice President in written form?

16          A           I don't understand the circumstance  
17 you're referring to.

18          Q           I'm not referring to any  
19 circumstance, am I?

20                       MR. BEAUMAN: That's why it's hard to  
21 answer. I mean, is he required to report or  
22 what --

23                       MR. PAFUNDA: Bryan, are you  
24 answering for him? He's a highly-educated  
25 individual.

AN/DOR Reporting & Video Technologies, Inc.

1 MR. BEAUMAN: I'm suggesting ways  
2 you could ask your question.

3 MR. PAFUNDA: I thought maybe you  
4 were suggesting how he can answer.

5 Q Do you report to the Executive Vice  
6 President in written form, either by e-mail,  
7 report, text?

8 A On request.

9 Q And what do those written forms  
10 generally include -- written reports?

11 A I don't know how to answer that.

12 Q Do you have budgetary reports?

13 A Yes.

14 Q Are those in written -- do you  
15 supply those?

16 A Department administrator, that's  
17 their primary job.

18 Q Do you interact in that?

19 A I do.

20 Q And in that same regard, what is the  
21 overall budget of the Department of Surgery on an  
22 annual basis?

23 A I don't recall the number.

24 Q Do you recall any number?

25 A No.

AN/DOR Reporting & Video Technologies, Inc.

1 Q Would you say that that's an  
2 important aspect of your job duties as department  
3 chair?

4 A Yes.

5 Q And what are your other job duties  
6 as department chair?

7 A I'm a supervisor.

8 Q Who do you supervise?

9 A Supervise the functional Department  
10 of Surgery.

11 Q And could you be more specific?

12 A The functions of the Department of  
13 Surgery are clinical care, education, research and  
14 administration.

15 Q And specifically, what do you do?

16 A I'm involved in overseeing at some  
17 level those functions.

18 Q Would you agree with me that's a  
19 rather broad generalization without being  
20 specific?

21 A No.

22 Q Give me some specific examples of  
23 what you do as department chair, as you oversee  
24 those functions?

25 A Was that a question?  
AN/DOR Reporting & Video Technologies, Inc.

1 MR. BEAUMAN: (Indicating yes.)

2 Q Yes.

3 A I'm sorry, I didn't get the -- say  
4 it again.

5 MR. PAFUNDA: Could you read it back  
6 to him madam court reporter?

7 (Record read.)

8 A I think I did. The educational  
9 aspects of the department are to educate medical  
10 students, residents and to oversee the activities  
11 of the faculty.

12 Q Let me interrupt you for a moment.  
13 Do you -- do you participate in the actual  
14 education of students?

15 A Yes.

16 Q And what do you do in that regard?

17 A I attend grand rounds. I attend  
18 morbidity/mortality conferences. I have  
19 conferences with the students as they rotate  
20 through. I identify those students that are  
21 interested in surgery of any aspect and I meet  
22 with them, counsel them, in some ways mentor them.

23 Q Have you asked residents to spy on  
24 other residents?

25 A Not that I recall.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q Have you asked your daughter or  
2 Dr. James Lynch to spy on other residents?

3 A No.

4 Q So I take it from your response that  
5 you don't -- do you give lectures to residents?

6 A Yes.

7 Q Would you describe for the record  
8 the lecture that you give or provide to the  
9 residents other than in grand rounds?

10 A I have a conference called Hanging  
11 with Zwisch where we discuss scientific matters.

12 Q Now hanging -- did I understand you  
13 correctly, Hanging with Zwisch?

14 A That's the title of the conference.

15 Q And what's the subject matter of  
16 that conference, and how often is it conducted?

17 A That conference is conducted monthly  
18 and it's invited lectures, invited scientific  
19 materials. I also meet -- I also give a talk to  
20 the residents -- the rotating students when  
21 they're going through on a topic of their choice  
22 where they present cases and I discuss case  
23 management.

24 Q In these functions that you attend  
25 and at which you lecture, have you asked residents  
AN/DOR Reporting & Video Technologies, Inc.

1 that if they had one silver bullet in a gun, what  
2 faculty member would they shoot?

3 A No, not -- not in that context.

4 Q Well, in what context have you made  
5 that statement?

6 A I think in residents departing, I --  
7 I do an exit interview with the residents and I  
8 ask -- I ask them in that context what they think  
9 we have that goes well with the residency, what  
10 doesn't go well, what we could improve upon, what  
11 we -- what we can do to make the experience  
12 better, because at that point they've finished  
13 their five-year residency and they have an  
14 overview of what we do well and what we don't, and  
15 I recall one of the residents paraphrasing my  
16 question that way.

17 Q So your answer is, you did not make  
18 the statement what would you -- to the residents  
19 that if you had one silver bullet in a gun, what  
20 faculty member would you shoot?

21 A I don't recall that.

22 Q Do you recall a resident making that  
23 remark?

24 A I do recall in the context of those  
25 discussions that paraphrase coming up. I don't  
AN/DOR Reporting & Video Technologies, Inc.



1 remember who did it.

2 Q Are you denying that you did it?

3 A I don't recall saying that.

4 Q You would agree with me, would you  
5 not, that such a phrase is inappropriate behavior?

6 A I don't control what people say in a  
7 closed-door setting where you're trying to improve  
8 the process of your department.

9 Q That doesn't mean anything.

10 (Off the record.)

11 Q My question is, you deny making that  
12 statement?

13 A I don't recall making that  
14 statement.

15 Q What is your present salary?

16 A I have a base salary and then  
17 bonuses.

18 Q And the base salary is what, sir?

19 A That's available by open records.

20 MR. BEAUMAN: (Indicating.)

21 A My annual AAR, which is our annual  
22 anticipated remuneration, which is our base  
23 salary, is \$820,000 a year.

24 Q Is that your base salary?

25 A Yes.

AN/DOR Reporting & Video Technologies, Inc.

1 Q And your bonuses?

2 A Based on how well the enterprise in  
3 the department does, quality and safety metrics.  
4 I don't determine that.

5 Q Who does determine that?

6 A I don't know if there's a who to  
7 answer that question. There is a process --

8 Q Well, is there some --

9 A There's a process within the  
10 University where the dean and the CMO and several  
11 others set targets and then the Board of Trustees  
12 agrees on those targets and then we attempt to try  
13 to get the institution to meet those targets.

14 Q And is that -- and that is -- that  
15 process sets your bonus; is that correct?

16 A That process determines a component  
17 of my bonus, yes.

18 Q Are there other processes that  
19 determine components of your -- of your bonus?

20 A It's -- I'm not a hundred percent  
21 sure all of the different factors that go into it.  
22 It's performance based and it's based on metrics,  
23 but I don't -- I don't actually set the metrics so  
24 I can't tell you all of the different factors that  
25 make up the metrics.

AN/DOR Reporting & Video Technologies, Inc.

1 Q Do you know who sets the metrics?

2 A Last year it was the dean and the  
3 CMO.

4 Q Does the Executive Vice-President  
5 play any role whatsoever in that?

6 A He may.

7 Q Do you know if he, in fact, does?

8 A I don't set the metrics. I don't  
9 know at what level he interacts with that process.

10 Q Have you had discussions with the  
11 Executive Vice President for Health Affairs as to  
12 your base salary or your bonus?

13 A Not directly.

14 Q And if you've had those discussions  
15 indirectly, through whom do you have those  
16 discussions?

17 A All discussions regarding my salary  
18 are through the dean.

19 Q And so that would have been  
20 Dean DeBeer in the recent past; correct?

21 A Correct.

22 Q And so in a sense, Dean DeBeer  
23 controls your pay, does he not -- or he did when  
24 he was dean?

25 A Controls my pay? I don't -- I'm not  
AN/DOR Reporting & Video Technologies, Inc.

1 a hundred percent sure what the powers of the dean  
2 are, as far as whether he can individually cut my  
3 pay, but he's the one that communicates.

4 Q So at the present time, you are  
5 under the understanding that the dean unilaterally  
6 can cut your pay?

7 A I didn't say that.

8 Q I know. I'm asking you that  
9 question.

10 A I don't know.

11 Q But you -- you do admit that the  
12 dean can have you removed as chair?

13 A That's correct.

14 Q And likewise, the Executive Vice  
15 President for Health Affairs can have you removed  
16 as chair, can he not?

17 A I don't know that.

18 Q All right.

19 A I don't actually think that's true.

20 Q And on what factual basis do you  
21 render the opinion that you do not think that's  
22 true?

23 A My understanding is that the chair  
24 of a department is determined by the dean.

25 Q Now -- so it's your -- it's your  
AN/DOR Reporting & Video Technologies, Inc.

1 statement that the dean, the dean alone determines  
2 your pay as well as may remove you as chair of the  
3 department; is that correct?

4 A I didn't say that.

5 Q Explain it to me, please, so that I  
6 understand it.

7 A Explain what?

8 Q May the dean remove you as chair?

9 A My understanding is the dean  
10 determines who the department chairs are and he  
11 can remove me as chair.

12 Q All right.

13 A My understanding is he does not  
14 solely determine salary. He is the communicator,  
15 but he -- that there's multiple factors that go  
16 into the salary determination.

17 Q I'm not concerned about the factors.  
18 I'm concerned about who else other than the dean  
19 goes into the salary determination?

20 A I don't really know.

21 Q Now, let's -- let's return to your  
22 position as chair.

23 You do agree that as chair, that's  
24 not a permanent position; correct?

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

1 Q That you can be removed at any time  
2 by the dean, can you not?

3 A I understand that's in his power.

4 Q And your answer then is yes?

5 A I don't determine the power of the  
6 dean. My understanding is he can, but I've -- I  
7 don't determine that.

8 Q Who evaluates your performance as  
9 Chair of the Department of Surgery?

10 A The dean.

11 Q Does anyone else participate in  
12 that?

13 A I don't know.

14 Q Do you actually have written  
15 performance evaluations?

16 A Yes.

17 Q And where are they maintained?

18 A The dean's office.

19 Q And when was the last time that you  
20 were evaluated for performance?

21 A It's every year.

22 Q And when was the last time?

23 A I don't recall the exact date.

24 Q I don't need the exact date.

25 Approximately will be fine.

AN/DOR Reporting & Video Technologies, Inc.

1 A About four months ago.

2 Q All right. And --

3 A Five months ago.

4 Q And do you recall what your  
5 evaluation was at that time?

6 A Yes.

7 Q And what was it, sir?

8 A Oh, I was -- I don't recall every  
9 category. I don't recall specific wording. I  
10 just recall that he felt I was doing an  
11 outstanding job.

12 Q And was that Dean DeBeer?

13 A That's correct.

14 Q Have you been evaluated by the new  
15 dean?

16 A Not yet.

17 Q The new dean is whom, for the  
18 record?

19 A Bob DiPaola.

20 Q Have you had discussions with the  
21 new dean about your job performance?

22 A Not specifically. I mean, I haven't  
23 had an evaluation.

24 Q No, I'm not asking that. I'm asking  
25 have you had discussions with the new dean about  
AN/DOR Reporting & Video Technologies, Inc.

1 your job performance as department chair?

2 A It's too broad of a question. I  
3 can't answer that. We've had multiple discussions  
4 but none have been specifically focused on me.

5 Q And you've had multiple discussions  
6 then concerning what subject matters?

7 A How to better improve the education,  
8 research, care and administration of the  
9 University of Kentucky.

10 Q We'll return to that subject in just  
11 a moment. But I also asked you to produce at this  
12 deposition copies of any and all warnings, leaves  
13 of absences, remediation programs, written  
14 reprimands and action plans that  
15 Dr. Zwischenberger, that's you, has in -- have in  
16 your custody or control related to Dr. Kearney  
17 together with -- Dr. Kearney, excuse me -- copies  
18 of any and all faculty complaints, student  
19 complaints, staff complaints and resident  
20 complaints related to Dr. Paul Kearney that are in  
21 your custody and control.

22 Did you bring those with you today?

23 MR. BEAUMAN: Our answer to that is  
24 he does not have any in his custody or  
25 control. As was previously relayed to you,  
AN/DOR Reporting & Video Technologies, Inc.



1           those were all given to the dean and those  
2           have all been produced even before this  
3           litigation was filed.

4           Q           Did you have any written complaints?

5           A           I keep -- my office kept copies that  
6           we would receive, student complaints --

7           Q           No, listen to the question, Doctor,  
8           so we don't have to go around the barn 15 times.

9                       Did you have any written complaints?

10          A           I had a file.

11          Q           That's not my question.

12                       My question is, did you have any  
13          written complaints?

14          A           I'd have to review the file.

15          Q           Do you still have that file?

16          A           No. It was rendered to the dean.

17          Q           Just from your recollection, were  
18          there written complaints in that file that were --  
19          that was rendered to the dean?

20          A           Yes.

21          Q           And do you recall over what span or  
22          period of time those written complaints?

23          A           When I started as chair in May of  
24          2007, I was handed a file about two inches thick  
25          regarding Paul and his previous performances --  
                AN/DOR Reporting & Video Technologies, Inc.

1 Q Let me interrupt you.

2 MR. BEAUMAN: Let him answer the  
3 question.

4 MR. PAFUNDA: No, I want to --

5 MR. BEAUMAN: He's trying to  
6 explain to --

7 MR. PAFUNDA: No, I want to find out  
8 where these things are.

9 Q That two-inch file, where is it now?

10 A I don't have it. All files on Paul  
11 were rendered to the dean.

12 Q And does that include that so-called  
13 two-inch file?

14 A Yes.

15 Q And would you have been able to  
16 prior to today ask the dean to return that file to  
17 you so that you could produce it at this  
18 deposition?

19 A I don't have access to it.

20 Q I didn't ask that.

21 Would you have been able to ask the  
22 dean to return those files to you so you could  
23 produce them at this deposition?

24 A I don't know.

25 Q You did not ask him that; correct?  
AN/DOR Reporting & Video Technologies, Inc.

1           A           I didn't -- I did not ask the dean  
2 for files -- the files that he had.

3           Q           So --

4                   MR. BEAUMAN:  Yeah, and I didn't ask  
5 him to do that because I knew things had  
6 already been presented, so.

7                   MR. PAFUNDA:  Well, I'm still waiting  
8 to see those things.  I haven't seen them.  
9 I've seen a few little letters spread over  
10 27 years, but I haven't seen -- oh, excuse  
11 me, I'm starting to sound like --

12                           (Off the record.)

13          Q           The Practice Plan Committee, are you  
14 familiar with that, Dr. Zwischenberger?

15          A           I'm not on it.

16          Q           I didn't ask you that.  Did I ask  
17 you that, whether you were on it?

18                   MR. BEAUMAN:  You can answer the  
19 question.

20                           The question is, are you familiar  
21 with the Practice Plan Committee?

22                           THE WITNESS:  Yes.

23          Q           And what is your understanding of  
24 the Practice Plan Committee?

25          A           They help evaluate and determine the  
AN/DOR Reporting & Video Technologies, Inc.

1 Practice Plan.

2 Q The Practice Plan is what, Doctor?

3 A It's a mechanism by which the work  
4 done by our faculty is compiled and accounted for  
5 in terms of how they're -- the cash flow enters  
6 into KMSF and how faculty are compensated.

7 Q And how the cash flow comes back out  
8 of KMSF; is that correct?

9 A I don't -- I don't manage that.  
10 That's not my...

11 Q I didn't ask you if you managed  
12 that. I'm asking your understanding?

13 A My understanding is that money  
14 generated by KMSF is used to supplement faculty  
15 salaries.

16 Q But you just misspoke, did you not?  
17 KMSF actually does not generate money, does it?

18 A Perhaps I did misspeak.

19 Q All right.

20 A KMSF bills and is part of the  
21 collecting our...

22 Q And when it bills and collects, it's  
23 for the clinical physicians who generate that --  
24 those billings; correct?

25 A I think you misspoke. I don't think  
AN/DOR Reporting & Video Technologies, Inc.

1 it's for them. I think it's on their behalf of  
2 the work that they've generated.

3 Q And since you've just split hairs,  
4 why do you say it's on their behalf as opposed for  
5 them?

6 A Because it's not a one-to-one  
7 relationship.

8 Q And do -- in your opinion, is there  
9 any fiduciary relationship there?

10 MR. BEAUMAN: Object to the form.

11 MR. PAFUNDA: No, that's fine.

12 Q Your opinion.

13 A I don't know how to answer that.

14 Q Do you understand -- what do you  
15 understand the phrase fiduciary relationship to  
16 mean?

17 A I can't answer that.

18 Q Are you a member of Kentucky Medical  
19 Services Foundation?

20 A I'm one of the faculty members that  
21 does contribute, yes.

22 Q My question is, are you on the Board  
23 of Directors of the Kentucky Medical Services  
24 Foundation?

25 A No.  
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1 Q Do you serve in any capacity on  
2 Kentucky Medical Services Foundation?

