

**In The Matter Of:**

*Alina Boyden and Shannon Andrews v.  
State of Wisconsin Department of Employee Trust Funds*

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*Deposition of David H. Nispel  
April 3, 2018*

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE WESTERN DISTRICT OF WISCONSIN

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ALINA BOYDEN and  
 SHANNON ANDREWS,

Plaintiffs,

Case No. 17-CV-264

-vs-

STATE OF WISCONSIN DEPARTMENT OF  
 EMPLOYEE TRUST FUNDS, et al.,

---

Defendants.

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Deposition of DAVID H. NISPEL, taken at  
 the instance of the Plaintiffs, under and pursuant to  
 Section 804.05 of the Wisconsin Statutes, before  
 Tammy L. Uhl, RPR, CRR, CRC, a Notary Public in and for  
 the State of Wisconsin, at the Risser Justice Center,  
 17 West Main Street, Madison, Wisconsin, on  
 April 3, 2018, commencing at 1:07 p.m. and concluding at  
 5:14 p.m.

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A P P E A R A N C E S

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2

3 ACLU FOUNDATION, by  
 MR. JOHN A. KNIGHT,  
 150 North Michigan Avenue, Suite 600,  
 Chicago, Illinois 60601,  
 4 appeared on behalf of the Plaintiffs.

5

6 ACLU OF WISCONSIN FOUNDATION, INC., by  
 MR. LAURENCE J. DUPUIS,  
 207 East Buffalo Street, Suite 325,  
 Milwaukee, Wisconsin 53202,  
 8 appeared on behalf of the Plaintiffs.

9

10 WISCONSIN DEPARTMENT OF JUSTICE, by  
 MR. STEVEN C. KILPATRICK and MR. COLIN T. ROTH,  
 17 West Main Street,  
 Madison, Wisconsin 53707-7857,  
 11 appeared on behalf of the Defendants

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13

14 Also present: Dan Hayes

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1 DAVID H. NISPEL, called as a  
2 witness, being first duly sworn, testified on  
3 oath as follows:  
4 EXAMINATION  
5 BY MR. KNIGHT:  
6 Q Mr. Nispel, will you please state your name for  
7 the record.  
8 A David H. Nispel.  
9 Q And have you ever been deposed before?  
10 A No. I don't believe I ever have.  
11 Q First time. Wow.  
12 A I've been on the other side.  
13 Q Have you testified at a trial, arbitration,  
14 anything of that sort?  
15 A I don't believe I have either.  
16 Q So just, you know, please remember if you could  
17 give me verbal answers instead of nods, that's  
18 helpful.  
19 A Yes.  
20 Q If you don't understand a question, please let me  
21 know that. And are you represented by  
22 Mr. Kilpatrick today?  
23 A I am.  
24 Q And is there any reason you can think of why you  
25 would not be able to answer the questions today

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1 truthfully and accurately?  
2 A There is no reason.  
3 Q Did you meet with your attorneys to prepare for  
4 the deposition?  
5 A Yes.  
6 Q Okay. When and for how long?  
7 A Friday -- I was going to say January. Friday,  
8 March 23. I don't recall the length. I recall it  
9 being in the afternoon.  
10 Q Any idea at all in terms of range? Was it your  
11 whole afternoon, or was it part of the afternoon?  
12 A I would say just part of the afternoon.  
13 Q Okay. Did you have any involvement in preparing  
14 the discovery requests --  
15 A I did.  
16 Q -- or the responses?  
17 A Excuse me. I did.  
18 Q And what was your involvement in doing so?  
19 A I think I would say two-fold. Assisting in  
20 gathering information responsive to the discovery  
21 and assisting in the actual language of the  
22 response -- some of the responses.  
23 Q Okay. So I'm going to be asking you questions  
24 about what I'd like to call an exclusion or a  
25 gender confirmation treatment exclusion, and by

Page 7

1 that I mean the exclusion of, quote, "Procedures,  
2 services, and supplies related to surgery and sex  
3 hormones associated with gender reassignment."  
4 Are you familiar with that language?  
5 A I am.  
6 Q And I'm referring specifically to language in the  
7 2017 -- I believe it's called uniform benefits for  
8 state employees.  
9 A I'm familiar with that.  
10 Q I believe that language -- that language still  
11 exists in that uniform benefits for state  
12 employees, does it not?  
13 A The language that you read, sir?  
14 Q Yes.  
15 A I believe that's correct.  
16 Q And you mentioned one time meeting to prepare for  
17 the deposition. Were there any other times or  
18 anything else that you did to prepare for the  
19 deposition today?  
20 A Well, that's a compound question as it concerns --  
21 Q Let me ask one of them. Did you do anything --  
22 did you meet at any other time to prepare?  
23 A With my attorneys?  
24 Q Yes.  
25 A Just briefly before coming into the room.

Page 8

1 Q Okay. And did you do anything to prepare?  
2 A Yes. I looked at what I'm going to say are  
3 several -- or a few memos from 2016 and the  
4 discovery response of request for admissions,  
5 interrogatories, and production of documents. I  
6 may have looked at others. That's what I can  
7 recall right now.  
8 Q Are there any of the memos that you can tell me  
9 that you looked at?  
10 A Yes. I believe I have the dates correct. June --  
11 they're all 2016, sir. June 22, August 10,  
12 August 11, December 8, and, I believe,  
13 December 29. I think that's five.  
14 Q Okay. And these were memos that -- if I'm  
15 recalling correctly, these are all memos that were  
16 provided to the Group Insurance Board, GIB?  
17 A That's correct.  
18 Q Any other documents that you recall of the ones  
19 that you looked at?  
20 A That's all I recall right now, sir.  
21 Q Okay. Okay. And just a little background. Where  
22 did you complete college?  
23 A Where did I complete college?  
24 Q Yes.  
25 A Undergraduate, sir?

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1 Q Yes.  
 2 A University of Wisconsin-Madison.  
 3 Q And what about law school?  
 4 A University of Wisconsin Law School.  
 5 Q Have you completed any other degrees other than  
 6 undergrad and law school?  
 7 A I have.  
 8 Q What are those?  
 9 A A masters degree from the University of Virginia.  
 10 Q And what was that degree in?  
 11 A Foreign affairs.  
 12 Q Any other degrees that you've completed?  
 13 A No, sir.  
 14 Q Any other training that you've had that did not  
 15 end in a degree?  
 16 A I'm sorry. Could you repeat that?  
 17 Q Sure. Is there any other education that you've  
 18 had that did not result in a degree?  
 19 A That was the not that I needed to hear again.  
 20 Training that did not result in a degree?  
 21 Q Yes.  
 22 A Attending law conferences.  
 23 Q Right.  
 24 A Training that the Department of Employee Trust  
 25 Funds provides to its employees. I believe that's

Page 10

1 it.  
 2 Q Okay. Have you had any training related to people  
 3 who are transgender?  
 4 A No.  
 5 Q And have you --  
 6 A No. No is the answer.  
 7 Q And have you had any training with respect to  
 8 gender dysphoria or its treatment?  
 9 A No, sir.  
 10 Q Have you had any training in health insurance  
 11 administration?  
 12 A No, sir.  
 13 Q When did you first begin working at the Department  
 14 of Employee Trust Funds?  
 15 A November 17th, 1997.  
 16 Q And have you been there continuously since then?  
 17 A I have.  
 18 Q What position were you hired into in 1997?  
 19 A The deputy chief counsel.  
 20 Q And who did you report to at that time?  
 21 A The chief counsel.  
 22 Q What was your position as deputy chief counsel?  
 23 What were your responsibilities?  
 24 A To provide legal services to, as I call it,  
 25 internal and external clients/contacts.

Page 11

1 Q Okay. And who would the internal and external  
 2 clients be?  
 3 A The Secretary and other management and staff all  
 4 at the Department of Employee Trust Funds.  
 5 Q How long were you in that position?  
 6 A If I can answer it this way, I became general  
 7 counsel in January 2009.  
 8 Q So that's when you left the deputy chief counsel  
 9 and were hired as the general counsel at that  
 10 point?  
 11 A That's correct. That's correct.  
 12 Q Who was -- was there a general counsel when you  
 13 started in November 1997?  
 14 A No. The terminology used was chief counsel rather  
 15 than general counsel.  
 16 Q And when was the terminology changed?  
 17 A When I became general counsel.  
 18 Q Was there any meaning behind going from chief  
 19 counsel to general counsel as far as you know?  
 20 A Not as far as I know.  
 21 Q Did you have other legal positions prior to  
 22 beginning in 1997 at the department?  
 23 A Was I an attorney?  
 24 Q Yes. When did you first -- I forgotten when you  
 25 said you graduated law school.

Page 12

1 A I wasn't asked that.  
 2 Q Okay. When did you graduate law school?  
 3 A In December 1984.  
 4 Q And what were your legal jobs after you graduated  
 5 in 1984?  
 6 A In private practice.  
 7 Q Okay. Where did you work?  
 8 A Pardon?  
 9 Q Where did you work?  
 10 A First right out of law school in La Crosse.  
 11 Q La Crosse?  
 12 A Yes. Wisconsin.  
 13 Q For a firm?  
 14 A Yes.  
 15 Q After that where did you work?  
 16 A In Madison with a law firm.  
 17 Q And which law firm was that?  
 18 A In Madison?  
 19 Q Yes.  
 20 A It was called at the time Collins, Beatty &  
 21 Krekeler.  
 22 Q Okay. And what's it called now?  
 23 A I don't know, sir.  
 24 Q Did you stay at Collins, Beatty and -- I forgot  
 25 the last one.