3 A As chair -- excuse me, as chair of  
4 surgery, I'm on the large board. I'm not on the  
5 Executive Board. I misspoke.

6 Q So -- all right. And how long have  
7 you been on the Board of Directors of Kentucky  
8 Medical Services Foundation?

9 A Since I was a chair of surgery.

10 Q 2007?

11 A Uh-huh.

12 Q What are your -- what are your  
13 duties as a member of the Board of the Kentucky  
14 Medical Services Foundation?

15 A We attend regular meetings. We get  
16 reports on the finances. We review the audits and  
17 we hear about the activities of the Kentucky --  
18 KMSF.

19 Q And during your tenure as a member  
20 of the Board of Kentucky Medical Services  
21 Foundation, did you have on any occasion any  
22 reason or any occasion to interact with  
23 Colleen King?

24 A I re -- I remember the name. I  
25 didn't directly interact with her.

AN/DOR Reporting & Video Technologies, Inc.

1 Q Well, you remember the name; do you  
2 remember her position at Kentucky Medical Services  
3 Foundation?

4 A No.

5 Q So you have no reason to quarrel  
6 with the fact that she at one time was the  
7 compliance officer?

8 A I don't contest that statement. I  
9 don't -- I don't recall.

10 Q Do you have a present compliance  
11 officer at Kentucky Medical Services Foundation?

12 A I think it's Brett Short.

13 Q Does Brett Short also hold a  
14 position at the University of Kentucky?

15 A I don't know.

16 Q And in -- and his job duties as  
17 compliance -- present compliance officer with  
18 Kentucky Medical Services Foundation are what as  
19 you understand them to be?

20 A Compliance officer.

21 Q What does the compliance officer do?

22 A I don't know the extent of his  
23 duties. I know he helps us -- he helps us  
24 maintain compliance with the different  
25 requirements.

AN/DOR Reporting & Video Technologies, Inc.

1 Q Different requirements of what,  
2 Doctor?

3 A The governing bodies of the  
4 institution.

5 Q And likewise with the federal  
6 government; correct?

7 A I can't dispute that.

8 Q When you say you can't dispute  
9 that --

10 A I don't know the full extent of his  
11 job duties.

12 Q Does the federal government oversee  
13 Medicare/Medicaid funds, and if so, to what  
14 extent?

15 A I don't know.

16 Q And you've been involved in the  
17 healthcare industry for how long a period of time?

18 A 35 years.

19 Q Does Kentucky Medical Services  
20 Foundation keep minutes?

21 A I don't know.

22 MR. BEAUMAN: Do you mean does the  
23 Board keep minutes?

24 MR. PAFUNDA: I don't have to say the  
25 Board. Come on, Bryan.  
AN/DOR Reporting & Video Technologies, Inc.



1 Q Are minutes kept by Kentucky Medical  
2 Services Foundation, either by the Board or any  
3 committees?

4 A I don't know.

5 Q Are you -- have you and do you  
6 presently serve on the Executive Committee?

7 A I don't presently serve on it.

8 Q Did you in the past serve on it?

9 A Yes.

10 Q Is Dr. Michael Karpf a member in  
11 any -- of Kentucky Medical Services Foundation?

12 A Not that I know of.

13 Q Is he an ex-officio member?

14 A I don't know.

15 Q Is the dean a member of Kentucky  
16 Medical Services Foundation?

17 A I think they are.

18 Q And your understanding is the dean's  
19 a member in what capacity?

20 A The dean is a faculty member, so in  
21 that capacity, they're part of KMSF.

22 Q In any other capacity, the dean?

23 A It changed multiple times in the  
24 nine years I've been chair.

25 Q And the --  
AN/DOR Reporting & Video Technologies, Inc.

1           A           So I can't tell you exactly which  
2 dean at what time.

3           Q           Well, let's take Dean DeBeer for  
4 example. What can you tell me about his  
5 relationship, if any, with Kentucky Medical  
6 Services Foundation?

7           A           He delegated his responsibilities  
8 for KMSF to Marc Randall.

9           Q           And --

10          A           So I never saw Dean DeBeer manage  
11 KMSF at all.

12          Q           And on what basis do you express the  
13 opinion that he delegated his responsibilities to  
14 Dr. Marc Randall? Explain that to me.

15          A           I can't explain it.

16          Q           Well, you just used -- you just said  
17 he delegated?

18          A           Right.

19          Q           What's your understanding of what he  
20 delegated and how he accomplished that?

21          A           I don't know.

22          Q           Which leads me back to, then why did  
23 you say that, that he had delegated it to Dr. Marc  
24 Randall?

25          A           Because my -- you asked me my  
AN/DOR Reporting & Video Technologies, Inc.

1 understanding?

2 Q Yes.

3 A My understanding was that he  
4 delegated it to Marc Randall and that -- that is  
5 the extent of it. I don't know how he -- my  
6 understanding is he has the ability to delegate  
7 a -- delegate those responsibilities and that's  
8 what he did.

9 Q And your understanding comes from  
10 what, a meeting, on what factual basis do you form  
11 that understanding?

12 A I can't recall the exact  
13 circumstances. I do know that there are bylaws  
14 have that written in them, have it written in  
15 how -- what the dean can do. But I'm not an  
16 expert on the verbiage or how it's written or what  
17 it says.

18 Q But you haven't been -- you have, in  
19 fact, been informed that those bylaws of Kentucky  
20 Medical Services Foundation have been amended  
21 several times over the past few years; correct?

22 A In the nine years I've been there  
23 there have been amendments, yes.

24 Q Approximately how many?

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

1 Q Venture a guess.

2 MR. BEAUMAN: We're got going to  
3 guess.

4 MR. PAFUNDA: Don't guess. I'll  
5 show you.

6 (KMSF EXECUTIVE COMMITTEE MINUTES  
7 DATED 10/1/13 WERE MARKED AS PLAINTIFF'S  
8 EXHIBIT NO. 2 FOR PURPOSES OF  
9 IDENTIFICATION.)

10 Q I'll hand you what I'll Marc as  
11 Plaintiff's Exhibit No, 2. If you will, Doctor,  
12 just take a moment to review that?

13 MR. BEAUMAN: Thank you.

14 MR. PAFUNDA: You're welcome.

15 Take a break and go to the restroom.

16 THE VIDEO TECHNICIAN: We're going  
17 off the video.

18 (Brief recess.)

19 THE VIDEO TECHNICIAN: We're back on  
20 the video. This is Tape No. 2. The time is  
21 10:15.

22 CONTINUED EXAMINATION

23 By Mr. Pafunda:

24 Q Doctor, have you had an opportunity  
25 to review the document marked as Plaintiff's  
AN/DOR Reporting & Video Technologies, Inc.

1 Exhibit No. 2?

2 A Yes.

3 Q And that is an Executive Committee  
4 minute from the Kentucky Medical Services  
5 Foundation, dated October 1st, 2013; correct?

6 A Yes.

7 Q It actually lists the members of  
8 Kentucky Medical Services Foundation who are  
9 present, does it not?

10 A Yes.

11 Q And one of those members is  
12 Dr. Hansen, Wendy Hansen?

13 A Yes.

14 Q And she was also a member, was she  
15 not, at the Fair Hearing Panel?

16 A Yes.

17 Q And when we say the Fair Hearing  
18 Panel, you and I both know that was the Fair  
19 Hearing Panel that heard Dr. Kearney's appeal on  
20 his disciplinary action; correct?

21 A Yes.

22 Q Had her department -- to your  
23 knowledge, had the residency program in her  
24 department been placed on probation?

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

1 Q If it, in fact, had been placed on  
2 probation, would you as department chair of  
3 surgery be aware of that or should you have been  
4 aware of that?

5 A I wasn't aware of it.

6 Q And we also have down there listed  
7 as a guest Cliff Iler, the University of Kentucky  
8 Healthcare legal; correct?

9 A Yes.

10 Q Do you recall why he was a guest at  
11 this particular Executive Committee meeting?

12 A No.

13 Q Would the -- do the minutes refresh  
14 your memory or trigger your memory as to why he  
15 was present?

16 A On the second page it refers to his  
17 opinion.

18 Q As to what, and if you'll please  
19 read where you're -- where you're referring to on  
20 the second page?

21 A "UK" -- there's a sentence, "UK  
22 Legal determined that the University has a right  
23 to allow KMSF to lease space in order to have  
24 multiyear type lease whereby the University would  
25 lease the space through KMSF."

AN/DOR Reporting & Video Technologies, Inc.

1 Q So we have the University of  
2 Kentucky's legal counsel rendering legal opinions  
3 to Ken -- Kentucky Medical Services Foundation;  
4 correct?

5 MR. BEAUMAN: Object to the form.

6 Q Go ahead, you can answer.

7 A I -- I don't know exactly what  
8 they're doing there, other than rendering an  
9 opinion.

10 Q And that was my question, you agree  
11 that he's rendering a legal opinion about leasing  
12 property; correct?

13 A He was advising the KMSF Executive  
14 Committee.

15 Q And it is customary to bring over UK  
16 legal counsel to advise the Executive Committee of  
17 Kentucky Medical Services Foundation?

18 A Only as it's pertinent to a  
19 discussion.

20 Q And does it happen, other than in  
21 this one instance?

22 A I don't independently recall.

23 Q But if it does happen, it would be  
24 reflected in Committee minutes of Kentucky Medical  
25 Services Foundation?

AN/DOR Reporting & Video Technologies, Inc.

1 A As it appears.

2 Q Are minutes kept of Executive  
3 Committee meetings?

4 A I don't keep the minutes. I see  
5 these minutes.

6 Q That's not my question.

7 A I don't know.

8 Q Well, who drafted these minutes?

9 A I don't know.

10 Q Are you supplied with copies of  
11 minutes of meetings?

12 A I don't keep -- I don't know.

13 Q Are these minutes subject to open  
14 records requests?

15 MR. BEAUMAN: Object to the form.

16 A I don't know.

17 Q Let's walk through this October 1st,  
18 2013 minute -- meeting minutes. What triggered  
19 this meeting, if you recall?

20 A They were regularly scheduled.

21 Q How often are they scheduled for on  
22 a regular basis?

23 A I don't know.

24 Q What makes you answer that it was  
25 regularly scheduled?

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1           A           Because they occurred on a regular  
2 basis.

3           Q           And how often?

4           A           I don't know.

5           Q           And is the -- other than the  
6 Executive Committee, are there other committees of  
7 Kentucky Medical Services Foundation?

8           A           Yes.

9           Q           And what are those committees?

10          A           I don't know.

11          Q           Do you serve on any other committees  
12 of the Kentucky Medical Services Foundation?

13          A           No. I am on the major board.  
14 There's the large board and then there's the  
15 Executive Committee and then there's a number of  
16 other committees.

17          Q           Uh-huh.

18          A           We've already determined that.

19          Q           Who's already determined that?

20          A           In your earlier question.

21          Q           What are those other committees, I  
22 think was my follow-up question?

23          A           I don't know.

24          Q           How often does the Board meet?

25          A           I can't recall exactly.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q So as I understand your answers, you  
2 can't recall how often the Executive Committee  
3 meets and you can't recall how often the Board  
4 meets; is that correct?

5 A That's correct.

6 Q And you've been a member of KMSF, as  
7 we noted earlier, since 2007, is that --

8 A That's correct.

9 Q Do you regularly attend meetings?

10 A When I'm -- I always attend the  
11 meeting when I'm in town.

12 Q And do you receive notice of when  
13 the meetings are to be held and where they're to  
14 be held?

15 A Yes.

16 Q As well as the times that they're to  
17 be held?

18 A That's correct.

19 Q Well, the subject matter of this  
20 particular committee meeting is the Practice Plan  
21 Committee; correct?

22 A Yes.

23 Q What is the Practice Plan Committee?

24 A Practice Plan Committee was put --  
25 put together to advise regarding the new Practice  
AN/DOR Reporting & Video Technologies, Inc.

1 Plan.

2 Q When you say new, if you'll read  
3 the -- the sentence, "A discussion was held,"  
4 would you read that into the record, that  
5 sentence?

6 A "A discussion was held related to  
7 the Practice Plan Addendum, dated July 1st, 2009,  
8 which states there is to be a Practice Plan  
9 Committee established for each of the colleges  
10 consisting of the elective members of the Plan."

11 Q Was there a -- and the college --  
12 one of the colleges is the College of Medicine;  
13 correct?

14 A Yes.

15 Q Was there a Practice Plan Committee  
16 in place for 2009, 2010, 2011 and 2012?

17 A I don't know.

18 Q Well, as you read these minutes,  
19 what went on -- what was discussed at this  
20 Executive Committee meeting?

21 A It -- it states here.

22 Q Tell me what is.

23 A "A discussion was held related to  
24 the Practice Plan Addendum, July -- dated July  
25 1st, 2009, which states there's to be a Practice  
AN/DOR Reporting & Video Technologies, Inc.

1 Plan Committee established for each of the  
2 colleges consisting of elected members of the  
3 Plan."

4 Q And was -- was there a Practice Plan  
5 Committee established for the College of Medicine?

6 A I don't know.

7 Q If you'll read the next sentence  
8 that begins "In addition" into the record, please?

9 A "In addition, the dean of the  
10 college shall serve as an ex-officio member of the  
11 Committee."

12 Q So according to these minutes of the  
13 Kentucky Medical Services Foundation, you would  
14 agree that the dean is an ex-officio member of the  
15 Practice Plan Committee; correct?

16 A That is what the discussion was  
17 about.

18 Q No, that's not my question, sir.  
19 According to these minutes, the dean  
20 was placed as an ex-officio member of the Practice  
21 Plan Committee; correct?

22 A I just read what it says here, "In  
23 addition, the dean of the college shall serve as  
24 an ex-officio member of the Committee."

25 Q Well, you've read that correctly.  
AN/DOR Reporting & Video Technologies, Inc.

1 My question, though, is, then according to these  
2 minutes, the dean is to serve as an ex-officio  
3 member of Practice Plan Committee; true or false?

4 A True.

5 Q Now, in the second sentence of --  
6 the first sentence of the second paragraph, would  
7 you read that into the record, please?

8 A "Dr. Randall will meet with the six  
9 elected KMSF Board members; advise them that  
10 pursuant to the College of Medicine Practice Plan,  
11 they have responsibility to form the Practice Plan  
12 Committee with the dean of the College of Medicine  
13 as an ex-officio member."

14 Q From that sentence you would -- you  
15 would agree, would you not, that up to that point  
16 in time, the six elected members, the KMSF Board  
17 members, had not been advised that they formed the  
18 Practice Plan Committee?

19 A I could infer that.

20 Q My question is more pointed, Doctor.

21 A I don't know.

22 Q Is it because you don't know because  
23 you have a problem -- difficulty understanding  
24 that sentence?

25 A I understand the sentence.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q What do you understand that sentence  
2 to mean?

3 A Based on the discussion of October  
4 1st, 2013, "Dr. Randall will meet with the six  
5 elected KMSF Board members; advise them that  
6 pursuant to the College of Medicine Practice Plan,  
7 they have the responsibility to form the Practice  
8 Plan Committee with the dean of the College of  
9 Medicine as an ex-officio member."

10 It makes...

11 Q Go ahead.

12 A That's what I understand.

13 Q So is it your understanding that the  
14 Practice Plan Committee had not been formed at  
15 that point in time?

16 A I don't know.

17 Q Well, what does the sentence mean to  
18 you in terms of actual working function?

19 A Going forward, this is what the  
20 discussion was should happen.

21 Q So going forward, as I take your  
22 response to mean, that the Practice Plan Committee  
23 would be formed and it would consist of the six  
24 elected KMSF Board members; correct?

25 A That's what the minutes say.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q Is that what, in fact, was going on  
2 during that meeting?

3 A I don't recall.

4 Q Well, according to the minutes, it's  
5 what, in fact, was going on at that meeting;  
6 correct?

7 MR. BEAUMAN: We're kind of going  
8 back and forth here. You're asking him to  
9 interpret minutes and what his recollection  
10 is. I think he's given you answers to both  
11 of them.

12 MR. PAFUNDA: He hasn't, and he's  
13 dancing around --

14 MR. BEAUMAN: Well --

15 MR. PAFUNDA: -- and I can dance all  
16 day and all night, you know, so we can just  
17 dance with the guy. In fact, I love dancing  
18 with the guy.

19 Q Dr. Zwischenberger, so at that point  
20 in time, as of October 1st, 2013, the six elected  
21 KMSF Board members had not been informed that they  
22 were to comprise the Practice Plan Committee; am I  
23 correct?

24 A I don't have any independent  
25 knowledge of that.

AN/DOR Reporting & Video Technologies, Inc.

1 Q I didn't ask you that.

2 A I'm reading the same sentence you  
3 are.

4 Q I know that.

5 MR. BEAUMAN: But you did ask him.  
6 If he doesn't know, he doesn't know.

7 Q Did the Practice Plan Committee at  
8 the College of Medicine, did it actually function  
9 as of October 1st, 2013. Yes or no?

10 A I don't recall.

11 Q Well, according to this -- these  
12 minutes you would agree that it did not; isn't  
13 that true?

14 MR. BEAUMAN: Again, object to the  
15 form.

16 A I don't know.

17 Q Well, had the Department of Surgery  
18 surrendered its voting rights with respect to the  
19 Practice Plan Committee?

20 A I don't know.

21 Q As -- as chairman of the --

22 A We had a Practice Plan amendment  
23 that was voted on by the faculty. I don't have it  
24 in front of me.

25 Q My question is -- is rather broad,  
AN/DOR Reporting & Video Technologies, Inc.



1 is it not, did the -- is it not?

2 A It's a broad question.

3 Q Did -- did the Department of Surgery  
4 faculty members surrender their voting rights?

5 MR. BEAUMAN: Object to the form.  
6 You've already asked and he's given you a  
7 response.

8 MR. PAFUNDA: Waiting for another  
9 one.

10 MR. BEAUMAN: Well --

11 A I don't recall.

12 Q Is there a particular document that  
13 would answer that question, and if so, what  
14 document is it, and who has custody and control of  
15 it?

16 A There is a document that we voted on  
17 that I would have to find it.

18 Q How is the document identified, and  
19 where is it maintained?

20 A I don't know.

21 Q So if you were to look for it, since  
22 you said you would have to find it, where would  
23 you begin to look for a document you don't know  
24 about?

25 A I would ask the dean.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q And should the dean maintain such a  
2 document in his office -- his or her office?

3 A I don't know.

4 Q Why would you ask the dean then?

5 A Because that's my immediate report.

6 Q Now, if you would, read the next  
7 sentence into the record?

8 A "They will be invited to the Faculty  
9 Compensation Committee, and it will be up to the  
10 Practice Plan Committee members to decide if and  
11 when they meet and who they will elect as chair."

12 Q What is the Faculty Compensation  
13 Committee?

14 A I don't know the or -- where they  
15 fit in the org chart.

16 Q No, what is it?

17 A I don't know.

18 Q Is it a committee of the Kentucky  
19 Medical Services Foundation?

20 A I'm not sure.

21 Q Is it a faculty committee at the  
22 University of Kentucky College of Medicine?

23 A I'm not sure. I don't know.

24 Q Did you participate in this  
25 discussion with respect to the Practice Plan  
AN/DOR Reporting & Video Technologies, Inc.

1 Committee?

2 A I was there.

3 Q I know that. That's not my  
4 question.

5 Did you participate in the  
6 discussion?

7 A I don't recall.

8 Q So as I understand it, as the -- as  
9 chair of the Department of Surgery, you don't know  
10 what the Faculty Compensation Committee is;  
11 correct?

12 A I know what it is. I don't know who  
13 they -- who they report to.

14 Q I didn't ask you that.  
15 What is it then?

16 A It's a committee that's to make  
17 recommendations regarding the faculty  
18 compensation.

19 Q Is it a committee of the Kentucky  
20 Medical Services Foundation?

21 A I don't recall.

22 Q Do you know who's on the committee?

23 A I do not.

24 Q Do you know anybody who ever served  
25 on the committee during your time as chair of the  
AN/DOR Reporting & Video Technologies, Inc.

1 Department of Surgery?

2 A We had a department advisory  
3 committee and we had -- and I -- and I'm not sure  
4 if you're referring to that or the big faculty  
5 compensation committee. I'm confused by the  
6 different --

7 Q Well, we're discussing the Executive  
8 Committee minutes of October 1st, 2013 of Kentucky  
9 Medical Services Foundation, are we not?

10 A Yes.

11 Q And it references the Faculty  
12 Compensation Committee; do those minutes not  
13 reflect that?

14 A Yes.

15 Q And I'm asking you about what  
16 committee that is; correct?

17 A Yes.

18 Q And you've told me it's a  
19 compensation committee, just as the title states;  
20 correct?

21 A Yes.

22 Q My question then is, do you know who  
23 served on that committee during your -- anyone  
24 during your entire tenure as chair of the  
25 Department of Surgery?

AN/DOR Reporting & Video Technologies, Inc.

1 A I don't recall.

2 Q If you were to identify the members  
3 of the Faculty Compensation Committee, where would  
4 you begin to learn their identity?

5 A I would start with KMSF.

6 Q Is it a committee of KMSF?

7 A I don't recall.

8 MR. BEAUMAN: That's the third time  
9 you've asked that, by the way.

10 MR. PAFUNDA: No, I know, it's the  
11 third time he said he don't recall. The  
12 president said it 89 times.

13 MR. BEAUMAN: I don't think you keep  
14 on asking him is going to get the answer.

15 MR. PAFUNDA: I might.

16 Q Does the Faculty Compensation  
17 Committee issue reports?

18 A I don't know.

19 Q Are you a member of the Compensation  
20 Committee as the chair of the Department of  
21 Surgery?

22 A No.

23 Q Is Dr. Moliterno a member of the  
24 Faculty Compensation Committee?

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

1 Q Does the Faculty Compensation  
2 Committee keep minutes?

3 A I don't know.

4 Q If you'll look at the last sentence  
5 on those minutes, it's referring to the Practice  
6 Plan Committee, is it not?

7 A Yes.

8 Q And would read the last sentence  
9 into the record, please?

10 A "Minutes are not required."

11 Q I take it from the minutes of the  
12 KMSF, that they've directed that the Practice Plan  
13 Committee not keep minutes if, in fact, it does  
14 meet; correct?

15 MR. BEAUMAN: Object to the form.

16 Q Go ahead, you can answer.

17 A As I read these minutes, the minutes  
18 refer to the Practice Plan Committee.

19 Q And as you read -- would you read  
20 the sentence just immediately prior to that last  
21 sentence?

22 A "The KMSF Executive Committee would  
23 not have an active role."

24 Q But the KMSF six elected board  
25 members are to comprise the Practice Plan  
AN/DOR Reporting & Video Technologies, Inc.

1 Committee as of October 1st, 2013; correct?

2 A Say that again.

3 Q If you'll direct your attention to  
4 the minutes, Dr. Marc Randall is saying that he  
5 will meet with the six elected members of the  
6 KMSF -- six elected KMSF Board members; correct?

7 A Yes.

8 Q And then he'll advise them that they  
9 have the responsibility to form the Practice Plan  
10 Committee; correct?

11 A Yes.

12 Q So he's taking it on his shoulders  
13 to inform the six elected KMSF Board members to  
14 form the Practice Plan Committee, and he's doing  
15 this on October 1st, 2013; correct?

16 A Yes.

17 Q Then it goes on to say that KMSF  
18 Executive Committee would not have an active role;  
19 correct?

20 A That's what it says.

21 Q Do you find those statements to be  
22 contradictory?

23 MR. BEAUMAN: Object to the form.

24 A I don't see that.

25 Q Are there other people on the  
AN/DOR Reporting & Video Technologies, Inc.

1 Practice Plan Committee other than the six elected  
2 KMSF Board members?

3 A I don't know.

4 Q Do you interact in any way with the  
5 Practice Plan Committee as of the present time?

6 A No.

7 Q Did you in the past?

8 A I don't recall.

9 Q If, in fact, you had interacted with  
10 the Practice Plan Committee in the past in your  
11 capacity as chair of the Department of Surgery,  
12 there would be no minutes of those meetings; am I  
13 correct?

14 A I have no minutes.

15 Q No, not whether you have any  
16 minutes, the Committee would have no minutes;  
17 correct?

18 A I don't know.

19 Q Well, your Executive Committee said  
20 that they didn't have to keep minutes, didn't it?

21 MR. BEAUMAN: Object to the form.

22 A That's what we've just read in the  
23 minutes.

24 Q So you would agree with me, would  
25 you not?

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1           A           I agree with you that's on the -- on  
2 the Executive Committee meeting minutes.

3                       (CONFIDENTIAL PEER REVIEW DOCUMENT  
4 WAS MARKED AS PLAINTIFF'S EXHIBIT NO. 3 FOR  
5 PURPOSES OF IDENTIFICATION.)

6           Q           I'll show you what I've marked as  
7 Plaintiff's Exhibit 3?

8                       MR. PAFUNDA: Bryan, I'll give you a  
9 copy. You've probably got them memorized.

10                      MR. BEAUMAN: I do not.

11                      MR. PAFUNDA: Photographic memory.

12                      MR. BEAUMAN: Maybe.

13           Q           Before you even begin to review this  
14 document, just on initial glance, have you seen  
15 this document before?

16           A           Yes.

17           Q           And what is it?

18           A           It's an amendment to the voluntary  
19 remedial action plan.

20           Q           Does it say that?

21           A           Yes.

22           Q           And likewise, the document is  
23 entitled what?

24           A           "Confidential Peer Review Document."

25           Q           Was this document formulated after  
AN/DOR Reporting & Video Technologies, Inc.

1 some peer review that was conducted?

2 A This document follows several others  
3 that led to this.

4 Q That's not my question.

5 What's peer review?

6 A It's a broad term. Peers are  
7 physicians or people of like type that would  
8 review an effort.

9 Q Are peer reviews conducted or had  
10 they been conducted in the past with respect to  
11 physicians' clinical activities?

12 A We have forms of peer review at  
13 multiple venues. We have --

14 Q If you'll just answer the question,  
15 we can cut through this deposition in a reasonable  
16 time.

17 Are there peer reviews that are  
18 conducted regarding physicians' clinical  
19 activities, yes or no?

20 A Yes.

21 Q And would you describe briefly what  
22 those peer reviews entail?

23 A I can't briefly. There's multiple  
24 peer review processes. There's conferences --

25 Q Then go through all of them.  
AN/DOR Reporting & Video Technologies, Inc.

1           A           There's external -- there's  
2 committees. There's conferences. There's  
3 morbidity/mortality conferences. There's  
4 evaluations. There's the Chief Medical Officer,  
5 so there's multiple opportunities for peer review  
6 regarding clinical work, education, research and  
7 administration.

8           Q           Well, let's take one that you've  
9 listed, mortality and morbidity conference?

10          A           Yes.

11          Q           Are notes kept at those conferences?

12          A           No.

13          Q           Is there a reason why notes are not  
14 deliberately kept at those conferences?

15          A           I don't know.

16          Q           Would such notes be discoverable by  
17 someone who has filed a medical malpractice case?

18                   MR. BEAUMAN: Object to form. He  
19 doesn't know that.

20          A           I don't know.

21                   MR. PAFUNDA: We don't know. We  
22 don't know if he knows it or not.

23          Q           Does Dr. Kearney presently attend  
24 those conferences?

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

1 Q And the reason he doesn't?

2 A He no longer has clinical  
3 privileges.

4 Q Do you need clinical privileges to  
5 attend a morbidity conference?

6 A Among the faculty, those that  
7 practice medicine attend that meeting.

8 Q I didn't ask that.

9 A It's -- it's also attended by  
10 students and residents.

11 Q That -- I didn't ask that question,  
12 though, did I?

13 MR. BEAUMAN: He's trying to give you  
14 the most thorough answer.

15 Q So -- so you're telling us as  
16 department chair you need clinical privileges to  
17 attend those conferences; is that correct?

18 A There's other -- there's other  
19 criteria.

20 Q I didn't ask that.

21 A I don't know.

22 Q Let's stick with this Amendment to  
23 Voluntary Remedial Action. Did you draft this?

24 A I'm trying -- I'm trying to think of  
25 how to better answer your previous question.

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1 Would you like for me to do that or not?

2 Q No, we're -- we've moved on. You  
3 either don't know, don't remember, so we're on to  
4 a new subject.

5 Did you draft this document?

6 A In conjunction with others.

7 Q Tell me who else helped you draft  
8 this document.

9 A Worked with the hospital attorney.

10 Q And that was or is?

11 A Cliff Iler.

12 Q Anyone else?

13 A No.

14 Q So as I picture it, and correct me  
15 if I'm mistaken, you and Mr. Iler sat down and  
16 drafted this document on or about May 7th, 2010;  
17 is that true?

18 A That's when we drafted the document.

19 Q That's what I'm asking you.

20 A Yes.

21 Q What input did you have and what  
22 input did Mr. Iler have?

23 A There were multiple discussions with  
24 a lot of people over years, so --

25 Q I didn't ask you that, and --  
AN/DOR Reporting & Video Technologies, Inc.

1 A That's the answer.

2 MR. PAFUNDA: No, he's not answering  
3 the question.

4 Q What discussions did you have --  
5 what input did you have in this document and what  
6 input did Mr. Iler have?

7 A I don't know.

8 MR. BEAUMAN: I think if you'd let  
9 him explain --

10 MR. PAFUNDA: He's not explaining  
11 anything. He has convenient lapses of  
12 memory. Let's turn the page --

13 MR. BEAUMAN: -- how he reached this  
14 information, you would get your answer to  
15 the question.

16 Q Let's turn to Page 2. Turn to  
17 Page 2, Doctor. You got it?

18 A I'm on Page 2.

19 Q You see Numerical No. 1?

20 A I do.

21 Q Read that sentence -- first sentence  
22 into the record, please?

23 A "You are removed as Director of  
24 Trauma Services. The financial" --

25 Q Just the first sentence.  
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1                   Who's "you" in that sentence? Who  
2 does it refer to?

3           A        Dr. Kearney.

4           Q        You didn't have to flip the page to  
5 know that, did you? All right.

6                   Was he removed as Director of Trauma  
7 Services?

8           A        Yes.

9           Q        When was he removed, and by whom was  
10 he removed?

11          A        I asked him to step down as Director  
12 of Trauma Services.

13          Q        Do you recall when that was?

14          A        No. It was in that period.

15          Q        When you say it was in that period,  
16 what period of time are you referencing?

17          A        During all of his behavioral issues  
18 that were becoming such a problem.

19          Q        Can you be any more specific than a  
20 general hard-hitting broad generalization during  
21 this period he was having problems?

22          A        He was having problems from the time  
23 I became the chairman --

24          Q        Well, let's --

25          A        -- in 2007.  
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1 Q -- approach it this way, Doctor,  
2 since you want to be evasive.

3 When was -- who appointed him  
4 Director of Trauma Services?

5 A He was Director of Trauma Services  
6 when I became chair in May of 2007.

7 Q So from 2007 to 2010, he served as  
8 Director of Trauma Services; correct?

9 A Yes.

10 Q Then you asked him to step down;  
11 correct?

12 A Yes.

13 Q And he was removed by you; is that  
14 correct?

15 A I was -- it wasn't just me. There  
16 was a remedial action plan for modifying his  
17 behavior and we weren't seeing any improvement, so  
18 he was asked to step down, and I was the one that  
19 delivered the communication.

20 Q So to answer my question, you  
21 removed him as Director of Trauma Services?

22 A Yes.

23 Q All right. Thank you.

24 No. 2, you see that item there?

25 A Yes.  
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1 Q Would you, in fact, read that  
2 paragraph into the record?

3 A "You are removed from clinical  
4 service schedule (both hospital and clinic) for 28  
5 days."

6 And we hadn't determined the start  
7 date because this was a draft.

8 "We do not consider this to be a  
9 suspension because you have voluntarily agreed to  
10 the rescheduling. During this 28-day period, you  
11 will devote your full professional efforts to  
12 research and administrative duties as directed by  
13 Dr. Pat McGrath."

14 Q My question then, sir, is, was he  
15 removed from clinical services for 28 days?

16 A I don't recall.

17 Q Well, are you the one that advised  
18 him that he was removed from clinical services?

19 A In the -- in the context of this  
20 draft, we -- he voluntarily agreed to reschedule  
21 so that he could have time off.

22 Q Is there a document that would  
23 reveal whether he, in fact, was removed from  
24 clinical services, both hospital and clinic, for  
25 28 days?

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1           A           I don't know.