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1 A Krekeler.  
2 Q Krekeler -- until you began working as general  
3 counsel or did you have other positions?  
4 A I had other positions that combined -- my  
5 terminology -- working as an attorney and as a  
6 lobbyist.  
7 Q Okay. What were your other positions after your  
8 firm?  
9 A In order as I can recall, what was called the  
10 School Administrators Alliance and the Wisconsin  
11 Farmers Union. I'm drawing a blank on the actual  
12 name. They would not like that. United Cerebral  
13 Palsy of Wisconsin. And then I also was in  
14 private practice throughout that time period that  
15 we're talking about.  
16 Q Okay. And when you said you were in private  
17 practice during that time period, were you working  
18 for yourself?  
19 A That's correct.  
20 Q Self-employed as an attorney at the same time you  
21 worked in these other positions?  
22 A That's correct.  
23 Q Any other legal jobs after law school that you  
24 recall?  
25 A Yes.

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1 Q What's that?  
2 A I was the municipal court judge for the City of  
3 Middleton.  
4 Q And after that?  
5 A There is no after that.  
6 Q So you left being municipal court judge in  
7 Middleton to take the position as deputy chief  
8 counsel?  
9 A I see, no. The word I'll use is overlapping. I  
10 was -- it was an elected position. I was elected  
11 municipal court judge and served in that position  
12 from 1996 through 2008 -- until 2008.  
13 Q Okay. So you were in that position for the first  
14 nine years or so that you worked at ETF? Do I  
15 have that right? '97 when you began deputy chief  
16 counsel?  
17 A That's correct. Those overlapped when I was  
18 deputy chief counsel and municipal court judge.  
19 Q Okay. What are your -- as general counsel -- let  
20 me make sure I have the dates right. So since  
21 January 2009 as general counsel, what are your  
22 responsibilities?  
23 A The same answer I gave as far as when I was deputy  
24 chief counsel providing legal services for the  
25 groups that I mentioned or the categories, if you

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1 will. In addition to that answer, one of the -- I  
2 provide legal services to the Group Insurance  
3 Board and the four other boards that are attached  
4 to the Department of Employee Trust Funds or ETF  
5 as we call it.  
6 Administrative rules were a part of my  
7 responsibilities -- promulgating administrative  
8 rules were part of my responsibility as dep chief  
9 counsel. They became more so when I became  
10 general counsel and being involved, as I will call  
11 it, from start to finish in contracts that the  
12 department, ETF, enters into and the boards enter  
13 into.  
14 They're undoubtedly are others. Those are  
15 the principle duties that I'm recalling at this  
16 time.  
17 Q What kind of contracts exist between ETF and GIB?  
18 A They don't exist between ETF and GIB.  
19 Q Then I misunderstood. So what kind of contracts  
20 were you talking about?  
21 A ETF -- tell me if I'm veering off where I think  
22 you are thinking. ETF administers a variety of  
23 benefit programs for members of the Wisconsin  
24 Retirement System. One of those benefit programs  
25 is the group health insurance program, and the

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1 Group Insurance Board pursuant to Wisconsin  
2 statute section 40.03(6), using my term, are  
3 responsible for -- GIB is responsible for  
4 administering and managing that program, and there  
5 is a subsection of that statute, which allows the  
6 GIB -- which authorizes the GIB to enter into  
7 contracts. So the contracts that the GIB enters  
8 into are with other entities, not ETF.  
9 Q And those are the contracts with the health care  
10 administrators?  
11 A That's one example. Well, the health plans.  
12 Q The health plans.  
13 A That's the term we would use.  
14 Q So the health plans -- what's the term you would  
15 use for the people who run -- who administers  
16 those health plans? I say administer, but you say  
17 that's not right?  
18 A Well, kind of door number three. We have -- we  
19 have health plans that are -- by we, I mean there  
20 are health plans that administer the uniform  
21 benefits and group health insurance program.  
22 Q And by -- if you could -- because I think we're  
23 going to be talking about administer in different  
24 ways. So in terms of their administration, is  
25 that to process claims? Is it that sort of thing,

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1 or how would you describe their role in  
2 administering these health plans?  
3 A Just as you did in your question to me. I think  
4 that's accurate.  
5 Q So the terms of the health plans are set by GIB?  
6 A Yes.  
7 Q And they are -- they are set by ETF and GIB? How  
8 would you describe the role -- let me ask this  
9 somewhat broad question but to the extent you can  
10 answer, how do ETF and GIB administer those plans?  
11 A Okay. In my understanding is the most direct but  
12 simple way is ETF provides information and makes  
13 recommendations to the Group Insurance Board, GIB,  
14 for the benefit programs that the GIB oversees  
15 including the group health insurance program. The  
16 GIB makes decisions regarding those  
17 recommendations and ETF, I will say, implements  
18 that, those decisions, and working -- part of that  
19 involves working directly with the health plans.  
20 Q So in terms of the -- so ETF will take instruction  
21 from GIB, but ETF will actually go directly to the  
22 health plans themselves?  
23 A I think that's accurate, yes.  
24 Q And to be clear, GIB gives instruction based in  
25 part on the advice that ETF provides to them;

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1 would that be accurate?  
2 A That's accurate.  
3 Q What is your role with respect to GIB?  
4 A I would say my role has -- I would use the title  
5 provide legal services and then under that I would  
6 say the following categories of types of services.  
7 Well, it's part of all of what I'm going to say or  
8 most of it.  
9 I attend the board meetings. So at board  
10 meetings occasionally to frequently I am asked  
11 by -- I'm going to say the Board -- questions  
12 regarding open meetings law, closed meetings. I'm  
13 also asked questions about the Wisconsin public  
14 records law. I am asked questions about whether  
15 the Board can take a particular action that it is  
16 contemplating and I am asked if the Board takes --  
17 not necessarily simultaneously, but if the Board  
18 takes action, can they at some future date reverse  
19 that or take different action.  
20 And the last category, if you will, that I  
21 can think of right now is I have occasionally  
22 provided -- actually, two parts. Fiduciary  
23 training and public records law training.  
24 Q To the GIB Board?  
25 A That's correct.

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1 Q To GIB?  
2 A Right.  
3 Q And you provide that training to GIB because they  
4 have a fiduciary -- they have fiduciary duties; is  
5 that right?  
6 A I provide the training -- I would answer it  
7 differently.  
8 Q Okay.  
9 A I provide the training because I was asked by  
10 either the Board or the secretary of the  
11 department or the board liaison given all because  
12 as my role of general counsel. And the last part  
13 is -- your question included the phrase because  
14 the Board has fiduciary training -- or  
15 responsibilities, and, yes, I just start at a  
16 different place in how I got to do that. Someone  
17 else could provide that training.  
18 Q But you were asked to do it by the Secretary and  
19 the board liaison or one of the other or you're  
20 not sure?  
21 A I provided, I think it was, three names because  
22 I'm not sure who and how -- who I was asked to  
23 provide that but it could have been one of those  
24 or could have been all three, but that's how I got  
25 to sit before the Board to provide the training.

Page 20

1 Q Who do you report to?  
2 A The Secretary of the ETF.  
3 Q And who reports to you?  
4 A Directly reports to me, three attorneys.  
5 Indirectly, three ombudsperson staff.  
6 Q Is Ms. -- I'm blanking on the name. But  
7 Ms. Felsmann, is she one of the attorneys that  
8 reports to you?  
9 A Yes, she is.  
10 Q And what is her name?  
11 A Felsmann is her last name. Diana is the first  
12 name.  
13 Q Does she still work for you?  
14 A Yes, she does.  
15 Q And she did at 2016 at the time of the policies  
16 that you talked about reviewing or the documents  
17 you talked about reviewing?  
18 A That's correct.  
19 Q 2016, who was the board liaison?  
20 A The GIB liaison is what I'm understanding your  
21 question?  
22 Q Yes. I mean the GIB liaison. Yes.  
23 A I do not know for certain. That is a position  
24 that -- the occupants of that position have  
25 changed over time, so I am not certain. You asked

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1 specifically about 2016, sir.  
2 Q I did, yes.  
3 A I believe it was Cheryllynn Wilkins or Sara  
4 Brockman.  
5 Q Okay. And the Secretary is Mr. Conlin?  
6 A Robert Conlin, yes.  
7 Q He was the secretary -- he still is the secretary;  
8 correct?  
9 A He is.  
10 Q He was the secretary in 2016?  
11 A He was.  
12 Q What did the ombudspeople do?  
13 A In brief, they receive inquiries and complaints  
14 from members primarily regarding the group health  
15 insurance program.  
16 Q And I'm sorry, what's your responsibility with  
17 respect to them?  
18 A I used the term indirectly supervise in response  
19 to an earlier question. One of the three  
20 attorneys that -- one of the three attorneys that  
21 reports directly to me is the immediate supervisor  
22 of the Ombudsperson Services staff.  
23 Q And who is that attorney?  
24 A That's Dan Hayes.  
25 Q And what is Dan's responsibility with respect to

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1 these ombudspeople?  
2 A To supervise them.  
3 Q Okay. What is done with those complaints?  
4 A I used the phrase inquiries and complaints and  
5 there was a reason for that. Members contact ETF  
6 and specifically many members contact the  
7 Ombudsperson Services staff in order to -- I'm  
8 going to go say two parts. In order to have  
9 questions answered that they have about the group  
10 insurance program, and I'm going to say its  
11 application to them.  
12 And second, as concerns complaints, in short,  
13 a member of a health plan may seek services from  
14 that health plan and be denied that request for  
15 services and part of the process is to -- after  
16 exhausting their options, if you will, with the  
17 health plan is to come to ETF and see if the  
18 ombudsperson services staff can review their  
19 complaint and resolve it.  
20 Q So is the -- what I call the complaint or the  
21 ombudsperson a level of review of the denial, or  
22 is it an actual review of the denial that might  
23 result in a change in providing coverage for  
24 somebody?  
25 A I would say it can be both of those, sir.