2           Q           Well, you're department chair;  
3 correct?

4           A           Yes.

5           Q           If somebody is taken out of service  
6 for a period of 28 days for whatever reason, is  
7 that documented?

8           A           The circumstances was that he  
9 voluntarily agreed to reschedule.

10          Q           That's not my question.

11          A           That's the answer.

12          Q           No, my question is, was it  
13 documented that he was taken out of service for 28  
14 days?

15          A           I don't have those documents.

16          Q           Is it documented when he's in  
17 service?

18          A           Not really, no. There's a book of  
19 business that the division does and they determine  
20 among themselves what their call schedule is and  
21 how they cross cover each other and when they're  
22 available.

23          Q           Now, on the front page, it says this  
24 was to Dr. Paul Kearney; correct?

25          A           Yes.  
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1 Q Was it, in fact, given to  
2 Dr. Kearney?

3 A I don't know. The draft was  
4 discussed with him.

5 Q And who discussed it with him and  
6 when was it discussed?

7 A I discussed it with him.

8 Q Where did you discuss it with him?

9 A I don't recall.

10 Q Was -- does he have an office or did  
11 he at the time?

12 A Yes.

13 Q Did you discuss it in his office?

14 A I don't recall.

15 Q Did you discuss it in your office?

16 A I don't recall.

17 Q Did you make any notes of that  
18 discussion?

19 A No.

20 Q Did he sign this document at that  
21 time?

22 A I don't see -- this particular  
23 document he did not sign. It's a draft.

24 Q I know what it is. The question is,  
25 do you --

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1 MR. BEAUMAN: The commentary is not  
2 going to help us here.

3 MR. PAFUNDA: No, it's not from him.

4 MR. BEAUMAN: I'm going to ask you to  
5 please stop and let's just stick to the --

6 MR. PAFUNDA: I can't help myself.  
7 It just drags me into it.

8 MR. BEAUMAN: Let's stick with the  
9 questions and not commentary.

10 MR. PAFUNDA: You got duct tape?

11 MR. BEAUMAN: I can probably find  
12 some around here if that will help you,  
13 Bernie.

14 Q Did Dr. Kearney sign this document?

15 A Not the draft, no, not the one --

16 Q Is there a final document from this  
17 draft that he signed?

18 A I don't know.

19 Q Who had this document after it was  
20 drafted?

21 A I don't know.

22 Q Did you?

23 A I don't know where this came from.  
24 I don't know.

25 Q My question is, did you have this  
AN/DOR Reporting & Video Technologies, Inc.

1 document after it was drafted, and your answer has  
2 to be yes, doesn't it?

3 A I had it, but I don't know if I keep  
4 the file. So the answer is, I don't know where  
5 this was kept.

6 Q You told us earlier this morning  
7 that you gave a two-inch file to the dean; was  
8 this document in that two-inch file?

9 A I don't know.

10 Q If you kept this document in your  
11 office, is there a file that you were keeping on  
12 Dr. Kearney?

13 A I did not keep it in my office.

14 Q If you didn't keep it in your  
15 office, then who did you hand off this document  
16 to?

17 A The department administrator.

18 Q And that would be whom?

19 A At this time it's Shawn Coffey.

20 Q All right.

21 A In 2010 he wasn't there.

22 Q Shawn wasn't there?

23 A Correct.

24 Q So who would it have been in 2010?

25 A There were two department  
AN/DOR Reporting & Video Technologies, Inc.

1 administrators. There was Rebecca Napier and --  
2 there was a second one that I can't recall his  
3 name right at this second.

4 Q And their offices are located  
5 physically where as opposed to your office?

6 A Immediately adjacent to mine.

7 Q So it was -- it would have been  
8 under your custody and control; correct?

9 A Their departments.

10 Q Yes. Of which you're chair?

11 A Yes.

12 Q It says a copy is to go to his  
13 credentialing file. What is a credentialing file?

14 A I don't know. I don't --

15 Q Well, did your secretary or someone  
16 on your behalf type this draft up?

17 A Yes.

18 Q Because you didn't do it yourself,  
19 did you?

20 A That's correct.

21 Q Did Mr. Iler have this -- have this  
22 typed up?

23 A I don't know.

24 Q You --

25 A He and I drafted it.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q I know.

2 A And others. There were several  
3 people that were involved. He --

4 Q Who else participated?

5 A I don't know. He sought counsel --  
6 he talked to other people.

7 Q Who sought counsel?

8 A Mr. Iler talked to several people  
9 and helped compile this.

10 Q Over how long a period of time?

11 A I don't know.

12 Q If you'll turn your attention to  
13 Page 3, the bottom line, do you see that? It  
14 says, "This Confidential Peer Review Document"?

15 A Yes.

16 Q Would you read that sentence into  
17 the record, please? It continues on to Page 4.

18 A "This Confidential Peer Review  
19 Document constitutes the entire agreement between  
20 you and the University of Kentucky relating to  
21 this amended voluntary remediation -- remedial  
22 action plan. Any prior drafts or versions of this  
23 document have been merged into this document and  
24 no such prior draft or version survives the  
25 execution of this document. This amended  
AN/DOR Reporting & Video Technologies, Inc.

1 voluntarily remedial action plan supersedes the  
2 February, 2010 plan in its entirety."

3 Q Now, the February of 2010 plan, what  
4 was that?

5 A I'll be glad to look at it.

6 Q No, I'm asking you. You were the  
7 department chair; correct?

8 A Yes.

9 Q You are the department chair;  
10 correct?

11 A Yes.

12 Q You helped draft this document;  
13 correct?

14 A Yes.

15 Q Kept outside your office, in fact,  
16 under your office's custody; correct?

17 A Yes.

18 Q So I'm asking you, this document  
19 amended the February of 2010 plan in its entirety;  
20 what was the February of 2010 plan?

21 A I don't recall the details.

22 Q Well, just give me some general  
23 description.

24 A I can't.

25 Q Was there, in fact, a February, 2010  
AN/DOR Reporting & Video Technologies, Inc.



1 plan?

2 A According to this May 7th document  
3 there was.

4 Q Right. So at the time, as you and  
5 Mr. Iler drafted this document -- and I take it  
6 you took your time and were careful about it;  
7 correct?

8 A I was involved, yes.

9 Q Well, were you careful about it?

10 A I think so.

11 Q Used your best efforts to draft this  
12 document, did you not?

13 A Yes.

14 Q And when you drafted this document,  
15 being careful and using your best efforts, you  
16 referred to the February of 2010 plan, did you  
17 not?

18 A Yes.

19 Q What did you hope by this amended  
20 article to amend from the February of 2010 plan?

21 A I don't know.

22 Q Did you go and double check and make  
23 sure that Dr. Kearney was removed from clinical  
24 service for 28 days after this document was  
25 drafted?

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1 A I don't know.

2 Q Did you go and check and make sure  
3 that he was removed as Director of Trauma  
4 Services?

5 A He was removed as Director of Trauma  
6 Services.

7 Q Who replaced him?

8 A We -- at the time he was in -- he  
9 had three titles. His titles were Director of  
10 Trauma Services, Section Head of Trauma, and  
11 director of the residency program, and all 3 of  
12 his duties eventually were dispersed.

13 Q Who replaced him as Director of  
14 Trauma Services?

15 A We had Andrew Bernard and  
16 Phillip Chang split his services between Director  
17 of Trauma Services and Section Head.

18 Q So I take it from your response that  
19 either Andrew Bernard or Dr. Chang became Director  
20 of Trauma Services; is that correct?

21 A Yes.

22 Q Is there a document that would  
23 reflect that, that they replaced Dr. Kearney as  
24 Director of Trauma Services?

25 A I don't recall.  
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1 Q Wouldn't there, in fact, have to be  
2 a document that would reflect that to show who now  
3 held the position as Director of Trauma Services?

4 A I don't recall the document.

5 Q You would agree with me that there,  
6 in fact, would have to be a document to that  
7 effect; correct?

8 A No. The trauma service ran itself  
9 very effectively, and among them, the decision was  
10 made to split those services, so it was more of a  
11 collegial division of duties than a document.

12 Q Well, is it important to have  
13 collegiality in the Department of Surgery?

14 A We make every attempt to.

15 Q When you say we make every attempt  
16 to, what efforts, if any, do you put into that as  
17 chairman of the department?

18 A I can't define that. I -- I think I  
19 put in an effort every day.

20 Q And your relationship with the  
21 faculty, how would you describe that?

22 A I think I'm available 24/7 of the  
23 faculty.

24 Q Would you say that you have a good  
25 relationship with the faculty?

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1           A           I'd say I have a very transparent,  
2 open relationship with the faculty.

3           Q           Well, transparent and open, that  
4 doesn't equate to a good relationship with the  
5 faculty, does it?

6                   MR. BEAUMAN: Object to the form.

7           A           I don't know how to qualify that.

8           Q           Well, is it important to you to  
9 maintain a good working relationship with the  
10 faculty as well as the clinical physicians in the  
11 Department of Surgery?

12          A           Yes.

13          Q           And do -- in your opinion, do you do  
14 that?

15          A           I work hard to do that. I don't --  
16 I can't pass judgment on my own activities. I try  
17 very hard to maintain that collegiality.

18          Q           I'm asking you right now, you can  
19 toot your own horn, do you do a good job as chair  
20 of the Department of Surgery?

21          A           I work hard to do the best I can.

22          Q           In your opinion, are you doing the  
23 best you can?

24          A           I think I could do better.

25          Q           Why haven't you done better over  
AN/DOR Reporting & Video Technologies, Inc.

1 these period of time?

2 A I try hard. I do everything I can  
3 to communicate with the faculty and air their  
4 concerns and address their concerns within the --  
5 within the purview of the chair of the department.  
6 I do everything I can.

7 Q You would agree with me that if  
8 you're not doing a good job or you don't have a  
9 good relationship with the faculty, you should be  
10 fired; correct?

11 MR. BEAUMAN: Object to the form.

12 A I don't agree with that.

13 Q Well, you should be removed as chair  
14 of the Department of Surgery, should you not?

15 A There's multiple criteria by which  
16 I'm evaluated.

17 Q Would you -- would one of those  
18 criteria be the number of surgeons who have left  
19 the Department of Surgery?

20 A I don't think so.

21 Q In the last five years have more  
22 surgeons left the Department of Surgery than in  
23 the past 25?

24 A I don't know the exact number.

25 We've had a number of talented people recruited  
AN/DOR Reporting & Video Technologies, Inc.

1 because of the development of the careers that  
2 have taken place at the University of Kentucky.

3 Q Do you, in fact, now use local --  
4 local surgeons to perform services at the  
5 Department of Surgery?

6 A All of our surgeons live locally.

7 Q Let's just cut through --

8 MR. BEAUMAN: Yeah, I mean that  
9 was -- I was getting ready to --

10 Q Do you use outside surgeons?

11 A We have surgeons that aren't part of  
12 the faculty that work in some of our facilities.

13 Q Did you have to go outside to get  
14 surgeons recently?

15 A We're recruiting all of the time.  
16 We're -- we're always recruiting talented new  
17 faculty.

18 Q Locum tenens means what?

19 A I don't have any locum tenens.

20 Q None?

21 A Not that I'm aware of.

22 Q Are you familiar with the Press  
23 Ganey & Associates recent survey?

24 A Yes.

25 Q Are you aware of where your  
AN/DOR Reporting & Video Technologies, Inc.

1 department ranked on that survey?

2 A Yes.

3 Q And where did it rank, sir?

4 A Nationally or locally?

5 Q Your department locally, within the  
6 hospital?

7 A With -- within the hospital  
8 departments, it was near the bottom.

9 Q When you say near the bottom, how  
10 close to the bottom was it?

11 A I think it was at the bottom.

12 Q And when you say the bottom, the  
13 bottom 1 percent?

14 A It was at the bottom of all of the  
15 departments evaluated at UK.

16 Q What do you attribute the fact --  
17 well, when you say at the bottom, is there a  
18 percentage that was assigned to it?

19 A Overall I think the whole University  
20 was at the bottom.

21 Q I'm talking about the Department of  
22 Surgery?

23 A Yes, it was at the bottom.

24 Q Now, that survey, do you have access  
25 to it?

AN/DOR Reporting & Video Technologies, Inc.

1           A           Not this minute. I don't have it in  
2 front of me.

3                   MR. BEAUMAN: I was going to ask  
4 whether you meant the results?

5                   MR. PAFUNDA: It's okay, easy. I'm  
6 going to get it eventually.

7           Q           We're on videotape, are we not,  
8 Doctor?

9           A           Yes, sir.

10          Q           So it's quite obvious to everybody  
11 present in the room that you don't have it in  
12 front of you; correct? Correct?

13          A           Yes.

14          Q           My question was, do you have access  
15 to it?

16          A           Yes.

17          Q           And how would you access that  
18 survey?

19          A           Through the Chief Medical Officer's  
20 office.

21          Q           Can you do it through your own  
22 computer?

23          A           I'm not sure. I don't know.

24          Q           And if you can do it through your  
25 own computer or on computer, do you need a  
AN/DOR Reporting & Video Technologies, Inc.



1 password?

2 A I don't know.

3 Q Do you have a password to access  
4 it --

5 A I don't know.

6 Q -- or a pass code, I'll make it even  
7 broader?

8 A I don't know.

9 Q So when you found out the results of  
10 the survey, was it by word of mouth or did you  
11 actually see a copy of the survey, as chairman of  
12 the Department of Surgery?

13 A We went to a meeting of all of the  
14 chairs where we saw a presentation of the results.  
15 We then had an individual department meeting with  
16 the Chief Medical Officer, where we reviewed the  
17 findings from our -- from the survey. And then we  
18 began a series of meetings to try to address those  
19 issues.

20 Q And during the course of the series  
21 of these meetings, what have you done since then  
22 to address the issues where your department has  
23 been ranked the lowest at the University of  
24 College of Medicine?

25 A Well, we've had several discussions,  
AN/DOR Reporting & Video Technologies, Inc.

1 division chiefs. We've --

2 Q And -- and for the record, the  
3 division chiefs of the Department of Surgery?

4 A Uh-huh.

5 Q And would you identify those for the  
6 record, please?

7 A Yes. We have a division chief of  
8 general surgery.

9 Q Who is that?

10 A Pat McGrath.

11 Q Continue on, please.

12 A We have a chief of trans --  
13 transplant.

14 Q And who is --

15 A That is Dr. Roberto Gedaly.

16 Q And how -- do you know how to spell  
17 her (sic) name?

18 A Capital G-E-D-A-L-Y.

19 Q Thank you.

20 A Then we have a chief of the Division  
21 of Cardiothoracic Surgery. That is Dr. Sibu Saha;  
22 spelled capital S-A-H-A. Then we have a Division  
23 of Pediatric Surgery, which is Dr. Joe Iocono,  
24 capital I-O-C-O-N-O. Then we also have a Division  
25 of Plastic Surgery --

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1 Q This is all within the Department of  
2 Surgery now?

3 A Correct.

4 Q Thank you.

5 A -- Dr. Vasconez.

6 Then we have the VA, which is not  
7 directly under the Department of Surgery, but that  
8 we communicate with regularly.

9 Q Now, were you department chair --  
10 had you come on board when the VA had to be paid  
11 back \$3,000,000?

12 A No.

13 Q All right. Go ahead.

14 A I'll correct that. The -- there was  
15 action taken and there was -- there was  
16 compensation exchanged during the time I was  
17 chair, as I recall, but all of the actions that it  
18 resulted from and all of the -- it took years --  
19 had occurred before I came on as chair.

20 Q But as you came on as chair, the  
21 actual payment back to the federal government of  
22 \$3,000,000 was made during the time period that  
23 you were chair, correct, for the actions that  
24 occurred prior to the time you arrived?

25 A As -- I had nothing to do with  
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1 that --

2 Q I understand.

3 A -- but as I recall, I heard that  
4 there was an exchange of funds during my  
5 department chairmanship.

6 Q So returning to my earlier question;  
7 so what actions, if any, have you taken to -- to  
8 rise -- to raise the Department of Surgery from  
9 the bottom in the UK College of Medicine?

10 A Well, we received those results a  
11 few months ago and there's been discussions at the  
12 chair level. There have been discussions  
13 throughout the departments. I've had discussions  
14 with Dr. Chang, who's our Chief Medical Officer.  
15 I had discussions with the chiefs, and we're  
16 compiling a plan as we speak.

17 Q And has that plan, in fact, been  
18 formulated as of this period of time?

19 A No.

20 Q And has Dr. Karpf participated in  
21 that in any way?

22 A I don't know at what level he's  
23 participated. He's very much aware of it.

24 Q And when you say he's aware of it,  
25 how is he being made aware of it?

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1           A           I don't know.