Page 23

1 Q Is there a different kind of appeal that goes to  
2 ETF of denials of coverage, or is that the primary  
3 mode for appeals?  
4 A I will say that a common path is as follows. A  
5 member seeks services from a health plan, is  
6 denied that service or services, seeks a review by  
7 the health plan called a grievance, and let's say  
8 the health plan affirms its initial decision, then  
9 the member can contact ETF and Ombudsperson  
10 Service staff for another look at that matter.  
11 If, as a result of that review, the member is  
12 still not satisfied or is not satisfied, he or she  
13 can seek what is called -- by ETF is called a  
14 departmental determination. ETF will issue  
15 that -- or issue a departmental determination.  
16 The member, if he or she is not satisfied with  
17 that departmental determination, can file a formal  
18 appeal and that appeal is assigned -- I'm using  
19 GIB as an example. That appeal -- excuse me. If  
20 that appeal is assigned a number, a file number if  
21 you will, that has GIB in its name, and then the  
22 administrative appeal process proceeds.  
23 Q Okay. And the -- is the ETF bill of determination  
24 a necessary step to getting the appeal in front of  
25 GIB?

Page 24

1 A A department determination?  
2 Q Yes. It's the Department of Employee Trust Funds;  
3 right? When you're talking about department, is  
4 that what you're talking about?  
5 A Yes. I think I've used interchangeably in the  
6 half hour or so Department of Employee Trust  
7 Funds, ETF, and department. They're all the same.  
8 Yes. Thank you.  
9 Q So the department determination, is that a  
10 necessary step to having your appeal heard by GIB?  
11 A Yes, it is.  
12 Q And then what happens with -- how does the process  
13 happen in front of GIB?  
14 A The Division of Hearings and Appeals, which is  
15 part of the Department of Administration -- the  
16 Division of Hearings and Appeals receives that  
17 appeal and pursuant to Wisconsin Administrative  
18 Code Chapter ETF 11 acts on the appeal. The  
19 result of that may be what's called a proposed  
20 decision that is issued by an administrative law  
21 judge of that division. That proposed decision  
22 goes to the GIB, and a final decision is issued by  
23 the GIB of that appeal.  
24 Q Got it. Do you -- I'm sorry. In the Division of  
25 Hearing and Appeals, is that a part of the

Page 25

1 department?  
 2 A It is not a part of the Department of Employee  
 3 Trust Funds. It's part of the Department of  
 4 Administration of Wisconsin.  
 5 Q And what is your role with respect to this appeal  
 6 process?  
 7 A My role in brief is to defend the position of ETF,  
 8 its departmental determination.  
 9 Q I talked about what I'm calling the exclusion  
 10 earlier. Do you know when that came into -- came  
 11 to be a part of the uniform benefits plan?  
 12 A It is my understanding that it became part of  
 13 uniform benefits in 1994.  
 14 Q That would have been before your time here at ETF;  
 15 right?  
 16 A That's right.  
 17 Q Do you know why that exclusion came into be?  
 18 A I do not have personal knowledge of that.  
 19 Q Do you have any knowledge of it?  
 20 A It's my understanding that the industry practice  
 21 at the time was to have such an exclusion.  
 22 Q And by industry practice, you mean the health  
 23 insurance industry? Is that what you mean?  
 24 A That's correct, sir.  
 25 Q What does this exclusion cover as far as you know?

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1 Does it cover surgery, for example?  
 2 A By cover, you mean concern I'm understanding.  
 3 Q Right. I mean, what kind of coverage would it  
 4 exclude? Surgical treatment is the general  
 5 question I'm asking.  
 6 A My understanding is the exclusion concerns the  
 7 words that are in that exclusion.  
 8 Q Okay. Well, I'm asking is it your understanding  
 9 that would include surgical treatment of a  
 10 condition called gender dysphoria?  
 11 A I believe that's accurate.  
 12 Q And would it cover hormone therapy for treatment  
 13 of gender dysphoria?  
 14 A That I'm less certain of.  
 15 Q Who would know the answer to that question?  
 16 A I believe Jeff Bogardus who was interviewed --  
 17 deposed this morning would be in the best position  
 18 to answer that.  
 19 Q Do you know if that language excludes any other  
 20 kind of medical care for treatment of gender  
 21 dysphoria?  
 22 A I do not know.  
 23 Q Who would know that?  
 24 A Perhaps Jeff Bogardus, but I do not know.  
 25 Q Do you know when the department first considered

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1 eliminating this exclusion?  
 2 A I know when the department first recommended to  
 3 the GIB the removal of the exclusion.  
 4 Q When was that?  
 5 A That was at the July 12, 2016, meeting of the GIB.  
 6 Q Were there -- are you aware of any other requests  
 7 to end the exclusion?  
 8 MR. KILPATRICK: Objection as to  
 9 vagueness.  
 10 A I do not know.  
 11 Q And why did the department recommend ending the  
 12 exclusion in July of 2016?  
 13 A ETF recommended the removal of the exclusion for  
 14 the reasons that appear in two of the memos that I  
 15 referenced earlier. First, the June 22nd memo  
 16 and, second, in the August 11 memo.  
 17 Q Were there any other reasons that you recall other  
 18 than what's listed in those two memos?  
 19 A Those are the only reasons I recall, sir.  
 20 Q What led up to the recommendation in the June  
 21 memo? In other words, what's the background to  
 22 that?  
 23 A I do not understand the question as phrased.  
 24 Q Well, I guess what I'm asking is what's the  
 25 background to drafting this memo and recommending

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1 to GIB that they end the exclusion?  
 2 A The background, as I understand it, is what's set  
 3 forth in each of those two memos, again, the  
 4 June 22 and August 11 memos.  
 5 MR. KNIGHT: I'm not sure how we  
 6 are numbering. I take it we're trying to  
 7 choose a number after the last --  
 8 MR. DUPUIS: No. We just decided  
 9 to go ahead with --  
 10 MR. KNIGHT: Just Nispel 1?  
 11 MR. ROTH: Nispel 1.  
 12 (Exhibit No. 1 marked for  
 13 identification)  
 14 BY MR. KNIGHT:  
 15 Q I'm showing what we marked Nispel Exhibit 1.  
 16 Could you identify that for the record, please.  
 17 A Nispel Exhibit 1 is the June 22, 2016, memo that  
 18 I've referenced in this deposition.  
 19 Q Okay. And I downloaded this from the ETF website.  
 20 Is this, I mean, the complete document as far as  
 21 you're aware? In other words, this is the  
 22 document that's available on the ETF website; is  
 23 that correct?  
 24 A I don't know that for a fact, but as I'm looking  
 25 at this quickly, I would say that is the memo that

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1 I am familiar with, and that should be on the ETF  
2 website.  
3 Q Got it. So then there's the memo at the  
4 beginning. This is from Tara Pray to the Group  
5 Insurance Board, and then it includes some -- a  
6 chart, which is Attachment A, that includes the --  
7 what it looks like is the current language in the  
8 health plan -- in the standard health plan; is  
9 that right?  
10 A I don't know that to be the case. I would expect  
11 that is the case. I haven't looked at this for a  
12 long time.  
13 Q Would that be the normal course of things to  
14 include the current language and show proposed  
15 changes?  
16 A That's correct, sir.  
17 Q I believe there's just the one attachment. Okay.  
18 So is this an accurate reflection then of the  
19 reasons why ETF recommended the change?  
20 A The reasons set forth in this memo, yes, sir.  
21 Q I believe you said this is it. There were no  
22 other reasons for making the change?  
23 MR. KILPATRICK: Objection. That  
24 misconstrues the testimony. He referenced  
25 another memo.

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1 Q You mentioned another memo. Is there anything  
2 else other than what's listed here and in that  
3 other memo that was a reason for making the  
4 change?  
5 A Is your question regarding the reasons in those  
6 two memos meant to refer to reasons that ETF and  
7 the Office of Legal Services made the  
8 recommendation to the GIB?  
9 Q Yes. I'm asking about the reasons behind the ETF  
10 recommendation.  
11 A I believe with that -- I'll call it  
12 clarification -- the answer is yes, sir, to the  
13 best of my knowledge, sir.  
14 Q Got it. And your name is not on here, but I take  
15 it that you were part of the drafting of this  
16 document; is that accurate?  
17 A That's accurate.  
18 Q And in particular, there's a discussion of the HHS  
19 regulations and the final regulations, and then a  
20 discussion of the analysis of ETF as a covered  
21 entity and further reasons for the recommendation;  
22 is that accurate?  
23 A That's accurate.  
24 Q So this would include -- this would list your  
25 conclusions that ETF is a covered entity; is that

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1 accurate?  
2 A It lists my conclusions. This is not an Office of  
3 Legal Services document or as we call it OLS in  
4 short. As you noted, sir, the author of the memo  
5 is Tara Pray and below her name it appears the  
6 name Office of Strategic Health Policy, and as we  
7 call it, OSHP.  
8 Q Is Ms. Pray a lawyer?  
9 A No.  
10 Q So I understand it's her document, but the legal  
11 analysis here is yours, is it not?  
12 A With that distinction, the legal analysis came  
13 from the Office of Legal Services, yes.  
14 Q And you say the Office of Legal Services, you're  
15 effectively the head of the Office of Legal  
16 Services; is that right?  
17 A That's right.  
18 Q You were saying it's the office's, so I'm  
19 wondering was there another author of this  
20 particular document other than you?  
21 A I do not call myself an author of the document.  
22 Q Okay.  
23 A The author in my opinion -- well, it's my opinion  
24 is Tara Pray. Period.  
25 Q Okay. But I take it that if Ms. Pray is not a

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1 lawyer, she was relying on information from you or  
2 people in your office for purposes of making the  
3 recommendations about the fact that ETF is a  
4 covered entity?  
5 A That's correct.  
6 Q So when you reached the conclusion -- or when your  
7 office, I'll specify, reached the conclusion that  
8 ETF was a covered entity, was that based on your  
9 or your office's analysis of the Affordable Care  
10 Act?  
11 A That's correct.  
12 Q And the regulations?  
13 A That's correct.  
14 Q And as a part of that analysis, you relied on the  
15 fact that ETF administers health insurance  
16 coverage; is that correct?  
17 A Yes. And as you already have heard, I believe in  
18 some of the questions -- let me back up. I  
19 believe your question says ETF administers and  
20 I'll leave it at that. Yes, sir.  
21 Q I know we talked a little bit earlier about  
22 administers. I just want to make sure that I've  
23 given you a chance to explain the role of ETF in  
24 administering the health insurance coverage. What  
25 is -- I think you listed off several ways in which

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1 they're administering them, but I may be confused.  
2 Why don't you remind me. How does ETF administer  
3 the health insurance coverage?  
4 A I believe I was asked that question and provided a  
5 sufficient answer as best as I can recall. I have  
6 nothing new to add.  
7 Q Okay. I just want to make sure I covered it. So  
8 I believe you said that GIB has some  
9 responsibilities to administer the health  
10 insurance coverage; is that right?  
11 A That's correct. And I referenced Wisconsin  
12 statute section 40.03(6) which sets forth the  
13 responsibilities of the GIB.  
14 Q Right. And so would it be fair to say that both  
15 ETF and GIB have responsibilities to administer  
16 the health insurance coverage for state employees?  
17 A I think that's fair.  
18 Q I believe you said that one of the roles that ETF  
19 has with respect to GIB is providing advice to GIB  
20 about coverage, changes that should be made; is  
21 that right?  
22 A That's right.  
23 Q And that's what was happening with respect to this  
24 particular June memo is that you were making --  
25 ETF was making a recommendation to GIB that they

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1 need to make this change?  
2 A Yes. With the exception I wouldn't use the word  
3 need, but it is ETF's recommendation that the GIB  
4 should make that change.  
5 Q And then ultimately you explained, I believe, that  
6 ETF has a role in -- has some role with respect to  
7 the contracts that GIB enters into with these  
8 different private insurance companies; is that  
9 right?  
10 A That's right.  
11 Q And I don't want to ask you to repeat all that,  
12 but I'm not sure you gave me much detail about the  
13 role that ETF has regarding those contracts. What  
14 is the role?  
15 A I'm not certain that I have anything to add other  
16 than what I've already indicated in an attempt to  
17 respond to your question or questions with this  
18 addition, if I can. I'm not sure I can perfectly  
19 recall the question most recently asked, but ETF  
20 negotiates contracts for the benefit programs --  
21 we're talking about GIB that the GIB oversees or  
22 is responsible for -- and brings forth the result  
23 of that negotiation to the GIB for approval or  
24 rejection.  
25 Q And when you talk about the negotiation, is that

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1 for purposes of -- for example, do they have a  
2 role in making a choice or a recommendation about  
3 which private companies GIB should contract with?  
4 A I'm not sure who they is. I think your question  
5 started out do they.  
6 Q Does ETF have a role in making recommendations to  
7 GIB about which private insurance companies they  
8 should enter into contracts with?  
9 A I will say, yes, but again not using the word  
10 should but should consider.  
11 Q Does ETF essentially ask for what I would call a  
12 bid from private insurance companies for the price  
13 they would charge for providing this service to  
14 GIB and state employees?  
15 A I believe the answer is yes. I couch it that way  
16 because now we're crossing into an area where I  
17 believe someone is better equipped to answer this  
18 question than I am --  
19 Q Who is that?  
20 A -- in this particular scenario. That would be  
21 Lisa Ellinger.  
22 Q And I believe we've seen that ETF has a role in  
23 asking the private administrators to actually sign  
24 contract amendments, for example?  
25 A I don't understand your question, sir.

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1 Q Well, so, for example, in this instance when the  
2 exclusion was ended, those contracts -- the  
3 private health companies would have been asked by  
4 ETF to enter into those contracts, for example,  
5 with those terms?  
6 A As I understood the question, at the time that ETF  
7 came before the GIB with the recommendation as set  
8 forth in the June 22nd memo, ETF on behalf of the  
9 GIB and the health plans -- let me back up.  
10 ETF had already appeared before the GIB at  
11 the May meeting, May 2016 meeting, and made  
12 various benefit recommendations, and this is where  
13 Ms. Ellinger is far better equipped to answer this  
14 line of question than I am.  
15 But my understanding -- and it's from the  
16 cheap seats -- is that discussions -- after that  
17 May meeting, discussions began between the health  
18 plans and ETF so those -- again, this is just my  
19 understanding. Those discussions were, I'm going  
20 to say, under way, but this is just David's  
21 understanding.  
22 Then we have the information set forth in the  
23 memo that's in your hands and ETF went to the GIB  
24 with this recommendation. Contracts with -- the  
25 kind of contracts that we're talking about with

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1 these health plans, this type, are effective  
2 January 1 of the next year, so 1/1/17, and that's  
3 about as far as I can go with my knowledge at this  
4 time of how that works.  
5 Q Do you have any role in reviewing those contracts?  
6 A Not the -- I'm going to say little to no and  
7 emphasis on no role in what's called the uniform  
8 benefits contract.  
9 Q Would that be Ms. Ellinger's job to be overseeing  
10 the uniform benefits plan?  
11 A It would have been Ms. Ellinger's role to oversee  
12 what I'm going to call the process and discussions  
13 with these health plans that would result in the  
14 uniform benefits that would go into effect 1/1/17.  
15 Q So I understand GIB is an independent board, but  
16 is it a part of ETF?  
17 A I would not say it is a part of ETF. The  
18 terminology I would use is attached to ETF.  
19 Q The uniform benefit plan itself involves certain  
20 decisions about what is covered, and I understand  
21 that GIB makes that decision, but is, effectively,  
22 GIB making that decision for ETF?  
23 A Not as I understand. I would not agree with that  
24 phrase -- or that terminology.  
25 Q How would you put it? In other words, are these

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1 the health insurance benefits or coverage  
2 determinations -- or coverage -- well, let  
3 me just -- how would you put it?  
4 A I'm having trouble with the word -- with the  
5 phrase for ETF.  
6 Q Okay. What would be a better word? I mean --  
7 A ETF makes benefit recommendations to the GIB.  
8 Let's say the GIB agrees with those  
9 recommendations -- and, again, Ms. Ellinger will  
10 be able to do much better than I can.  
11 If GIB approves those recommendations for  
12 benefits, those benefits will become part of what  
13 we're calling the uniform benefits that would go  
14 into effect January 1st of the next year.  
15 Q And those are the uniform benefits for all state  
16 employees?  
17 A That's correct.  
18 Q And are those one of the benefits that ETF  
19 provides to state employees?  
20 A The group health insurance program is one of the  
21 benefits that ETF administers in this case on  
22 behalf of the GIB for employees.  
23 Q Were you at the July 12th, 2016, GIB meeting?  
24 A I was.  
25 Q And am I right that that was a unanimous decision

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1 to remove the exclusion based on ETF's  
2 recommendation?  
3 A That's correct.  
4 Q Did anyone speak to the issue that you recall?  
5 A The issue being this specific recommendation that  
6 appears in that memo?  
7 Q Yes.  
8 A I do not recall whether there was any discussion,  
9 you know, in favor or against. The minutes of  
10 that meeting should reflect whether or not there  
11 was any discussion.  
12 Q And did anyone from the Department of Justice  
13 speak at that meeting?  
14 A My recollection is no.  
15 Q Do you recall when you first heard of an effort to  
16 reinstate the exclusion?  
17 A No.  
18 Q Do you recall who you heard that from?  
19 A Of an effort to remove the exclusion?  
20 Q Correct.  
21 A No.  
22 Q I know this is going back a little bit. There  
23 must have been lawyers at some point involved in  
24 the drafting of the uniform coverage plan. Was  
25 that before your time, or was there someone else

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1 involved, or am I just wrong that lawyers didn't  
2 draft those?  
3 A I think you're just wrong.  
4 Q Okay.  
5 A My input -- I cannot -- well, to be accurate in my  
6 response I'm about to give, I will not use the  
7 word draft. My input in the content of uniform  
8 benefits as I can recall -- to the best I can  
9 recall as of this date is when questions may be  
10 posed to me by someone in OSHP, Office of  
11 Strategic Health Policy, and before that it was  
12 called the Division of Insurance Services. That's  
13 the last thing, let's say, that's relevant to  
14 that. The description I just gave to you, sir, is  
15 how I would describe the type of services that I  
16 or my office provide to ETF to staff and managers.  
17 MR. KNIGHT: I'd like to mark this  
18 as Nispel Exhibit No. 2.  
19 (Exhibit No. 2 marked for  
20 identification)  
21 BY MR. KNIGHT:  
22 Q Mr. Nispel, if you would just take a look at  
23 Exhibit 2 and identify that for the record.  
24 A Nispel Exhibit 2 is a December 8, 2016, memo to  
25 the Group Insurance Board from Sarah Brockman of

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1 the Office of Strategic Health Policy. The  
2 subject reads Discussion and Consideration of 2017  
3 Uniform Benefits-HHS, in caps, Nondiscrimination  
4 Rule, and there are attachments.  
5 Q Right. So I believe Attachment A is a memo from a  
6 deputy attorney general dated August 10, 2016, and  
7 then Exhibit B is a memo from you and Diana  
8 Felsmann to the Group Insurance Board; is that  
9 right?  
10 A That's right, sir.  
11 Q When did you first see the August 10th memo?  
12 A I do not recall the specific date that I first saw  
13 the memo.  
14 Q So it's possible you saw it before August 10th?  
15 A Yes. No. No, sir. It's not possible.  
16 Q You knew that DOJ had an opinion about this before  
17 August 10th, I assume?  
18 A No. My hesitation was in correction of my initial  
19 answer is it is possible that I heard that DOJ may  
20 be working on a memorandum and that it's possible  
21 I heard that prior to August 10th.  
22 Q And who would you have heard that from?  
23 A That's why I'm using the word it's possible. I  
24 don't know who I heard it from, if, in fact, I did  
25 hear it.