2           Q           Has anyone at this particular point  
3 in time held you responsible for that -- or the  
4 lowest ranking?

5           A           We've had numerous discussions  
6 regarding the meaning of that ranking.

7           Q           So I take it from the tone of your  
8 response that the meaning of that ranking doesn't  
9 really impact you as chair of the department; is  
10 that correct?

11          A           I'm very concerned about the fact  
12 that the faculty have expressed con -- low scores  
13 on that survey and we're trying to address how to  
14 improve the environment so that those scores  
15 improve.

16          Q           In fact, it's not the faculty that  
17 had low scores, it's the administration that had  
18 low scores, is it not?

19          A           The administration did in terms of  
20 that survey get -- did get low scores, yes.

21          Q           In fact, your administration got the  
22 lowest score, did it not?

23          A           I didn't compare myself to the other  
24 departments, but I -- I know it was low.

25          Q           Know it was the lowest in the  
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1 College of Medicine, do you not?

2 A Now, the -- the implication is that  
3 this is a judgment of the department. Actually,  
4 the survey is global regarding the environment of  
5 the institution.

6 MR. BEAUMAN: Can we go back? You're  
7 getting off on a side track. Did you finish  
8 all of the division chiefs?

9 MR. PAFUNDA: No --

10 MR. BEAUMAN: Excuse me. Did you  
11 finish the list of all of the division  
12 chiefs?

13 THE WITNESS: I thought I did. I can  
14 review it.

15 MR. PAFUNDA: Do you think there's  
16 more?

17 MR. BEAUMAN: I don't know. I was --  
18 you got him off on -- you interrupted him  
19 and I wanted to make sure he got it all out.

20 THE WITNESS: I was recalling the  
21 chiefs by memory, so I -- I'd have to look  
22 at the list to see if I left anybody off.

23 MR. BEAUMAN: Thank you.

24 Q But you and I made our point,  
25 there's a number of division chiefs within the  
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1 Department of Surgery?

2 A Correct.

3 Q What -- what action do you plan to  
4 take to correct the lowest rating that the  
5 Department of Surgery has received? What action  
6 do you plan to take as chair?

7 A I object to the term rating. This  
8 is a score reflecting physician engagement by  
9 Press Ganey. That's not a rating. That is a --  
10 that is a -- and it's not an evaluation. It is a  
11 reflection of the faculty's opinion.

12 Q Well, what action do you plan on  
13 taking to raise that score?

14 MR. BEAUMAN: And let me just object  
15 to that question to the extent that he may  
16 have a preliminary plan in mind, but it's  
17 not been formulated and it's not been  
18 announced. I think it would be  
19 inappropriate for him to make that  
20 announcement here in this setting. If  
21 there's other things he's decided on, I'll  
22 be more than happy to let him answer that  
23 part of the question.

24 Q He already said that it hasn't been  
25 formulated; correct?

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1 A (Witness indicating yes.)

2 Q You have to answer yes or no.

3 A I said yes.

4 Q Right.

5 And my question is, what action do  
6 you plan on taking?

7 MR. PAFUNDA: And we have to take a  
8 break because we're running out of tape.

9 THE WITNESS: Okay.

10 THE VIDEO TECHNICIAN: Going off the  
11 video. The time is 11:11.

12 (Brief recess.)

13 THE VIDEO TECHNICIAN: We're back on  
14 the videotape record. This is Tape No. 3.  
15 The time is 11:21.

16 CONTINUED EXAMINATION

17 By Mr. Pafunda:

18 Q Dr. Zwischenberger, how did the  
19 draft document get in Dr. Kearney's personnel  
20 file?

21 MR. BEAUMAN: Are you talking about  
22 Exhibit 3?

23 MR. PAFUNDA: Exhibit 3, yes. Thank  
24 you.

25 A It was placed there.  
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1 Q By whom?

2 A I don't know.

3 Q Why do you say it was placed there,  
4 or how do you know it was placed there?

5 A I don't. You said it was.

6 Q No. I said how did it get in his  
7 personnel file?

8 A I don't know.

9 Q Was it in his personnel file?

10 A I don't know.

11 Q Did you deliver this document to  
12 anyone other than Dr. Lofgren?

13 A I don't know.

14 Q Did you even deliver it to  
15 Dr. Lofgren?

16 A Not personally.

17 Q Did you cause it to be delivered to  
18 him?

19 A I directed it to be delivered to him  
20 and I discussed it with him.

21 Q And was it, in fact, delivered to  
22 him?

23 A I don't know.

24 Q Was there a final document or  
25 Amendment to Voluntary Remedial Action Plan?  
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1           A           If there is, it's not in front of  
2 me.

3           Q           No, I'm asking you, is there?

4           A           I don't know.

5           Q           If there, in fact, is one that is  
6 final and signed by Dr. Kearney, who would main --  
7 would you maintain that record?

8           A           I don't know.

9           Q           If you had to guess, who would  
10 maintain that record?

11          A           I don't know.

12          Q           Where are -- where are the personnel  
13 files maintained?

14          A           We keep a file in our office of  
15 materials that come to the department.

16          Q           Is that personnel records, do you  
17 keep in your office?

18          A           We call it -- we call it a faculty  
19 file. I don't -- you can call it a personnel  
20 file. We don't call it that.

21          Q           Are personnel records kept with the  
22 dean?

23          A           I assume. I don't know.

24          Q           And the file that you keep in your  
25 office, you call a faculty file?

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1 A Yes.

2 Q Does it contain the faculty members'  
3 evaluations?

4 A Yes.

5 Q What other documentation does it  
6 contain?

7 A I don't know specifically.

8 Q Well, as chairman of the department,  
9 if there's a reprimand in a faculty member's file,  
10 is it placed in there with the faculty member's  
11 knowledge?

12 A Yes.

13 Q So would this draft document have  
14 been placed in Dr. Kearney's file with his  
15 knowledge?

16 A Yes.

17 Q And would he have likewise -- if it  
18 had, in fact, been placed in his personal file,  
19 would he likewise have an opportunity to respond  
20 to it?

21 A He was part of the discussion. This  
22 was discussed with him.

23 Q Well, this document is not signed,  
24 is it?

25 A No.  
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1 Q And so the only -- well, we have  
2 your word that it was discussed with him, but that  
3 does not necessarily mean that it was discussed  
4 with him, does it?

5 A I discussed it with him.

6 Q Did you show him this draft  
7 document?

8 A As I -- as I recall, yes.

9 Q Did you have an opportunity or did  
10 you present him with a final document?

11 A I don't recall.

12 Q If, in fact, you had, it would have  
13 been signed by Dr. Kearney, would it not?

14 A I don't see it. I don't --

15 Q I know. I'm asking you.

16 A -- I don't recall.

17 Q He would have the opportunity to  
18 sign the final document, would he not?

19 A I don't know.

20 Q Well, this draft indicates that he  
21 had the opportunity to sign the Amended Voluntary  
22 Remedial Action Plan of 2010?

23 A Yes.

24 Q So likewise, if there is a final  
25 one, there would be a place for him to sign off on  
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1 it, would there not, to acknowledge that he, in  
2 fact, received it and complied with the Voluntary  
3 Remedial Action Plan?

4 A Yes.

5 Q Likewise, there would have to be  
6 documentation in his -- in his personnel file that  
7 he, in fact, completed the so-called Remedial  
8 Action Plan if there, in fact, had been one;  
9 correct?

10 A Well, it was voluntary, so.

11 Q That's not my question. My question  
12 is, would there be a document to show had he had  
13 completed any Voluntary Remedial Action Plan?

14 A Not necessarily.

15 Q All right.

16 A It was voluntary.

17 Q If those events did not occur, if he  
18 was not removed as trauma director, and if he did  
19 not take a 28-day leave of absence, then you would  
20 agree with me that that document contains lies,  
21 does it not?

22 MR. BEAUMAN: Object to the form.

23 A No.

24 Q On what basis would you disagree  
25 with me?

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1           A           Because it was voluntary.

2           Q           No, listen to my question.  Maybe  
3 I -- I misspoke.  Okay.

4                       In the draft document, under  
5 numerical Paragraph 1, it says that Dr. Kearney  
6 was removed as director of the trauma program,  
7 does it not?

8           A           Yes.

9           Q           If that did not, in fact, occur, you  
10 would agree that that's a lie, would you not, that  
11 statement?

12                      MR. BEAUMAN:  Object to the form.

13           A           The sentence is not a lie.  We --  
14 as -- as it states in this document, "We have  
15 discussed the options available at this time,"  
16 which we did.

17                      "You have recognized," re --  
18 referring to Dr. Kearney -- "You have recognized  
19 and accepted responsibility for your behavior, and  
20 we have agreed to amend the previous plan as  
21 follows:  You are removed as Director of Trauma  
22 Services."

23           Q           Stop right there.  You told me  
24 earlier, did you not, that he was removed as  
25 Director of Trauma Services; correct?

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1 A It was my understanding he was.

2 Q Well, you're the department chair.  
3 You said you actually went down and talked to him  
4 and removed him; true?

5 A In discussions with Dr. Kearney, in  
6 a voluntary remediation plan, he understood that  
7 he was going to relinquish his directorship of  
8 Trauma Services within his group, which was a -- a  
9 group that was semi-auton -- that worked as a  
10 team, they were to select people who would succeed  
11 him, so they did that.

12 Q My question is -- it's more direct,  
13 more pointed -- if Dr. Kearney was not removed as  
14 Director of Trauma Services, then what's stated in  
15 Paragraph 1 is a lie, is it not?

16 MR. BEAUMAN: Object to the form.

17 A I don't agree with that.

18 Q And I -- and I'm asking, on what  
19 basis do you not agree with that?

20 A I explained it. It was -- this was  
21 a voluntary --

22 Q I got your explanation.

23 MR. BEAUMAN: You don't have to --

24 Q You don't have to do it again. I  
25 got it.

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1 MR. BEAUMAN: If your prior answer  
2 was sufficient enough, that's fine.

3 MR. PAFUNDA: I got it.

4 Q If he was not removed as Director of  
5 Trauma Services, then the statement in numerical  
6 Paragraph 1 is false, is it not?

7 MR. BEAUMAN: Object to the form.  
8 You've already asked that. He's already  
9 said that he doesn't agree that that's what  
10 happened, so.

11 MR. PAFUNDA: I know. He's already  
12 said it happened.

13 MR. BEAUMAN: I think --

14 Q All right. No. 2, you see where it  
15 says he has 28 days leave of absence?

16 A Yes.

17 Q If that statement -- if he didn't  
18 have 28 days leave of absence, that statement is a  
19 lie, is it not?

20 MR. BEAUMAN: Object to the form.

21 A I don't agree with that.

22 Q Again, on what basis do you not  
23 agree?

24 A Because this was a voluntary  
25 remediation plan.

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1 Q So he was -- you're telling me he  
2 was actually out of service for 28 days; correct?

3 A I'm telling you exactly what the  
4 nature of this was, a voluntary remediation plan.  
5 He agreed that he would schedule to re -- to come  
6 off service for 28 days.

7 Q Well, did he come off service for 28  
8 days?

9 A I don't know.

10 Q All right.

11 A It was voluntary.

12 Q You add it was voluntary. My  
13 question is, and it's not difficult, did he come  
14 off service for those 28 days?

15 A I don't know.

16 Q Thank you.

17 And likewise, I take it your earlier  
18 answer was you don't know if he was removed as  
19 Director of Trauma Services; true or false?

20 A The duty was assigned to one of his  
21 colleagues, and I allowed them, since this was  
22 voluntary, to work it out among themselves.

23 Q In order -- as you eloquently put  
24 it -- in order for it to be voluntary, Dr. Kearney  
25 had to agree to it; correct?

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1 A Yes.

2 Q Thank you.

3 If you'll look at this. I've marked  
4 this as Exhibit No. 4.

5 (LETTER DATED 12/12/12 WAS MARKED AS  
6 PLAINTIFF'S EXHIBIT NO. 4 FOR PURPOSES OF  
7 IDENTIFICATION.)

8 (Off the record.)

9 Q Doctor, if you would, just take a  
10 moment and review that document, and when you're  
11 finished reviewing it, let me know.

12 A Okay.

13 Q You've had an opportunity to review  
14 it, Doctor?

15 A Yes.

16 Q Did you draft this document?

17 A This was drafted in collaboration  
18 with Cliff Iler.

19 Q My question is, who actually typed  
20 it out, caused it to be typed out?

21 A Mr. Iler.

22 Q Did you participate in this  
23 investigation, and if so, to what extent?

24 A I did not.

25 Q And the reason you did not, or  
AN/DOR Reporting & Video Technologies, Inc.

1 reasons?

2 A It was a complaint that went through  
3 nursing, and the nursing -- nursing, as well as  
4 the Chief Medical Officer and the hospital  
5 attorney conducted the investigation.

6 Q And why was the hospital attorney  
7 the one that conducted the investigation?

8 A I don't know.

9 Q You don't know or you don't recall?

10 A I don't know.

11 Q Was this document placed in  
12 Dr. Kearney's personnel file?

13 A It states under Item 6 that it was.  
14 "This document will be filed in your  
15 personnel file."

16 Q Did you review this document at the  
17 time that Mr. Iler caused it to be completed?

18 A Yes.

19 Q Did you agree with the items that  
20 were placed in it and the findings in this  
21 document?

22 A I didn't have any way to dispute or  
23 confirm because I -- I didn't conduct an  
24 investigation.

25 Q Did you place this item in your file  
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1 on Dr. Kearney that you kept in your office?

2 A I -- I don't independently recall  
3 that. I...

4 Q That's the same file that you told  
5 us almost at the beginning of this deposition that  
6 you turned over to the dean?

7 A Correct.

8 Q When did you turn that over to the  
9 dean?

10 A When he requested it.

11 Q When?

12 A I don't recall.

13 Q Would it have been following the  
14 James Wilson incident?

15 A I don't recall.

16 Q Well, did Dr. Boulanger come to your  
17 office to see a -- to see if you had a file on  
18 Dr. Kearney?

19 A No.

20 Q Did anybody from the dean's office  
21 when Dr. Kearney was suspended come to your office  
22 to get a file?

23 A I -- I assume they did.

24 Q And is that probably when you turned  
25 it over to the dean?

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1 A I don't know.

2 Q Well, did you have occasion prior to  
3 that to give the dean the file, or you just don't  
4 know?

5 A If the dean requests a file, I give  
6 it to him.

7 Q All right.

8 A The department gives it to him, not  
9 just me.

10 Q Well, we're specifically talking  
11 about when Dr. Kearney's clinical privileges were  
12 suspended; you recall that; correct?

13 A Yes.

14 Q And you recall the reason why his  
15 privileges were suspended?

16 A I mean, I was told, but I wasn't  
17 witness to it.

18 Q No, I understand that.

19 Who told you?

20 A The Chief Medical Officer.

21 Q Which was Dr. Boulanger at the  
22 time --

23 A Right.

24 Q -- correct?

25 And did he give you the reasons why?  
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1 A Not immediately.

2 Q So it was just I'm suspending the  
3 clinical privileges of one of the surgeons in your  
4 department?

5 A Right.

6 Q Was it in person, over the phone, by  
7 e-mail, text?

8 A No, in person.

9 Q You didn't ask why?

10 A I did. And he gave an explanation  
11 that there was an egregious event that impacted  
12 the safety of a patient and they were going to be  
13 evaluating it.

14 Q Did he tell you the nature of that  
15 egregious event?

16 A In vague terms; no specifics.

17 Q And you recall what about those  
18 vague terms?

19 A That it sounded of sufficient  
20 serious merit to warrant the suspension that he  
21 had imposed.

22 Q I'm talking about the specificity of  
23 those -- what occurred that impacted the alleged  
24 safety of a patient?

25 A I can't recall the exact wording on  
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1 that first discussion because so many more  
2 discussions took place after that, and I can't  
3 separate that first discussion from all of the  
4 rest.

5 Q When you say so many more  
6 discussions took place after that discussion,  
7 concerning the suspension of Dr. Kearney's  
8 clinical privileges?

9 A Yes.

10 Q Prior to the time that the Medical  
11 Staff Executive Committee took action?

12 A Well, the chronology as I recall it  
13 was the Chief Medical Officer suspended his  
14 privileges first pending investigation.

15 Q But you -- you're agreeing with me  
16 that when the Chief Clinical Officer did it, he  
17 notified you as the Chair of the Department of  
18 Surgery?