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1 Q Okay. Well, so at least by August 10th, you saw  
2 this memo regarding the decision that the Board  
3 had made in July, and you drafted a response to  
4 it?  
5 A My answer to the question would be I am certain  
6 that I saw the DOJ memo on August 10 and drafted  
7 and put my name on Attachment B, the August 11  
8 memo, along with Diana Felsmann.  
9 Q Right. Do you agree with the Department of  
10 Justice that GIB should not be providing these  
11 benefits?  
12 A My legal opinion regarding the Department of  
13 Justice's memo and its contents appears in the  
14 August 11th memo bearing my name and Diana  
15 Felsmann's name.  
16 Q So on the August 11th memo on page 10, you quote  
17 some analysis from Segal Consulting regarding the  
18 cost of providing coverage --  
19 MR. KILPATRICK: Excuse me, John.  
20 I don't see a page 10. Neither does --  
21 MR. KNIGHT: I'm sorry. Page 2.  
22 Page 2 of the August 11 memo.  
23 THE WITNESS: I have it.  
24 Q So you quote from -- or you quote the conclusions,  
25 I guess, of the analysis from Segal Consulting

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1 about what I'll call the low cost of providing  
2 this coverage. Would that be an accurate  
3 description of that?  
4 A I reference that conclusion if that's what you  
5 mean by quote that, yes.  
6 Q Okay. Reference. So I take it that the message  
7 here is that the cost is low?  
8 A That was the conclusion that I reached based on my  
9 review of that 2014 study regarding Maryland --  
10 State of Maryland by Segal.  
11 Q I believe I've seen records indicating that you've  
12 seen other cost data other than this or other  
13 summaries of cost data. Do you recall seeing  
14 those things?  
15 A I do not personally recall seeing -- I do not  
16 personally recall seeing other cost studies. If  
17 that reference is attached to my name somewhere,  
18 I'd be happy to be reminded of that or help with  
19 my recollection.  
20 Q I guess more to the point, was there any contrary  
21 data that you saw or reviewed other than the data  
22 from Segal suggesting that the cost is, in fact,  
23 low?  
24 A I do not recall seeing any contrary data prior to  
25 preparing the August 11 memo.

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1 Q Did you see anything afterwards?  
2 A I do not recall that either as well.  
3 Q And in the paragraph, which is titled  
4 Background --  
5 A Yes, sir.  
6 Q -- you describe ETF's role in relation to the GIB  
7 is to make recommendations to assist the GIB in  
8 the performance of its fiduciary duties to the  
9 insurance programs administered by ETF. So, I  
10 mean, that's an accurate statement of your views  
11 in terms of your role -- ETF's role?  
12 A That's an accurate statement.  
13 Q So I think this is inherent in the context here,  
14 but it was a part of ETF's role -- or in  
15 exercising that role that you made the  
16 recommendation July 12th; is that correct?  
17 A I think I'm going to be able to say yes, but I ask  
18 for a rephrasing of the question so I have a  
19 better understanding.  
20 Q In exercising the role that you describe here that  
21 ETF has with respect to GIB, you made the  
22 recommendation in July to end the exclusion; is  
23 that right?  
24 A That's right, sir.  
25 Q So in discussing the -- or in making your

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1 recommendations, you consider, for example, the  
2 potential liability of GIB with respect to the  
3 Affordable Care Act regulations. Is that one  
4 thing that you consider?  
5 A I believe your question was framed that  
6 information about that topic appears in this memo,  
7 yes.  
8 Q To put this more succinctly, both in the July  
9 memo -- I believe there's a June memo -- and in  
10 this August 8 memo, you have taken the position  
11 that ETF and potentially GIB are subject to  
12 potential liability for violating the HHS  
13 regulations; is that accurate?  
14 A I must say no. I believe in the response to the  
15 discovery, I don't know where, but -- and I don't  
16 know -- or recall the interrogatory, but I believe  
17 there was a statement that -- to paraphrase, a  
18 statement that does not -- the statement doesn't  
19 address ETF being liable.  
20 Having said that, the subject matter that  
21 we're talking about now, sir, regarding those two  
22 memos and fiduciary responsibility is meant to go  
23 to the GIB, and from my perspective, the GIB's  
24 fiduciary duties and potential liability.  
25 Q But it was your conclusion that the exclusion was

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1 a violation of 1557 of the Affordable Care Act?  
2 A My legal conclusion -- if that's what it says in  
3 this August 11th memo, then that's my conclusion.  
4 It was. The reason I phrase it that way is I  
5 don't know -- my answer that way is I don't know  
6 that's how I phrased my legal conclusion, but my  
7 legal opinion in that August 11th memo is my legal  
8 opinion to the GIB.  
9 Q I guess apart from what's said in the memo itself,  
10 do you believe that the exclusion violates the  
11 Affordable Care Act Section 1557?  
12 MR. KILPATRICK: I'm going to  
13 object on that as it calls for a legal  
14 conclusion as to the case. Other than that,  
15 you can answer.  
16 A The reason I framed my answers the way I did is I,  
17 in my capacity as general counsel of ETF, felt I  
18 was obligated with the information that appears in  
19 this memo to provide -- to make the GIB aware of  
20 that information and to provide my legal opinion  
21 about what, if anything, the Board should do in  
22 response to that information. I had a legal  
23 opinion. That's what I voiced.  
24 Q Okay. Well, I mean, I don't know how else to read  
25 your legal opinion other than the statement that

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1 there's at least a chance of liability under the  
2 Affordable Care Act.  
3 A I can agree with that statement. I believe that's  
4 what I was attempting to indicate to the GIB in  
5 this memo where it appears in this memo.  
6 Q Okay. And you also talk about the possibility of  
7 a violation of Title IX or a violation of Title  
8 VII?  
9 A Can you refer me, sir, to where that appears? I'm  
10 sorry. I believe the answer is yes. I just don't  
11 know where it appears.  
12 Q I believe you talk about it actually more  
13 extensively in the earlier memo.  
14 A I believe it is in the June 22 memo, yes.  
15 Q On page 3 of Nispel Exhibit 1, you talk about the  
16 intent to refer discrimination complaints to the  
17 EEOC, which enforces Title VII.  
18 A Yes, sir.  
19 Q That's why I'm talking about Title VII.  
20 A Yes. I see that paragraph. I made that  
21 reference.  
22 Q It would be accurate to say that you were  
23 discussing a potential liability under Title VII  
24 as well?  
25 A I believe that answer is yes. I now see the

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1 express reference to Title VII in the second to  
2 last paragraph on page 3.  
3 Q Are we talking about Exhibit 1?  
4 A Of Exhibit 1.  
5 Q Okay. Well, ultimately, your recommendations are  
6 to not reconsider the July 12th decision to end  
7 exclusions; is that right?  
8 A My recommendation in Nispel Exhibit 2, the August  
9 11th memo, the recommendations appear on page 5.  
10 And that is recommendation number one is ETF does  
11 not recommend reconsideration.  
12 MR. KNIGHT: I'd like to mark this  
13 as Nispel Exhibit 3.  
14 (Exhibit No. 3 marked for  
15 identification)  
16 BY MR. KNIGHT:  
17 Q Sir, I would like you to take a look at Nispel  
18 Exhibit 3. I'll start by pointing out that  
19 there's a name at the top of this page, which you  
20 would not have seen before. That's my assistant.  
21 That's the only way we can print these documents  
22 out because of the form in which we were given  
23 them.  
24 A I appreciate that.  
25 Q Other than that, this is a document that was

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1 produced to us in discovery. Could you identify  
 2 it?  
 3 A Other than the name that you just referenced that  
 4 appears in the upper left, the document says from  
 5 Nispel David, date Monday, August 15th, 2016, to  
 6 Voelker, John; Ellinger, Lisa; Conlin, Bob and  
 7 subject line it says RE: 8D, capital D, motions  
 8 for chair agenda.  
 9 Q Would it be accurate to call this an e-mail chain  
 10 and effectively your response to an e-mail that  
 11 was forwarded to you? I guess you were on the  
 12 original e-mail, weren't you? So the August 15th,  
 13 2016, now has your name on it as well?  
 14 A The three e-mails that comprise Nispel Exhibit 3  
 15 all seem to have my name somewhere either on the  
 16 from line or the to line.  
 17 Q Well, I take it this is your word agreed stating  
 18 that you're in agreement that these are the right  
 19 motions to use?  
 20 A If I could have a moment to review that.  
 21 Q Sure.  
 22 A I believe the answer is going to be yes, but I  
 23 don't know when I last saw this e-mail.  
 24 Okay. Sir. I have read what I'll call the  
 25 first e-mail from Lisa Ellinger, the middle e-mail

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1 from John Voelker, and then as you indicated the  
 2 e-mail at the top from me where the word agreed  
 3 appears.  
 4 Q And is -- I take it the way I put it before -- is  
 5 that accurate that you're agreeing that these are  
 6 the right motions or that these motions should  
 7 work?  
 8 A I'm agreeing with the terminology or phraseology  
 9 of what appears to me to be two motions, yes, sir.  
 10 Wait. There's actually a third motion on the  
 11 third page, sir. If I can have a moment.  
 12 Q Sure.  
 13 A Yes, sir. I read that. The answer I gave is the  
 14 same.  
 15 Q So these were the -- well, first of all, this is a  
 16 part of your role then is to provide advice to GIB  
 17 about the way to conduct their business?  
 18 A I have to approach my response a little  
 19 differently but I think -- as I'm looking at this  
 20 e-mail chain, what's being asked of me by -- to my  
 21 recollection, the individuals that appear on this  
 22 chain, is David Nispel, do you agree with the  
 23 framing, phraseology, of those three motions, and  
 24 now as I'm recalling your last question, sir, I  
 25 think you asked something is this a typical

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1 service that I provide, and I would say yes. In  
 2 this case that service, as I'm reading this, is to  
 3 the ETF, which I don't know that that was the case  
 4 but I believe what I'm about to describe -- but I  
 5 believe it would have been that ETF would have  
 6 made -- offered these three motions to the board  
 7 chair. All of what I just described, sir, is a  
 8 typical process.  
 9 Q Okay. So the process would be ETF provides  
 10 guidance to the Board about how to conduct their  
 11 business?  
 12 A Well, that's part of the hang up, sir. In my  
 13 response, the business that's being discussed or  
 14 referenced in this, as I'm understanding the  
 15 e-mail chain, is how should the motions -- what's  
 16 a good way to frame motions that the GIB chair may  
 17 wish to consider if that situation presents  
 18 itself.  
 19 Q And your role in providing advice to ETF is as a  
 20 lawyer to say that the language meets the concerns  
 21 that you might have about the legality of the way  
 22 in which they conduct their process?  
 23 MR. KILPATRICK: I'll object as to  
 24 disclosure of attorney/client privilege.  
 25 MR. KNIGHT: It seems to me that

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1 privilege is being waived pretty clearly.  
 2 MR. KILPATRICK: To the extent this  
 3 was an inadvertent disclosure, defendants may  
 4 attempt to claw this back.  
 5 MR. DUPUIS: This document?  
 6 MR. KILPATRICK: Yes. Nispel  
 7 Exhibit 3.  
 8 Q Can you answer my question?  
 9 A Yes, I will answer your question. I need it  
 10 repeated.  
 11 MR. KNIGHT: Do you mind repeating  
 12 it?  
 13 (Last question read)  
 14 A I cannot answer that question as framed. I was  
 15 being asked, as I understand this e-mail chain,  
 16 David, what do you think about the way this -- I  
 17 don't know who drafted the initial -- the motions.  
 18 But what do you think about that? And, yes, as I  
 19 would expect being asked my opinion, sir, as the  
 20 general counsel for ETF. I can't say that I was  
 21 being asked those things about the process of how  
 22 GIB conducts its business. This was --  
 23 Q So you're saying just as to language of this  
 24 specific motions that they would rely or that they  
 25 would make?

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1 A That's -- yes. I mean, that's why I answered the  
2 question.  
3 MR. KNIGHT: Okay. I think I  
4 should identify for the record this is in our  
5 records ETF3778. Do we want to write that on  
6 the actual exhibit?  
7 MR. DUPUIS: That's what we had  
8 been doing before.  
9 MR. KNIGHT: There we go.  
10 THE WITNESS: Thank you.  
11 MR. KILPATRICK: Just to confirm,  
12 3778?  
13 MR. KNIGHT: Yes. I'd like to mark  
14 this as Nispel Exhibit 4.  
15 (Exhibit No. 4 marked for  
16 identification)  
17 MR. KNIGHT: I'm going to mark on  
18 here this is ETF208.  
19 BY MR. KNIGHT:  
20 Q Mr. Nispel, I've given you what's been marked as  
21 Nispel Exhibit 4, which for the record, is ETF208.  
22 Have you seen this document before?  
23 A I don't know for certain that I have.  
24 Q I mean, do you know what this is?  
25 A This appears to me to be -- and I say it because

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1 it says Search ETF Community at the top. This  
2 appears to me to be -- I'm going to use the term  
3 article -- from the ETF website. The title of  
4 Exhibit 4 says OSHP News & Notes: Group Insurance  
5 Board Meeting (8/16/16) Highlights, and I haven't  
6 asked to read this today, but it appears to me  
7 that, just at scanning it, it's a summary of what  
8 it says, highlights of a meeting that occurred on  
9 that date.  
10 Q Do you know who the ETF Community is? Does that  
11 include the private insurers? Do you know?  
12 A I know what it is.  
13 Q Okay. What is it?  
14 A And the Office of Communication folks at ETF may  
15 not like my description, but my best I can  
16 describe it is it is ETF's blog, internal blog.  
17 ETF Community is that. As I mention in my earlier  
18 answer, my thought is that this information  
19 appeared on the website. It may have appeared  
20 just on the ETF Community. That I don't know.  
21 Q Okay. Taking a look at the bottom of the page.  
22 This talks about ETF is moving forward on  
23 communicating the benefit change related to the  
24 removal of exclusion for services based on gender  
25 identity. Do you see where I'm reading?

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1 A I do, sir. It's the last paragraph.  
2 Q Right. And it goes on to say the change will be  
3 effective January 1. And then says that The GIB  
4 was asked by the Department of Justice to  
5 reconsider its decision. And then it goes onto  
6 say in the next sentence on the next page that  
7 ETF's legal counsel has determined that the GIB  
8 correctly interpreted the Affordable Care Act  
9 nondiscrimination requirements and health plans  
10 may deny services that are not medically  
11 necessary. What do you mean by that?  
12 MR. KILPATRICK: Objection. It  
13 misconstrues --  
14 Q I'm sorry. I understand this is not -- but do you  
15 know what that's referring to?  
16 A I may if I have just a moment to review.  
17 Q Please do.  
18 A I'm going to say I do not because as I'm read --  
19 as I read the sentence while I'm sitting here,  
20 sir, I'm confused by what that sentence is  
21 attempting to convey to the reader.  
22 Q Okay. Can I just refer you back to Exhibit 2.  
23 A Yes, sir.  
24 Q So in the section that talks about Benefits  
25 Coverage, have you found -- did I give you a page?

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1 Page 3.  
2 A Yes, sir. I found it.  
3 Q Where it says Benefits Coverage, the second  
4 bulleted item.  
5 A Yes, sir.  
6 Q If you'll just take a look at this.  
7 A Yes, sir. Just a moment. Yes, sir. I read that  
8 second bullet.  
9 Q Is it possible this is what that other document is  
10 referencing, your statement that plans can deny  
11 services if they're not medically necessary?  
12 MR. KILPATRICK: Objection. Calls  
13 for speculation.  
14 A I believe it is possible.  
15 Q But I take it you had no role in the drafting of  
16 those particular documents that I showed you on  
17 Exhibit -- whatever that was -- 4? That's not  
18 your job, and you don't review those, these ETF  
19 community documents?  
20 A I would say that typically it is neither my job  
21 nor is it something I review. I cannot say that I  
22 have not on some occasions. I just can't say  
23 that.  
24 MR. KILPATRICK: I want to  
25 interject. Do you plan on taking a break

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1 soon or no?  
2 MR. KNIGHT: We can take a break.  
3 I have one more document, and then maybe we  
4 could take a break after that or -- would  
5 that be okay?  
6 THE WITNESS: That would be fine,  
7 sir.  
8 (Exhibit No. 5 marked for  
9 identification)  
10 BY MR. KNIGHT:  
11 Q Mr. Nispel, that is what we've marked as  
12 Exhibit 5. Could you identify this for the  
13 record.  
14 A Yes, sir. Nispel Exhibit 5 is a memorandum dated  
15 December 29th, 2016, to the Group Insurance Board  
16 from David H. Nispel, General Counsel, and the  
17 subject line reads 2017 Uniform Benefits and  
18 Services Related to Gender Reassignment or Sexual  
19 Transformation-HHS, all caps, Nondiscrimination  
20 Rule.  
21 Q Okay. And this memo then has a few attachments.  
22 It looks like Attachment A is from Sarah Brockman  
23 to the Group Insurance Board, and then there's the  
24 August 10th memo from Andy Cook at the Department  
25 of Justice, and then the last exhibit is your

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1 August 11th memo to the Board; is that right?  
2 A That's right.  
3 Q And these are the memos that we reviewed before,  
4 the August 10th and the August 11th memo being  
5 provided to the Board again?  
6 A If I'm understanding, by before you mean Nispel  
7 Exhibit 2 consists of these three attachments that  
8 are part of Nispel Exhibit 5.  
9 Q Does it include all three or just the two?  
10 A Well, the cover page of Nispel Exhibit 2 is the  
11 December 8th memo.  
12 Q I got it. Okay. So there's a mention of the 2013  
13 board meeting. Were you at that board meeting?  
14 A I was.  
15 MR. KILPATRICK: Excuse me. Did  
16 you mean 2016, December 13th board meeting?  
17 MR. KNIGHT: I did. I apologize.  
18 Q December 13th, 2016, were you at that meeting?  
19 A I was at that meeting.  
20 Q Not the meeting that I misspoke about.  
21 A And that I didn't properly hear. Yes.  
22 MR. KNIGHT: Why don't we take a  
23 break now. I want to actually -- we can come  
24 back to this in just a minute. Why don't we  
25 take a quick break.

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1 (Recess taken)  
2 MR. KNIGHT: Back on the record.  
3 BY MR. KNIGHT:  
4 Q I believe we were looking at Exhibit --  
5 A Five. Nispel Exhibit 5.  
6 Q Okay. Actually, I think we were looking at that,  
7 but I wanted to go back to talking about the  
8 December 13th board meeting. I believe I asked  
9 you whether you were at the December 13th board  
10 meeting.  
11 A Yes. We clarified the year.  
12 Q 2016 board meeting. Right. So did -- the issue  
13 of the exclusion came up during that meeting, was  
14 that right?  
15 A That's right.  
16 Q And how did that come up?  
17 A I believe a board member -- actually, I believe  
18 that subject matter appears on the agenda for that  
19 meeting.  
20 Q Okay. And do you recall who spoke to that issue  
21 during the meeting? I mean, I can show it to you.  
22 All it shows on the agenda is Discussion and  
23 Consideration of 2017 Uniform Benefits - HHS  
24 Nondiscrimination Rule.  
25 A May I see that?