19 A The Chief Medical Officer did inform  
20 me that he had done that, yes.

21 Q And you were in agreement with it?

22 A I had no choice.

23 Q Tell me why you had no choice.

24 A Because the Chief Medical Officer is  
25 capable of suspending faculty pending  
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1 investigation.

2 Q And during your entire tenure as  
3 Chair of the Department of Surgery, had any  
4 physicians -- any surgeon, any physician in your  
5 department, had their privileges been suspended?

6 A Not -- not for safety reasons. They  
7 had been suspended for administrative reasons.

8 Q And who was that, please?

9 A I don't recall.

10 Q Where would I find that information?

11 A I don't know.

12 Q So it's not documented anywhere?

13 It's not documented --

14 MR. BEAUMAN: Object to form.

15 A What is not documented?

16 Q The fact that someone else's  
17 clinical privileges were suspended for  
18 administrative reasons.

19 MR. BEAUMAN: Object to the form.

20 A Well, we have a policy if someone is  
21 delinquent on their medical records to where it  
22 may impact -- there's -- if they're delinquent on  
23 their medical records, they can be temporarily  
24 suspended until they complete those records, and I  
25 don't keep track of that.

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1 Q Other than those instances -- well,  
2 let me ask you, just follow up, why don't you keep  
3 track of that?

4 A Because they're usually brief, half  
5 an hour, 45 minutes at the most, while people  
6 complete their records, and we --

7 Q Other than those instances of  
8 medical records, where their records aren't  
9 completed within a certain time period, has any  
10 physician in your department, other than  
11 Dr. Kearney, had their privileges suspended due to  
12 a patient issue?

13 A No.

14 Q Now, you preface the patient issue  
15 with the adjective patient safety. What do you  
16 mean by patient safety?

17 A That was the term used by the Chief  
18 of Clinical -- Chief Medical Officer.

19 Q What do you understand patient  
20 safety to entail?

21 A You want me to define safety for  
22 you?

23 Q Yes, I do.

24 A Any behavior or activity or action  
25 that would negatively influence the outcome of an  
AN/DOR Reporting & Video Technologies, Inc.

1 interaction to where it's extreme enough to -- to  
2 cause concern for the patient.

3 Q When you say concern for the  
4 patient, you mean for the patient's physical  
5 well-being?

6 A Well, the patient's overall  
7 well-being. I don't know what you really mean  
8 by --

9 Q What do you mean by overall -- I  
10 don't know what you mean by overall well-being?

11 A Well, overall is their physical  
12 well-being, their psychological well-being, their  
13 psychiatric well-being, their cultural well-being.  
14 I mean, there's a number of factors that go into  
15 the well-being of a patient.

16 Q Most of those you've just outlined  
17 are self-explanatory, but tell me what you mean by  
18 cultural well-being?

19 A Well, as our society has evolved, as  
20 I'm sure you are aware, there is -- there is a  
21 sense of acceptance of different race, religion,  
22 color, creeds, sexual preferences that we are --  
23 we have been evolved into tolerating.

24 Q Did you at any point in time up and  
25 to including today have an occasion to review the  
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1 medical records of James Wilson?

2 A No.

3 Q Do you recall who his attending  
4 physician was?

5 A No.

6 Q Other than the Dr. Kearney  
7 complaint, did James Wilson ever complain about  
8 his physical condition to anyone in your  
9 department --

10 A I don't know.

11 Q -- that you're -- pardon?

12 A I don't know.

13 Q If there had been such a complaint,  
14 would it have been documented anywhere, and if so,  
15 where?

16 A I don't know.

17 Q Let's say for example Mr. Wilson  
18 complained of fourth-degree bedsores. No. 1, is  
19 there such a thing as fourth-degree bedsores?

20 A I don't know what you're referring  
21 to.

22 Q Bedsores, you know what they are,  
23 don't you?

24 A Yes.

25 Q And you know that they can be  
AN/DOR Reporting & Video Technologies, Inc.

1 associated with anybody who's quadriplegic,  
2 paraplegic; correct?

3 A Yes.

4 Q Did Mr. Wilson ever complain of  
5 bedsores?

6 A I don't know.

7 Q Did you look at the act -- at any  
8 point in time did you look at the actual physical  
9 treatment that Mr. Wilson received while he was at  
10 the University of Kentucky?

11 A No.

12 Q At any point in time, did you engage  
13 in or participate into the investigation of  
14 Dr. Kearney's disciplinary action?

15 A Which disciplinary action?

16 Q The suspension of his clinical  
17 privileges.

18 A No.

19 Q And was there a reason or reasons  
20 why you as the department chair were not included  
21 in that?

22 A I don't know.

23 Q So I take it from your responses  
24 that the Chief Medical Officer, Dr. Boulanger, was  
25 solely responsible for the suspension of  
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1 Dr. Kearney's privileges; correct?

2 A I don't know that. He was the one  
3 that communicated to me that his privileges had  
4 been suspended. I don't know who else was  
5 involved.

6 Q Did you later learn if anyone else  
7 was involved?

8 A Excuse me?

9 Q Did you later learn if anyone else  
10 was involved?

11 A No.

12 Q Including up and to this day;  
13 correct?

14 A Correct.

15 Q With respect to the minutes of the  
16 Kentucky Medical Services Executive Committee of  
17 October, 2013, were you aware as a member of the  
18 Executive Committee that faculty -- senate faculty  
19 council members had made inquiries as to the  
20 composition of the Practice Plan Committee?

21 A No.

22 Q Did you become aware of that fact at  
23 any point in time?

24 A I can't -- I mean, I've heard it,  
25 but I don't recall when.

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1 Q If you'll review again those --  
2 those minutes of 2013 of Kentucky Medical Services  
3 Foundation, they clearly reveal, do they not, that  
4 as of October, 2013, the six elected members of  
5 the KMSF Board had not been informed that they  
6 were on the Practice Plan Committee, isn't that  
7 true?

8 MR. BEAUMAN: Object to the form.

9 A I can't infer that from what I read  
10 here. I can only infer -- I can only read what  
11 the minutes reflect.

12 Q Well, prior to October of 2013, had  
13 you had any interaction whatsoever with the  
14 Practice Plan Committee?

15 A Not personally.

16 Q Anyone in your department?

17 A I don't know.

18 Q Do you know if anybody did?

19 A I do not.

20 Q Prior to October, 2013, do you know  
21 if the Practice Plan Committee even functioned?

22 A I don't know.

23 Q As of 2013, had Kentucky Medical  
24 Services purchased Hazard Cardiology?

25 A I don't know.  
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1 Q Do you know when they did purchase  
2 it or that Kentucky Medical Services had, in fact,  
3 purchased that practice?

4 A I don't know.

5 Q Did you know that Kentucky Medical  
6 Services paid back \$4,000,000?

7 A To who?

8 Q I'm asking you.

9 A No, I don't know.

10 Q Did you read it in the newspaper  
11 they paid back \$4,000,000 to the federal  
12 government?

13 A No.

14 Q Were you aware of that fact at all?

15 A I heard there was a settlement.

16 Q And your understanding -- well, what  
17 did you hear?

18 A Just that there was a settlement.

19 Q And as a member of Kentucky Medical  
20 Services Foundation, you learned no more?

21 A That's correct.

22 Q And as a member of Kentucky Medical  
23 Services Foundation, did you know that the  
24 Kentucky Medical Services Foundation had engaged  
25 the services of a Washington, DC lawyer?

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1 A No.

2 Q Did you -- have you learned that at  
3 the present time?

4 A I read it in the newspaper.

5 Q And was that the first time you  
6 learned of that fact, as a member of the Executive  
7 Committee of the --

8 A I wasn't a member of the Executive  
9 Committee.

10 Q But as a member -- well, as a Board  
11 of Director of Kentucky Medical Services  
12 Foundation, was that the first time that you  
13 learned of that?

14 A Yes.

15 Q Did you impart any information about  
16 Dr. Kearney to the Medical Staff Executive  
17 Committee, either yourself directly or indirectly?

18 A Not that I'm aware of.

19 Q Pardon?

20 A Not that I'm aware of.

21 Q Well, who else would be aware of it  
22 if you, in fact, had?

23 A I don't understand the question.

24 Q The Medical Staff Executive  
25 Committee that met and voted to suspend  
AN/DOR Reporting & Video Technologies, Inc.



1 Dr. Kearney's clinical privileges, you're familiar  
2 with that; correct?

3 A Yes.

4 Q Did you impart any information  
5 concerning Dr. Kearney to that committee, either  
6 directly or indirectly?

7 A No.

8 Q Thank you.

9 Were you aware of the anonymous --  
10 I'll call it anonymous -- student complaint about  
11 Dr. Kearney and his lecture?

12 A I learned about it subsequently. I  
13 wasn't aware of it at the time.

14 Q Were you aware of it prior to the  
15 Medical Staff Executive Committee suspending  
16 Dr. Kearney's clinical privileges?

17 A No.

18 Q So it was after the fact?

19 A Yes.

20 MR. BEAUMAN: Before you move on, on  
21 Exhibit 4 --

22 MR. PAFUNDA: What about it?

23 MR. BEAUMAN: -- did you intend to  
24 give the one that's not signed?

25 MR. PAFUNDA: Yes.  
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1 MR. BEAUMAN: Okay.

2 MR. PAFUNDA: I thought you were  
3 going to find another piece of paper.

4 MR. BEAUMAN: No, I just had the  
5 signed one.

6 MR. PAFUNDA: But you're like the  
7 paper monster.

8 MR. BEAUMAN: We have the signed one  
9 and we know it's different and --

10 MR. PAFUNDA: No, I know.

11 MR. BEAUMAN: -- I didn't know which  
12 one you were inquiring about.

13 MR. PAFUNDA: But you're like the  
14 paper monster. You're the only guy I know  
15 that really looks at exhibits.

16 (Off the record.)

17 (LETTER DATED 8/28/16 WAS MARKED AS  
18 PLAINTIFF'S EXHIBIT NO. 5 FOR PURPOSES OF  
19 IDENTIFICATION.)

20 Q Take a moment just to just review  
21 that.

22 MR. BEAUMAN: Thank you.

23 A Okay.

24 Q Have you had an opportunity to  
25 review this particular document?  
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1 A Yes.

2 Q Prior to today, had you seen this  
3 document that's dated August 28, 2015?

4 A No.

5 Q If you'll --

6 A Excuse me. I knew this -- I -- I  
7 knew the components existed and I was copied on  
8 it. I was aware of it.

9 Q Prior to August 28, 2015, were you a  
10 member of the committee that's referenced in this  
11 letter?

12 MR. BEAUMAN: Can I get you to  
13 clarify that, because it refers to  
14 University Healthcare Committee of the Board  
15 of Trustees.

16 MR. PAFUNDA: All right, I will.

17 A I'm not sure what committee you're  
18 talking about. I did meet in a group with Dr. --  
19 I was consulted by --

20 Q If you'll --

21 A -- Dr. DeBeer.

22 Q So we're clear on the record,  
23 Doctor, if you'll look at Paragraph No. 2, and if  
24 you would, read that into the record.

25 A "Because Dr. Kearney's status has  
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1 materially changed as result of the Committee's  
2 action, at the direction of the president, a group  
3 of appropriate persons was immediately formed to  
4 comprehensively define Dr. Kearney's roles and  
5 responsibilities going forward."

6 Q Now, if we just take that paragraph,  
7 you would agree with me, would you not, that  
8 Dr. Kearney was returned as a ten -- full ten --  
9 regular titled, full tenured professor at the  
10 College of Medicine; correct?

11 MR. BEAUMAN: Object to the form.

12 A I don't see that, no.

13 Q Was he returned by a Healthcare  
14 Committee of the Board of Trustees?

15 MR. BEAUMAN: Object to the form.

16 A I don't know. I don't know -- I  
17 just --

18 Q Is he -- is he back on campus?

19 A He was -- he was --

20 Q No, my question -- listen to my  
21 question. Is he back on campus?

22 A He's back on the campus of the  
23 University of Kentucky as a tenured professor.

24 Q Is he a member of the Department of  
25 Surgery?

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1 A I was told he no longer was.

2 Q Who told you that?

3 A The -- Dr. -- Bill Thro.

4 Q General counsel for the University;  
5 correct?

6 A Correct.

7 Q When did Mr. Thro tell you that?

8 A On or about this time.

9 Q Prior to this letter being drafted,  
10 did you have a meeting with the individuals who  
11 are copied on this letter?

12 A No, not all of them were there. It  
13 was -- it was a different group.

14 Q Did you have a meeting with some of  
15 the individuals who are copied on this letter  
16 prior to the letter being drafted?

17 A Yes.

18 Q With whom did you meet?

19 A I don't recall the exact list.

20 Q Well, let's throw out the idea of an  
21 exact list. Can you remember anybody?

22 A Dr. DeBeer was there. Dr. Boulanger  
23 was there. There were several others. I don't  
24 recall the rest.

25 Q Well, there's only several others  
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1 left on the list there, are there not?

2 A I can't remember if Brett Short or  
3 Margaret was there. I don't think Susan was  
4 there. I don't think Cofield was there. And I  
5 don't think Swinford was there. I don't think  
6 Tracy was there. I --

7 Q Was Bill Thro there?

8 A Yes.

9 Q And was Cliff Iler there?

10 A Likely.

11 Q Now, if you'll read the last  
12 sentence on the first page into the record. It  
13 begins "Because Dr. Kearney."

14 A "Because Dr. Kearney lacks clinical  
15 privileges, there are significant restrictions on  
16 his access to particular areas of the hospital and  
17 to patient information, and on his interactions  
18 with various members of the UK community. But  
19 because he remains a tenured professor within the  
20 College of Medicine, he retains certain rights."

21 Q What rights does he retain as a  
22 tenured professor?

23 MR. BEAUMAN: Object to the form.

24 A I don't know.

25 Q As department chair were you  
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1 informed by anybody on this -- I'll call it  
2 committee -- what rights he retained?

3 A I was involved in numerous  
4 discussions, but I wasn't given specifics. This  
5 was unprecedented. Nobody -- this had never  
6 happened before, so some of this was formative.

7 Q Well, it's unprecedented, is that  
8 not the party line right now, that this is  
9 unprecedented so we didn't know what to do?

10 MR. BEAUMAN: Object to form.

11 A I don't know. I've never heard of  
12 the --

13 Q Let me ask you this: Has his salary  
14 been reduced?

15 A First of all, I never heard the  
16 party line. Secondly, based on his activities, I  
17 understand his salary has been reduced by the  
18 dean.

19 Q Did you participate in that decision  
20 to reduce his salary?

21 A I participated in the discussion. I  
22 didn't make the decision.

23 Q And what discussion did you have,  
24 and with whom did you have it?

25 A The dean.  
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1 Q Anyone else present?

2 A There were multiple discussions, so  
3 I can't recall who may or may not have been there  
4 on the different times we discussed it.

5 Q Well, other than the dean, what  
6 other persons do you recall participating in the  
7 discussions to reduce his salary?

8 A I think Mr. Thro was there.

9 Q Anyone else you recall?

10 A No.

11 Q So the picture you've drawn for me  
12 is it's -- it's a small group that decided to cut  
13 his salary; correct?

14 A It's a small group that discussed  
15 it. I -- I don't know exactly who decided, but a  
16 small group discussed it.

17 Q Do you have an understanding as to  
18 who made the final decision to cut his salary?

19 A My understanding is the dean did.

20 Q Now, to return to the sentence  
21 you've just read into the record, you see where it  
22 says, "There are significant restrictions on his  
23 access to particular areas of the hospital," my  
24 question is, where can't Dr. Kearney go? Where is  
25 his access restricted?

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1           A           Well, he lost clinical privileges,  
2 my understanding, so he was limited in his access  
3 to clinical activities.

4           Q           No. This says "His access to  
5 particular areas of the hospital," does it not?

6           A           That's what the words say.

7           Q           Yeah, so I'm asking you, what areas  
8 of the hospital can't he go into?

9           A           I don't know.

10          Q           In your opinion as department chair,  
11 can he go into the hospital, yes or no?

12          A           It was more complicated than that.

13          Q           No --

14          A           The dean --

15          Q           I'll listen.

16                   MR. BEAUMAN: Let him --

17                   MR. PAFUNDA: Let him what, give me a  
18 speech?

19                   MR. BEAUMAN: Let him explain the  
20 answer.

21          Q           Go ahead.

22          A           The dean felt strongly that based on  
23 these decisions -- these decisions that  
24 Dr. Kearney should not interact with medical  
25 students or residents. So because he was denied  
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1 clinical privileges and because he was denied  
2 access to students and residents, there were --  
3 there are many areas of the hospital that he had  
4 no need to frequent. Now, I don't know -- I  
5 didn't determine exactly what areas he did and  
6 didn't go into.