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1 MR. KNIGHT: So this would be --  
2 this would be Exhibit 6.  
3 (Exhibit No. 6 marked for  
4 identification)  
5 BY MR. KNIGHT:  
6 Q And this, Mr. Nispel, for the record, is the  
7 agenda for the December 13, 2016, GIB meeting; is  
8 that right?  
9 A That's correct, sir.  
10 Q Okay. And so I believe that on page 2 there's --  
11 number 6 is a -- is what I read before, the  
12 Discussion and Consideration of 2017 Uniform  
13 Benefits - HHS Nondiscrimination Rule?  
14 A That's correct, sir.  
15 Q There's a gavel there that shows it's an action  
16 item. Why was that an action item?  
17 A I don't know why it was an action item. My  
18 experience tells me that if there was a  
19 possibility that a board, in this case the GIB,  
20 was going to take action, that in order to inform  
21 the public of that possibility, our agenda would  
22 have a gavel next to that item. That's the best  
23 of my understanding as to why there's a gavel next  
24 to number 6.  
25 Q Who makes the decision about whether someone has a

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1 gavel assigned to it or not?  
2 A I don't believe there's any one person.  
3 Q Is it the Secretary ultimately who makes the  
4 decision, or does he sign off on that, or does  
5 someone else make the decision?  
6 A I believe it's -- I'm going to say collaborative  
7 effort. And part of the preparation, if you will,  
8 of the agenda -- as you see number 4, for example,  
9 does not have a gavel with the understanding --  
10 well, I'm understanding that the absence of a  
11 gavel means that there was no action to be  
12 expected, that either oral or written reports  
13 would be provided.  
14 Q So information but no board vote?  
15 A That's correct, sir. Whereas, you see 5, 6, and  
16 then obviously -- well, not obviously, but number  
17 8 Adjournment has a gavel.  
18 Q What happened as a part of that discussion?  
19 A Are you asking me what was the result of that  
20 action?  
21 Q I'm asking you did someone speak?  
22 A My recollection is that two Department of Justice  
23 attorneys attended that meeting and spoke.  
24 Q Who were they?  
25 A My recollection is they were Colin Roth and Kevin

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1 Potter, who attended the meeting.  
2 Q And what did they say?  
3 A My recollection is Mr. Roth did not -- Attorney  
4 Roth did not speak. I would have to defer to the  
5 minutes as to what Attorney Potter said. I'm  
6 not -- as I sit here, I cannot summarize what he  
7 said.  
8 Q Okay. And other than those two attorneys, did  
9 anyone else speak on this topic?  
10 A I believe one or more board members did speak  
11 during the discussion, but, again, the minutes  
12 would reflect that.  
13 Q Okay.  
14 A I would expect the minutes would reflect that.  
15 Q Right. And do you recall whether anyone else  
16 other than -- did you speak to the issue yourself?  
17 A I do not recall whether I was asked or invited to  
18 speak at the December 13th meeting. If I did,  
19 that would be reflected in the minutes.  
20 MR. KNIGHT: All right. I really  
21 have lost -- that was number 6. All right.  
22 So let's mark this as Nispel Exhibit 7.  
23 (Exhibit No. 7 marked for  
24 identification)  
25 BY MR. KNIGHT:

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1 Q Okay. So is Nispel Exhibit 7 the minutes from the  
2 December 13th meeting?  
3 A It is.  
4 Q And this is the GIB meeting?  
5 A That's correct.  
6 Q Now, it actually says draft at the top, but I will  
7 tell you that I printed this off the ETF website,  
8 so I presume this is the final. I don't know why  
9 it has draft there, but with the exception of  
10 that, this -- let me just take a look at where it  
11 talks about this. So this issue, the  
12 consideration of this issue, shows up page 8, it  
13 looks like. Page 8 and 9.  
14 A Yes, I'm there.  
15 Q You want to take a look at what's said about this,  
16 and then I'll ask you some questions about it.  
17 A To review what appears at the bottom of page 8,  
18 discussion and consideration?  
19 Q Right. That topic. What is written in the  
20 minutes about what happened there.  
21 A Yes, sir. Yes, sir. I've read that.  
22 Q Now, this says -- talks about Ms. Ellinger  
23 speaking to the issue and referring the Board to  
24 the memo that was -- I think we previously  
25 identified as --

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1 MR. DUPUIS: Two.  
2 Q -- Exhibit 2. Do you recall her speaking?  
3 A I have no current recollection of Ms. Ellinger  
4 speaking. As I read that first paragraph, that  
5 would be a normal part of my observation of how --  
6 what Ms. Ellinger does at GIB meetings.  
7 Q And then it references Mr. Potter speaking. It  
8 doesn't say anything about board members speaking.  
9 It does say ETF was directed to proceed with the  
10 implementation of the language previously adopted  
11 and then -- I'm reading the last paragraph there.  
12 A Yes, sir.  
13 Q So do you know who directed ETF to proceed with  
14 the implementation of the language previously  
15 adopted?  
16 A I do not.  
17 Q That would have been the Board?  
18 A That's my understanding. That's correct. That's  
19 my take away from that paragraph.  
20 Q Okay. And in the first paragraph of this section,  
21 it says that this item was added to the  
22 December 13 meeting at the request of a board  
23 member. Do you know who the board member was who  
24 requested this be added to the agenda?  
25 A I have an understanding as to --

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1 Q What's your understanding?  
2 A -- who the board member was, and I believe the  
3 board member who made that request was JP Wieske.  
4 I believe it's W-e-i-s-k-e. But the name  
5 appears -- I can look at it. W-e-i-s-k-e.  
6 Q And is it your belief that this is an accurate  
7 reflection of what happened during that meeting  
8 that's written here?  
9 A I believe what's written here is accurate as to  
10 what occurred at the meeting, yes.  
11 Q Was there anything else that occurred that's not  
12 reflected in the minutes as far as you recall?  
13 A Not as far as I recall, sir.  
14 Q Turning back to Exhibit 5 --  
15 A Yes, sir.  
16 Q So there are four bullet points in that first memo  
17 from you. And the second one says that At the  
18 December 13 Board meeting, a DOJ attorney  
19 recommended that the Board follow existing law.  
20 A That's the third bullet point, sir?  
21 Q Yes. Do you see where I'm reading?  
22 A I am -- I do rather, yes.  
23 Q Is that what happened on December 13th? DOJ  
24 recommended that the Board follow existing law?  
25 A Yes. That's what's reflected in the minutes,

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1 Exhibit 7.  
2 Q And it goes on to say that ETF is not aware of any  
3 changes to the existing law?  
4 A It says that, yes.  
5 Q And that -- what is that referring to? The  
6 Affordable Care Act, for example?  
7 A I believe when I wrote that memo, which is  
8 Exhibit 5, I was referring to the Affordable Care  
9 Act and the HHS regulation, yes.  
10 Q And then in the next bullet point, it says at the  
11 board meeting the DOJ attorney stated DOJ was  
12 willing to prepare an opinion regarding the  
13 fiduciary duties of board members? Is that also  
14 accurate? That's what happened at the  
15 December 13th board meeting?  
16 A That a DOJ attorney made that statement?  
17 Q Yes. Stating its willingness to provide a legal  
18 opinion about fiduciary duties of the board  
19 members?  
20 A That's accurate, sir.  
21 Q Was it unusual for DOJ to be making  
22 recommendations directly to GIB about coverage  
23 matters?  
24 A I'm going to say no -- going to say no. My  
25 hesitation was I'm not, as I sit here today,

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1 recalling another situation that I could --  
2 another topic that I could offer but --  
3 Q Have they ever -- do you recall them ever doing it  
4 before during the time that you've been at ETF?  
5 A Giving a presentation?  
6 Q Their taking a position in front of the Board with  
7 respect to coverage?  
8 A As I sit here today, I do not recall another  
9 instance.  
10 Q Were you at the December 30th meeting?  
11 A I was.  
12 Q And by meeting, I'm talking about the GIB meeting?  
13 A That's correct, sir.  
14 Q And the Board addressed the exclusion during that  
15 meeting; is that right?  
16 A That's right.  
17 Q And what happened with respect to it?  
18 A What was the result of that meeting, sir?  
19 Q Well, what happened? That is, who spoke to it?  
20 Do you recall?  
21 A There was an open session and a closed session.  
22 The answer to your question is that I recall  
23 numerous people speaking.  
24 Q Did the board members speak to the issue?  
25 A I recall that board members did speak to the

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1 issue.  
2 Q Do you recall who? Which of the board members?  
3 A My recollection is that the board members spoke  
4 during closed session.  
5 Q So you don't recall the Board speaking during the  
6 public session?  
7 A I recall the board chair speaking during the open  
8 session.  
9 Q Were you a part of the closed session discussion?  
10 A I was part of the closed session, yes.  
11 Q And why was that a closed session?  
12 A If we look at the agenda for that meeting, I'm  
13 guessing there's an action item listed there,  
14 meaning a gavel rather, meaning that there was the  
15 expectation that the GIB may take action at that  
16 meeting.  
17 Q And are those -- when the GIB takes action, are  
18 those discussions always in private?  
19 A I thought I looked at an agenda. I guess not,  
20 huh?  
21 Q I think one of those I gave you was an agenda.  
22 MR. KILPATRICK: Six.  
23 MR. ROTH: I don't think we have  
24 the agenda for the 30th in there.  
25 A I'm sorry, sir. Your question is when the GIB

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1 takes action is there always a gavel?  
2 Q No. My question is --  
3 MR. DUPUIS: No. Is there a closed  
4 session?  
5 THE WITNESS: One at a time,  
6 please.  
7 Q My question is are those sessions always closed?  
8 A My recollection, as I sit here today, is no.  
9 Q Okay. Do you know why that one was a closed  
10 session?  
11 MR. KILPATRICK: When you say that  
12 one, December 30th?  
13 Q I'm talking about December 30th, the discussion of  
14 the exclusion.  
15 A My memory will be refreshed if I look at the  
16 agenda because I believe that there would be a  
17 motion -- excuse me -- language citing a statute  
18 of the open meetings law that would -- the Board  
19 would be referencing to go into closed session.  
20 Whenever the Board goes into closed session, there  
21 is a reference to a section of the open meetings  
22 law to the best of my recollection.  
23 Q I think I have those so just a minute.  
24 (Exhibit No. 8 marked for  
25 identification)