7 Q As department chair I'm asking you  
8 what areas of the hospital, if any, that  
9 Dr. Kearney can't go into?

10 MR. BEAUMAN: Objection. I think he  
11 answered that the best he could. He said he  
12 doesn't know --

13 MR. PAFUNDA: Bryan, just let him  
14 identify the areas so we can get to this  
15 retaliatory conduct by the University.

16 MR. BEAUMAN: Come on, we're not  
17 getting anywhere with this. You and I can  
18 go back and forth.

19 MR. PAFUNDA: We will.

20 MR. BEAUMAN: He's on the clock. We  
21 need to get him out of here, so.

22 A I don't know.

23 MR. BEAUMAN: You had your answer.

24 Q All right. It also says he's  
25 restricted to patient information, does it not?

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1 A Correct.

2 Q You would agree with me, would you  
3 not, that Dr. Kearney is a licensed physician and  
4 allowed to practice in the Commonwealth of  
5 Kentucky; correct?

6 A Yes.

7 Q So he would be under the same state  
8 and federal law prohibitions with respect to  
9 patient information, would he not?

10 MR. BEAUMAN: Object to the form.

11 A I don't determine that.

12 Q Who does?

13 A Who does what?

14 Q Determines that.

15 A I didn't determine his access to  
16 medical information.

17 Q Who did?

18 A I don't know.

19 Q Well, from what you've told me,  
20 there was a small group, and it had to either be  
21 the dean; correct?

22 A Uh-huh.

23 Q Or Mr. Thro; correct?

24 A Those are the two --

25 Q Or those two in conjunction;  
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1 correct?

2 A You're linking different -- you're  
3 linking different discussions. You asked me who I  
4 talked to, and I as the chair talked to the dean,  
5 Dr. -- Mr. Thro and a number of other people that  
6 I don't recall exactly. I don't know whether  
7 discussions or what other considerations or what  
8 other factors went into these decisions.

9 Q Let me approach it this way: Do you  
10 as department chair determine what benefits, if  
11 any, Dr. Kearney is to receive as a member of the  
12 department, and if so, what are those benefits?

13 A Which benefits are you talking  
14 about?

15 Q I'm asking you.

16 A I don't determine benefits.

17 Q Does he get paid his expenses for  
18 attending seminars?

19 A We have a development -- we have  
20 professional development on the distribution of  
21 effort, and we have funds available in order to  
22 pursue those professional development efforts. If  
23 he wishes to attend a seminar as a senior member  
24 of our faculty, he determines the relative merit.  
25 He discusses it with his colleagues, as far as his  
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1 coverage. He determines whether there's funds  
2 available from his division and then he goes based  
3 on those discussions. I don't micromanage that.

4 Q Has he been denied those benefits,  
5 if you know, those kinds of benefits?

6 A Not that I'm aware of.

7 Q Now, the same sentence, it actually  
8 goes on to the next page, "And on his interaction  
9 with various members of the UK community"; who  
10 can't he interact with in the UK community?

11 A Where do you see that?

12 Q Again, if you'll look at that --

13 MR. BEAUMAN: Can I point it out?

14 MR. PAFUNDA: Sure.

15 MR. BEAUMAN: Sentence starts at the  
16 bottom of the page and keeps on with Page 2.

17 Q Do you see that sentence?

18 A Oh, "The interaction with various  
19 members of the UK community"?

20 Q Yeah.

21 A I see the words, yeah.

22 Q Well, what do those words mean to  
23 you as an educated individual?

24 A It's too broad.

25 Q Well, you're copied on this letter.  
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1 I take it you participated in coming up with these  
2 restrictions, did you not?

3 A I was present at some of the  
4 discussions.

5 Q You got a copy of the letter; right?

6 A I did.

7 Q As department chair, I'm asking you,  
8 who can he not interact with?

9 A I was told he could not interact  
10 with students and residents.

11 Q So interaction with various members  
12 of the UK community, as you just noted, that's  
13 pretty broad, isn't it?

14 A Correct.

15 Q And if you're reading literally, it  
16 means he can't talk to anybody, doesn't it?

17 MR. BEAUMAN: Object to the form.

18 A I don't know how to define "Various  
19 members of the UK community."

20 I've acknowledged I don't know how  
21 to define it.

22 Q And, in fact, given your degree of  
23 education, it's beyond definition, is it not?

24 A It depends on the -- it depends on  
25 the definition.

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1 Q Actually, it depends on what takes  
2 place, doesn't it?

3 A I don't know what that means.

4 Q Are you in a position as department  
5 chair to enforce what's in -- contain -- the  
6 restrictions that are contained in this August  
7 letter?

8 A I'm not an enforcer. I'm -- I'm not  
9 a safety -- I'm not a policeman, so I was -- I was  
10 asked to conform with what this document  
11 recommended.

12 Q If you will, please, under numerical  
13 paragraph -- the paragraph that's numerical  
14 Paragraph 1, if you'll read that last sentence,  
15 "This prohibition," if you'll read that into the  
16 record?

17 MR. BEAUMAN: Talking above the  
18 bullet points; right?

19 MR. PAFUNDA: Yes.

20 A "This prohibition includes, but is  
21 not limited to, the following clinical and  
22 teaching settings:"

23 Q And if you'll read those  
24 prohibitions that are bullet pointed out into the  
25 record.

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1           A           "Attending mortality and morbidity  
2 conferences."

3           Q           All right.  If we can just stop on  
4 each one.  Is he allowed to attend those?

5           A           No.

6           Q           And you as chair, can you tell him  
7 he cannot attend those?

8           A           I don't know exactly what my -- my  
9 duties are.  As a gentleman and a scholar and a  
10 colleague, I was asked to communicate to Paul what  
11 this letter communicated, so there was one  
12 incidence where I asked him not to attend.

13          Q           Well, you know, as a  
14 gentleman-scholar, and a colleague, let's go back  
15 through some of my earlier questions, before you  
16 came to UK, you were at what university?

17          A           University of Texas medical branch.

18          Q           At the University of Texas, did you  
19 have ad -- administrative duties?

20          A           I was the Director of the ECMO  
21 program.  I was the Director of General Thoracic  
22 Surgery and I was the chair of the IRB.

23          Q           So your answer to my question is  
24 yes?

25          A           Yes.  
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1 Q When you came on as Chair of the  
2 Department of Surgery at the University of  
3 Kentucky, did your administrative duties  
4 necessarily expand?

5 A From what I had before, yes.

6 Q And do you feel in your opinion that  
7 you're competent to carry out those administrative  
8 duties?

9 A I do the best I can.

10 Q No, my question is, and it's very  
11 pointed, do you feel in your opinion that you're  
12 competent to carry out those administrative  
13 duties?

14 A I don't know how to judge that.  
15 Others -- others think I'm competent. I do the  
16 best I can.

17 Q When you say others think you're  
18 competent, to whom are you referring?

19 A Those -- those who evaluate me, my  
20 boss.

21 Q Who's that?

22 A The dean.

23 Q Anyone else?

24 A My peers.

25 Q And your peers would be whom?  
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1           A           My peers are my divisional peers, my  
2 department peers, the institutional physicians.  
3 Nationally I'm on a number of committees,  
4 nationally, internationally. I mean, there's a  
5 lot of peers.

6           Q           And that would also include the  
7 Executive Vice President for Health Affairs, would  
8 it not?

9           A           I consider him a peer, yes.

10          Q           Do you consider him a boss?

11          A           Yes.

12          Q           Returning, did you at any point in  
13 time report to the dean that Dr. Kearney was not  
14 to attend mortality and morbidity conferences?

15                        (Off the record.)

16          Q           Did you at any time report to the  
17 dean that Dr. Kearney was not to attend any  
18 mortality or morbid -- morbidity conferences?

19          A           No.

20          Q           Grand rounds, is Dr. Kearney free to  
21 attend grand rounds?

22          A           According to this document, he's  
23 not.

24          Q           I'm asking you as department chair?

25          A           I'm answering you as department  
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1 chair. In this -- in this document, grand rounds  
2 were listed, but on further reflection, I appealed  
3 to the dean that grand rounds are -- are available  
4 to the public, and that I felt Dr. Kearney should  
5 be able to attend. So there was a period of time  
6 where he could attend grand rounds.

7 Q Is he still able to do that?

8 A No.

9 Q Tell me why not.

10 A Well, at my request he was granted  
11 the privilege of being able to come. He came to a  
12 couple and he participated in the discussion. I  
13 even asked him questions because of his knowledge  
14 base that I was aware of in order to participate  
15 in the discussions. And during one of the  
16 discussions he insulted one of the faculty  
17 members.

18 Q Which faculty member?

19 A He insulted the Chief Medical  
20 Officer.

21 Q Dr. Boulanger at the time?

22 A No. At that time it was Phil Chang.

23 Q And how did he insult -- or what did  
24 he say to insult Dr. Chang?

25 A You want to know specifically?  
AN/DOR Reporting & Video Technologies, Inc.

1 Q Yes, I do.

2 A There was a discussion about  
3 infection control during which Dr. Chang  
4 expressed --

5 Q Infection control in the operating  
6 room?

7 A I don't remember the setting, but it  
8 was infection control within the context of the  
9 hospital. And Dr. Chang was explaining what had  
10 been initiated in the discussion and tried to  
11 explain it, and Dr. Kearney stated to all of the  
12 students and residents present that he was a  
13 pencil-pushing pecker head who shouldn't be  
14 listened to and his opinion didn't count, and  
15 so --

16 Q Now, this was a pointed remark at  
17 Dr. Chang that he is or was a pencil-pushing  
18 pecker head?

19 A Yes.

20 Q So I take it that Dr. Chang, as well  
21 as yourself, took offense to that remark?

22 A There were numerous people that took  
23 offense to it.

24 Q So what happened as a result of that  
25 remark?

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1           A           I was requested to send a -- a  
2 communication to the dean by --

3           Q           You were requested by whom? Who  
4 requested you send a communication to the dean?

5           A           Well, in discussion with the people  
6 in the room who were offended, there were several.

7           Q           All right. Who were they?

8           A           I don't specifically recall. It was  
9 a room full of people.

10          Q           I know but --

11          A           Students, residents.

12          Q           You got --

13          A           I discussed the incident with  
14 Dr. Chang, who felt highly insulted by the  
15 comment. I conferred with Dr. McGrath, the  
16 section head, and then -- and I can't recall who  
17 others.

18          Q           Was Dr. McGrath present in the room?

19          A           I don't recall.

20          Q           But you recall Dr. Chang, he was  
21 offended, so my question is, who else do you  
22 recall that was offended that was in the room?

23          A           I do -- I don't recall.

24          Q           Did anyone ever express the opinion  
25 they were not offended?

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1 A No.

2 Q Did anyone ever express the opinion  
3 that Dr. Kearney was not disruptive at that time?

4 A No.

5 Q Continue on.

6 A And so as I had been requested, if  
7 there were issues related to Dr. Kearney's  
8 behavior, I communicated to the dean that this  
9 incident had taken place.

10 Q Dean DeBeer at the time?

11 A Correct.

12 Q And Dean DeBeer gave you what  
13 instructions, if any?

14 A He told me that he had to think  
15 about it, but he probably wouldn't allow  
16 Dr. Kearney to attend grand rounds either an --  
17 anymore, going forward.

18 Q So who -- who did -- who made the  
19 decision not to allow Dr. Kearney to attend grand  
20 rounds?

21 A Dr. DeBeer.

22 Q Thank you.

23 And I take it you concurred with  
24 that decision?

25 A I complied with it.  
AN/DOR Reporting & Video Technologies, Inc.

1 Q That's not the same thing, though.  
2 Did you concur with it?

3 A Yes.

4 Q Now, the next bullet point -- well,  
5 were there any other incidents such as that at  
6 grand rounds with Dr. Kearney?

7 A Over the nine years I've been here,  
8 or over that particular incident?

9 Q That particular incident, since his  
10 return in August of 2015?

11 A I can't recall whether he came to  
12 one other grand rounds or two. I recall he came  
13 to one where he was a contributory -- he was very  
14 contributory to the discussion. And I took that  
15 as a positive, and so when he came to -- the dean  
16 asked me, should I have him come to more grand  
17 rounds. I said yes. I said, "He came to the  
18 first grand rounds and he was very contributory.  
19 He is a senior member and knowledgeable," so I  
20 said, "I think it's worthwhile to have him come to  
21 grand rounds."

22 Q Now, you would -- just on the senior  
23 and knowledgeable, and just on your description,  
24 you would agree, would you not, that Dr. Kearney  
25 is a competent trauma surgeon; correct?

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1 A Yes.

2 Q In fact, you would describe him as  
3 an excellent trauma surgeon, would you not?

4 A Yes.

5 Q In fact, as a teacher, Dr. Kearney  
6 is also an excellent teacher, is he not?

7 A To most students he's perceived as  
8 excellent. To many he's offensive.

9 Q And so the students, do they vote on  
10 these teaching awards? Is it a blind vote? No.  
11 1, do they vote?

12 A I'm not a hundred -- I'm not sure  
13 how that --

14 Q You don't know in your own  
15 department how the residents vote on teaching  
16 awards?

17 A In my own department I know.

18 Q How do they vote?

19 A There's numerous teaching awards.  
20 Yes. The --

21 Q Is it a blind vote?

22 A I think so.

23 Q Has, in fact, Dr. Kearney received  
24 27 teaching awards over the 27 years he's been  
25 there?

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1           A           I assume that's true. I haven't  
2 kept track.

3           Q           You're the department chair?

4           A           I don't keep track of his previous  
5 awards, but I know that he won numerous awards  
6 during my tenure.

7           Q           Is it the Richard Schwartz award?  
8 Is there a Richard Schwartz award?

9           A           There is a Richard Schwartz award.

10          Q           Did Dr. Kearney win that award?

11          A           He did.

12          Q           Is that the highest teaching award  
13 that can be given out?

14          A           It's the highest teach -- it's a  
15 lifetime achievement award within our department.

16          Q           How does one get that award; do they  
17 buy it?

18          A           No.

19                   MR. BEAUMAN: Okay, look --

20                   MR. PAFUNDA: No, I'm looking at you.

21           Okay. I take that back.

22          Q           How does one attain that award?

23          A           Through a nomination process.

24          Q           Does that include faculty people?

25          A           Yes.

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1 Q And would you for the record  
2 describe to us who are not familiar with it how  
3 you get the Richard Schwartz teaching award?

4 A The division chiefs and the senior  
5 professors in the department have a discussion and  
6 they nominate someone that they think has  
7 sufficient meritorious achievement to win that  
8 award. And I recall Dr. Kearney was nominated and  
9 he did receive the award.

10 Q Has Dr. Kearney also had an endowed  
11 chair in his name?

12 A Yes.

13 Q Is there any other active member at  
14 the College of Medicine who has an endowed chair  
15 in their name?

16 A I don't know.

17 MR. PAFUNDA: We've got to take a  
18 break. The tape is almost out.

19 MR. BEAUMAN: You interrupted him.  
20 He was trying to go through --

21 MR. PAFUNDA: It's okay.

22 MR. BEAUMAN: It's not okay.

23 (Off the video.)

24 THE VIDEO TECHNICIAN: We're back on  
25 video. This is Tape No. 4. The time is  
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1 12:25.

2 CONTINUED EXAMINATION

3 By Mr. Pafunda:

4 Q So if we look at the bullet points  
5 in that letter, he cannot attend grand rounds;  
6 correct?

7 A Not -- not following the event where  
8 he called the Chief Medical Officer a  
9 pencil-pushing pecker head. The dean decided, and  
10 I concurred, that he should not be allowed to  
11 attend because there's students and residents at  
12 that conference.

13 Q Who complained?

14 A Yes.

15 Q And I asked you to bring at the  
16 outset of this deposition any complaints filed by  
17 students or residents to the deposition; correct?

18 A Yes.

19 Q Did you document those student or  
20 resident complaints?

21 A No.

22 Q Do you recall what student or  
23 residents complained?

24 A No.

25 Q But not a doubt in your mind that  
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1 Dr. Chang complained, correct, and took offense?

2 A Correct.

3 Q Now, attending house staff  
4 conferences, what is a house staff conference, and  
5 why can't Dr. Kearney go to one?

6 A Those are -- he's not conducting  
7 clinical practice, so the house staff conferences  
8 were not felt to be pertinent.

9 Q What is a house staff conference?

10 A Internal conferences regarding  
11 patient care.

12 Q Are they held on a regular basis?

13 A I don't know.

14 Q Now, the next bullet point,  
15 "Attending Presentations by Visiting Professors or  
16 Named Lecture Events," why can't Dr. Kearney go to  
17 presentations by visiting professors or named  
18 lecture events -- named lecture events?

19 A Because those are open to residents  
20 and students.

21 Q Aren't they also open to the public?

22 A Yes.

23 Q In fact, did you know that I had  
24 actually attended those conferences or those  
25 presentations --

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1 A I did not.

2 Q -- in the past?

3 So if members of the public can  
4 attend those, why can't Dr. Kearney enjoy the same  
5 rights that members of the public have?

6 A My opinion is is because he had  
7 offended people and the Chief Medical Officer as  
8 well as students and residents at grand rounds,  
9 which is also open to the public, that they would  
10 restrict his activities at other public venues.

11 Q Did they, in fact, do so?

12 A I don't know.

13 Q At -- is he, in fact, banned as we  
14 speak today from attending presentations by  
15 visiting professors or named lecture events?

16 A I don't know.

17 Q But according to this letter, he is;  
18 correct?

19 A That's what the letter says, yes.

20 Q Next bullet point, "Attending Any  
21 Other Teaching Setting Where The House Staff  
22 Attend."

23 No. 1, who's house staff?

24 A I assume that's referring to  
25 residents.

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1 Q But we don't know from reading this  
2 letter, do we?

3 MR. BEAUMAN: Objection.

4 Q Whose house staff, how is that?

5 A I didn't draft the letter, so --

6 Q I know that.

7 A -- I'm trying to interpret it just  
8 like you are.

9 Q Who do you understand house staff to  
10 include?

11 A Residents.

12 Q For the record, there's a difference  
13 between students and residents; correct?

14 A There is.

15 Q What is the difference?

16 A Well, medical students are members  
17 of the Medical School class and they come and  
18 attend the University of Kentucky College of  
19 Medicine and they're in a student capacity. They  
20 aren't even physicians yet. Whereas house staff  
21 are part of the graduate medical education  
22 program, trained residents.

23 Q Are residents physicians?

24 A That's the term we use.

25 Q Does that mean they're licensed  
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1 physicians?

2 A They all have an M.D., but they're  
3 practicing under an institutional license.

4 Q So why is Dr. Kearney excluded from  
5 other teaching setting where house staff attend?

6 A Because his behavior was determined  
7 to be so egregious that he espoused unprofessional  
8 behavior and that the residents shouldn't be  
9 exposed to that.

10 Q And that's behavior at grand rounds?

11 A Well, it was the -- it's cumulative  
12 over -- over years of offensive behavior to  
13 residents and students.

14 Q And, in fact, you -- you're aware of  
15 the fact that he has no resident complaints;  
16 correct?

17 MR. BEAUMAN: Object to the form.

18 A No.

19 Q You're aware of the fact that he has  
20 no student complaints; correct?

21 A No.

22 MR. BEAUMAN: Object to the form.

23 Q The only student complain that he's  
24 received in 27 years has been one anonymous  
25 complaint about a lecture that he conducted, did  
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1 you know that?

2 A I do not.

3 Q Did you know that he received an  
4 anonymous student complaint over a lecture that he  
5 conducted in August of --

6 A No.

7 Q -- 2014?

8 A I do not.

9 Q Did you ever listen to the lecture  
10 that he allegedly offended a single student?

11 A No.

12 Q Have you ever attended any of his  
13 lectures?

14 A No.

15 Q And do you, in fact, socialize with  
16 Dr. Kearney or had you socialized with him?

17 A Early on, when I first came we  
18 socialized.

19 Q And the extent of your social  
20 interaction was what?

21 A Conferences, meetings, parties. We  
22 would go to meetings -- we'd go to meetings. He  
23 invited me to dinner. I had been out to dinner  
24 with him, considerable.

25 Q And did something happen with  
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1 respect to that relationship? Did it sour?

2 A Over time, it was very uncomfortable  
3 for me to socialize with Dr. Kearney when I was  
4 hearing all of the complaints about his offensive  
5 behavior.

6 Q And so did you disengage from any  
7 social interaction with Dr. Kearney as a result of  
8 that?

9 A Well, it was over time. There  
10 were --

11 Q No, I understand that.

12 A There were numerous complaints,  
13 numerous incidences of unprofessional behavior.

14 Q All of which are undocumented;  
15 correct?

16 A I didn't personally document them.

17 Q Thank you. But I'm asking -- so you  
18 two -- your social relationship soured; are you  
19 saying it's due to all of those complaints that  
20 you received over a period of time?

21 A Yes.

22 Q Is that the only --

23 A From my perspective.

24 Q And it also says is excluded from  
25 attending any recruitment activities for house  
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1 staff. What are recruitment activities for house  
2 staff?

3 A That's where we either recruit  
4 medical students to become residents or we recruit  
5 house staff to become faculty. It was -- it was  
6 felt that his -- the authors of this document felt  
7 that his presence would be detrimental to that  
8 effort.

9 Q Well, you told us earlier that the  
10 Department of Surgery as was ranked by Press Ganey  
11 as the lowest at the College of Medicine; doesn't  
12 that also adversely impact recruitment activities?

13 A It's unrelated. It's unrelated to  
14 this statement. We were recognized by US News &  
15 World Report as being a high performer in mul --  
16 multiple areas.

17 Q But your area was not one of them,  
18 was it?

19 A That's not true.

20 Q Was it?

21 A Yes.

22 Q But also the public hasn't been  
23 notified as to the ranking of the engagement  
24 survey, Press Ganey; correct?

25 A I don't know.  
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1 Q And he's also excluded from engaging  
2 in activities that involves protected health  
3 information or patient safety work product. Tell  
4 me what patient safety work product is.

5 A That's a term that we use to  
6 describe activities to try to improve our  
7 environment, improve our efficiencies, improve --  
8 improve our -- our care.

9 Q Why would they -- would you not want  
10 input from one of the leading teachers in the area  
11 of surgery as well as one of the leading surgeons?

12 A Well, he no longer had clinical  
13 privileges.

14 Q Well, you don't need clinical  
15 privileges --

16 A And the person who drafted this felt  
17 that this was a -- that his involvement might  
18 negatively impact that effort.

19 Q So Mr. --

20 A He may have been an expert on  
21 content, but his offensive style of interacting  
22 with other people often was detrimental to  
23 committee work.

24 Q So the person who drafted this is  
25 Mr. Thro, so I take it from your comment that  
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1 Mr. Thro was making these decisions as to  
2 Dr. Kearney?

3 A I don't know that.

4 Q Did Mr. Thro draft this?

5 A I don't know that. I just know  
6 he's -- that it's listed here that he sent it to  
7 you.

8 Q Yeah. Well, while you were giving  
9 input, was Mr. Thro there when you had your  
10 "committee meeting"?

11 A I was engaged in the discussion with  
12 the small group that I described. I don't -- I  
13 don't know if that was the only discussion.

14 Q But Mr. Thro was engaged in that  
15 discussion; correct?

16 A He was.

17 Q Why does legal even get involved in  
18 these matters?

19 A What matters?

20 Q Matters that pertain to the  
21 Department of Surgery; why call in legal?

22 A Well, at the time Dr. Kearney was no  
23 longer considered part of the Department of  
24 Surgery. And it was --

25 Q Wait -- wait a second, and I know  
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1 you're going to finish the answer, but you've  
2 thrown out at the time Dr. Kearney was no longer  
3 considered department -- part of the Department of  
4 Surgery; what time are you talking about?

5 A During the period of discussions  
6 following the ruling by the Board.

7 Q Well, are you, in fact, stating  
8 today that he's not part of the Department of  
9 Surgery?

10 A Under Item 3, "Because Dr. Kearney  
11 is no longer part of the Department of Surgery, it  
12 is inappropriate for his office to be in the  
13 Department of Surgery."

14 Q I'm asking, is he part of the  
15 Department of Surgery today?

16 A Well, that's complicated. I'll  
17 answer it as best I can.

18 Q It can't be that complicated?

19 A I'm going to do the best I can.

20 MR. BEAUMAN: Let him answer.

21 MR. PAFUNDA: No, I can ask him a  
22 question.

23 Q It can't be that complicate, can it?  
24 You either are or you are not a part of the  
25 Department of Surgery; correct?

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1 MR. BEAUMAN: I think his answer is  
2 it is complicated and he's going to explain  
3 it to you.

4 MR. PAFUNDA: I thought maybe --

5 MR. BEAUMAN: If you'll let him.

6 MR. PAFUNDA: No, I don't know if I  
7 will, but I don't have any duct tape.

8 MR. BEAUMAN: Then ask the next  
9 question.

10 MR. PAFUNDA: All right, I will.

11 Q When was he taken out of the  
12 Department of Surgery?

13 A There were multiple discussions --

14 Q No, now listen to my question.

15 A I am answering your question.

16 Q When?

17 A There were multiple discussions  
18 after the Board of Trustees made their ruling as  
19 to how to manage it because it had never happened  
20 like this before, it was unprecedented, and there  
21 was a number of discussions as to who should be in  
22 charge of Dr. Kearney's tenured faculty position  
23 because he no longer had clinical privileges.  
24 And -- and from that point forward, I was told he  
25 was not part of the Department of Surgery.

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1 Q All right. Thank you.

2 Who told you that?

3 A The dean. As I recall, the dean  
4 did.

5 Q Anybody else may have given you that  
6 information that he was not part of the Department  
7 of Surgery?

8 A Not that I recall.

9 Q Since we're running out of time, not  
10 just on your schedule but on Mr. Beauman's too --

11 MR. BEAUMAN: And the 6th Circuit.

12 MR. PAFUNDA: And the 6th Circuit.

13 Actually, he could call the 5th Circuit and  
14 talk to Judge Rosenbaum and drop my name.

15 MR. BEAUMAN: I'm not going to take  
16 that bait.

17 MR. PAFUNDA: It's a good bait. I'm  
18 serious. Just a second.

19 Q I'm going to direct your -- this is  
20 the hearing panel recommendation, Fair Hearing  
21 Panel. Had you seen this prior to today?

22 A Let me see it.

23 Q Had you seen the Fair Hearing Panel  
24 recommendation prior to today?

25 MR. BEAUMAN: He might recognize it  
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1           when he sees what it looks like.

2           Q       Have you, yes or no?

3           A       I don't recall. I need to see it.

4           Q       I'll hand you a document which  
5 purports to be the Fair Hearing Panel's  
6 recommendation. And I'll direct your attention to  
7 Page 11 and see if you've seen it before today?

8                   MR. PAFUNDA: And I'll mark it as  
9 No. 6; correct?

10                   THE REPORTER: Yes.

11                   (FAIR HEARING PANEL RECOMMENDATION  
12 WAS MARKED AS PLAINTIFF'S EXHIBIT NO. 6 FOR  
13 PURPOSES OF IDENTIFICATION.)

14                   THE WITNESS: Thank you.

15                   MR. PAFUNDA: Here, Bryan, here is a  
16 copy.

17                   MR. BEAUMAN: Thank you.

18                   MR. PAFUNDA: Here. Hand me that one  
19 back and I'll hand you this one because I've  
20 marked this one. Thank you.

21           Q       Page 11, if you would, do you see  
22 where it's No. 3, "Major Obstacle"?

23           A       Yes.

24           Q       Would you read the first two  
25 sentences into the record?

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1           A           "The Executive Committee had a  
2   substantial reason to believe that Dr. Kearney's  
3   unprofessional behavior would persist if the  
4   Medical Center continued to rely upon the same  
5   kind of moderate sanctions it had employed for  
6   most of 20 years."

7           Q           Next sentence, please.

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

12          Q           Question No. 1, was Dr. Kearney  
13  placed on multiple leaves of absence, yes or no?

14          A           I don't know.

15          Q           Question No. 2, was Dr. Kearney  
16  placed in multiple remediation programs, yes or  
17  no?

18          A           I knew of several attempts to  
19  remediate his behavior.

20          Q           No. Was he -- my question is -- you  
21  see the words -- was he placed in multiple  
22  remediation programs, yes or no?

23          A           He had multiple remediation programs  
24  even within my venue recommended and he was  
25  supposed to have taken part in them, but we had no  
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1 way of policing that action. So in my -- from my  
2 perspective, he had multiple remediation plans  
3 planned and recommended.

4 Q And were they reduced to documentary  
5 form, those remediation programs?

6 A To the extent the doc -- we -- we  
7 saw the documents that were written.

8 Q Thank you.

9 Next question, has Dr. Kearney  
10 during your tenure received multiple written  
11 reprimands?

12 A My interpretation was that we've  
13 seen multiple documents today referring to his  
14 unprofessional behavior.

15 Q My question to you is, sir, did he  
16 receive multiple written reprimands?

17 A It says, "As viewed by the  
18 Committee" he had multiple written reprimands.

19 Q So my question to you is, did he?

20 A I don't each -- I don't know of all  
21 of them. I just know what took place in the  
22 department.

23 Q Next question, did Dr. Kearney,  
24 during your tenure as chair of the department from  
25 2007 to -- receive multiple action plans?

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1 A Yes.

2 Q And what's an action plan?

3 A That's where we discuss with him on  
4 how to modify his behavior in order to improve it.

5 Q What was done pursuant to the action  
6 plan?

7 A We had multiple discussions with  
8 Dr. Kearney on how to improve his behavior. It's  
9 up to him to do it.

10 Q No, this says action plans, does it  
11 not?

12 A It does.

13 Q What were the plans?

14 A Well, they evolved over time.  
15 There's numerous documents that I'm aware of that  
16 outline things that he could do better.

17 Q And those documents, are they  
18 maintained by you?

19 A There's numerous places they could  
20 be maintained.

21 Q No, my question is, are they  
22 maintained --

23 A I do have some documents showing  
24 that.

25 Q Did you bring any of those documents  
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1 with you today?

2 A (Indicating). I'm aware of  
3 documents from 2008, 2010. As I recall there's  
4 multiple documents.

5 Q I asked you, did I not, to bring  
6 with you today copies of any and all warnings,  
7 leaves of absences, remediation programs, written  
8 reprimands and action plans?

9 MR. BEAUMAN: That were in his  
10 custody and control.

11 MR. PAFUNDA: In his custody or  
12 control?

13 MR. BEAUMAN: Right, and our answer  
14 is you already have all of those.

15 MR. PAFUNDA: Is that for the record?

16 MR. BEAUMAN: Yes.

17 MR. PAFUNDA: Well, I don't know,  
18 Bryan, you could sneak something in later.

19 Do you want to take off?

20 MR. BEAUMAN: No, I have one question  
21 in follow up.

22 MR. PAFUNDA: He's your client. You  
23 can have him sign it.

24 MR. BEAUMAN: Well, we can read and  
25 sign it. I haven't thought of it that way.  
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1 MR. PAFUNDA: All right. Go ahead.

2 Do it.

3 EXAMINATION

4 By Mr. Beauman:

5 Q Real quick. Before,  
6 Dr. Zwischenberger, Mr. Pafunda asked you about a  
7 conversation between Dr. Boulanger and you  
8 concerning the events that occurred after the  
9 Wilson incident involving Dr. Kearney's role and  
10 presence at the University. Did he, in fact, tell  
11 you in that initial conversation that Dr. Kearney  
12 was suspended?

13 A I don't recall the exact language of  
14 what he asked -- what he told me. He told me that  
15 he was relieved or that he was going to be absent  
16 while there was an evaluation.

17 MR. BEAUMAN: Thank you.

18 MR. PAFUNDA: That's it.

19 THE VIDEO TECHNICIAN: Going off the  
20 video. The time is 12:44.

21 \* \* \* \* \*

22 THEREUPON, the taking of the  
23 deposition of JAY ZWISCHENBERGER, M.D., was  
24 concluded at 12:44 p.m.

25 \* \* \* \* \*

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1 STATE OF KENTUCKY )

2 COUNTY OF PENDLETON )

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

14 Upon request of counsel, the witness  
15 herein was furnished a copy of the foregoing  
16 deposition to read and sign. An errata sheet was  
17 also furnished for any corrections the witness  
18 wished to make. When same is returned to this  
19 reporter, it will be filed with the deposition.

20 My commission expires: 9/11/18.

21 IN TESTIMONY WHEREOF, I have hereunto set  
22 my hand and seal of office on this the 7th day of  
23 September, 2016.

24

25

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