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1 BY MR. KNIGHT:  
2 Q Okay. Is Exhibit 8 the agenda for the  
3 December 30th board meeting?  
4 A It is.  
5 Q Okay. So when you talk about the basis for this  
6 being in closed session, is that the asterisk at  
7 the bottom, the reference to Wisconsin statute  
8 19.85?  
9 A That is what I was referring to exactly.  
10 Q So you made the determination that this fell  
11 within the subsection? Was this your  
12 determination of whether that should be a closed  
13 meeting -- or that discussion should be a closed  
14 discussion?  
15 A I'm going to say, no, it was not my determination.  
16 Having said that, I have no current recollection  
17 whether or not I was involved in any discussions  
18 about whether -- prior to the agenda being  
19 published, whether there should be an action item  
20 and whether the action item should have that  
21 asterisk referencing a closed session.  
22 Q So would that have been a decision Mr. Conlin made  
23 himself?  
24 A I'm going to say -- I'm going to say no. He might  
25 have another answer when he's deposed, but to the

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1 best of my recollection, no.  
2 Q Well, if it wasn't -- I'm sorry. Maybe you told  
3 me. You don't have a recollection of being  
4 consulted; is that right?  
5 A I have no current recollection of being consulted.  
6 That's correct.  
7 Q If it weren't you, it sounds like it may have been  
8 you, but if it weren't you, who else would it be?  
9 A The reason I answered the way I did as you just  
10 indicated, I may have been involved given my  
11 position.  
12 Q But if it weren't you, who else would have made  
13 that decision?  
14 A Well, see, I use the word consultation. You're  
15 saying made that decision.  
16 Q Okay. Consultation. Who would have made a  
17 determination that this falls within this  
18 statutory basis?  
19 A Typically the types of -- the types of people --  
20 the people by position that are involved in such a  
21 decision are what I referenced, I think, in  
22 response to a question several minutes ago which  
23 are the following people, general counsel,  
24 secretary of the department. I'm not sure who  
25 else was on my list. Secretary of the department.

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1 Ms. Ellinger would be likely to be involved in  
2 those discussions. The board chair would perhaps  
3 be. That's the best I can do right now as to a  
4 typical decision referencing the appropriate  
5 section of the open meetings law.  
6 Q How long did this closed session go on on  
7 December 29th?  
8 MR. KILPATRICK: Just want to  
9 clarify. You mean December 30th?  
10 Q December 30th. I'm sorry. December 29th was the  
11 memo. December 30?  
12 A How long did the meeting consisting of both open  
13 and close go?  
14 Q No. I'm just asking how long did the closed  
15 session go when there was a vote on this  
16 exclusion?  
17 A The closed session portion of the December 30th  
18 meeting to the best of my recollection went over  
19 three hours, and I'm going to say approximately  
20 three hours and 30 minutes.  
21 Q And what happened during that meeting?  
22 MR. KILPATRICK: Objection with  
23 regard to disclosure of attorney/client  
24 privilege in a closed session meeting.  
25 Q Was all of the discussion in the closed session

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1 legal advice?  
2 MR. KILPATRICK: To the extent,  
3 yes, it says consultation with DOJ.  
4 MR. DUPUIS: He's asking the  
5 witness.  
6 Q I'm just asking Mr. Nispel whether it was only  
7 legal advice discussed during the course of the  
8 three and a half hour meeting?  
9 A That's why -- that's the reason that we -- that's  
10 the reason the Board went into closed session.  
11 That's my recollection as I sit here today, but it  
12 was a very long meeting.  
13 Q Again, though, my question is whether this was all  
14 a discussion of legal advice about the exclusion?  
15 A The Board went into closed session as it states  
16 for the purpose to confer with legal counsel.  
17 It's my response, sir, that the three and a half  
18 hours were conferring with legal counsel  
19 concerning the advice that's cited in that  
20 statute.  
21 Q There are, you know, presumably other reasons why  
22 GIB might decide to provide coverage other than  
23 concern about liability. They might think that  
24 it's wise from a policy determination to make  
25 that -- to provide that coverage. That's what I'm

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1 asking about.  
2 A I can't speculate to that, sir.  
3 Q Well, you were there; right?  
4 A You asked me are there -- conceivably there are  
5 other reasons.  
6 Q Well, was there a discussion of other reasons for  
7 why the coverage should be provided?  
8 A My recollection, sir, is -- were there other  
9 reasons? My recollection, sir, is there were not  
10 other reasons.  
11 Q What lawyers were providing legal advice during  
12 the course of this meeting?  
13 A The two lawyers -- the two people that are lawyers  
14 that -- there were two lawyers that spoke that I'm  
15 aware of that are lawyers. I don't know if any  
16 board members --  
17 Q I'm sorry. I didn't want to cut you off.  
18 A You did fine. I was going to give the names of  
19 those two lawyers.  
20 Q Who were they?  
21 A Kevin Potter and David Nispel.  
22 Q So is the Department of Justice litigation  
23 position in another case a legal reason for  
24 ETF/GIB to act?  
25 MR. KILPATRICK: Objection as to

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1 misconstruing the topic stated.  
2 Q I'm just asking in general.  
3 A I request that you say that -- or have the  
4 question read back again, sir.  
5 MR. KNIGHT: Sure. Do you mind  
6 reading it?  
7 (Last question read)  
8 A I don't know how to answer the question as  
9 phrased, sir. If the question -- tell me if I'm  
10 not -- if the question is meant to say -- is meant  
11 to ask is the Department of Justice position in  
12 other litigation a reason to -- a reason to go  
13 into closed session of the GIB meeting -- it's  
14 going to be very convoluted -- that is relevant to  
15 an issue that the Board is considering?  
16 I mean, I can't answer the question as you  
17 pose, sir. I struggle coming up with a variation  
18 but my variation is -- the GIB represents the  
19 Group Insurance Board in litigation. So that's  
20 part of what was underlying my rephrasing of your  
21 question, sir.  
22 (Exhibit No. 9 marked for  
23 identification)  
24 BY MR. KNIGHT:  
25 Q Just as a follow up, was the Department of Justice

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1 representing GIB?  
2 A When, sir?  
3 Q In making a decision about whether to reinstate  
4 the exclusion?  
5 A My answer is yes. Yes.  
6 Q So, effectively, both you and DOJ were  
7 representing the Group Insurance Board?  
8 A Here's how I answer that question, sir, is --  
9 excuse me. My left contact lens chose a poor  
10 time. Two-fold, maybe three-part answer.  
11 Some time ago in this deposition, I indicated  
12 that in my role as general counsel, I provide  
13 legal services to the Board. And that's number  
14 one.  
15 Number two is that the Department of Employee  
16 Trust Funds -- Department of Employee Trust Funds  
17 and Secretary Conlin are named defendants in the  
18 litigation that brings us here.  
19 And, third, in my personal opinion -- in my  
20 legal opinion, it was appropriate for ETF's  
21 general counsel to be present at the closed  
22 session.  
23 Q I'm sorry. For ETF's general counsel to be  
24 present at the closed session?  
25 A That's correct. That's how I can best answer the

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1 question as posed.  
2 Q Was the Department of Justice representing GIB in  
3 the Texas litigation?  
4 A I should be able to nail that answer, sir, but I  
5 don't know. Yeah. I don't know. I'd like to say  
6 I don't recall, but as I'm sitting here, I think I  
7 don't know is my answer.  
8 Q Is that -- I mean, as GIB's general counsel -- I  
9 guess as general counsel for ETF, isn't that  
10 something you would normally know?  
11 A It is something I would normally know -- should  
12 normally know. I'm not asking you to get out the  
13 violin, but as I sit here at 20 to four or quarter  
14 to four after doing other work like all of you,  
15 that's the honest answer that I can give today.  
16 Q All right. I think we've given you what we marked  
17 as --  
18 MR. KILPATRICK: You've given him  
19 nine but not me.  
20 Q Okay. So is Exhibit 9 the December 30th minutes  
21 of the -- let me make sure I've got the right one.  
22 Right. These are the December 30th, 2016, GIB  
23 minutes; is that right?  
24 A That's right, sir.  
25 Q Okay. And then on page 3 of the meat of the

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1 minutes -- actually, I should say page 2, it says  
2 that Mr. Grapentine moved to convene in closed  
3 session. Is he a GIB member?  
4 A He is.  
5 Q What is the -- I'm a little confused about  
6 strategy to be adopted with respect to litigation  
7 in which the Board is or is likely to become  
8 involved. Do you know what that's referencing?  
9 A The only thing I can say, sir, is that what the  
10 words themselves say. To confer with legal  
11 counsel concerning advice about strategy to be  
12 adopted with respect to litigation which is under  
13 way or is likely -- the Board is likely to become  
14 involved. Either or both of those possibilities.  
15 Q Okay. And then there's a vote on whether to enter  
16 into closed session. It looks like everyone votes  
17 yes for that other than one member being absent.  
18 And then it says that Mr. Neitzke departed. Is  
19 that accurate, what I'm reading about what  
20 happened at the meeting?  
21 A Sir, sorry. I don't recall if you read the first  
22 sentence that they went into closed session at  
23 3:13. That resonates with me that the meeting  
24 began at about 3:00. 12 or 13 minutes later  
25 closed session. The name is pronounced Neitzke.

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1 Q Sorry.  
2 A That's all right. That he departed at 5:00, I  
3 have no current recollection of that.  
4 Q It says other ETF or staff were invited into  
5 closed session. Who else was invited into the  
6 closed session?  
7 A I'm going to give you my understanding from  
8 attending board meetings as to what that's  
9 referencing. I did not write that. I know you  
10 didn't ask me to.  
11 Here's my understanding as to what that  
12 sentence is referring to. At about -- well, prior  
13 to -- either shortly before or shortly after the  
14 motion to go into closed session or maybe both  
15 times, the room that the Board was meeting in was  
16 standing room only. There were -- that's what the  
17 term means. There were just lots of people. Of  
18 that lots of people, there were many ETF staff,  
19 and the best I can do as to who that might have  
20 been, the ETF staff would be those persons listed  
21 on page 1.  
22 Q So all of the ETF staff members were invited into  
23 the closed session?  
24 A Well, I'm not there at the end yet, but I know I  
25 paused. But this is why I'm phrasing it my best

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1 recollection based on experience is that very  
2 often in closed sessions of boards, including the  
3 GIB, several ETF staff are present.  
4 In this instance, I'm certain that there  
5 were -- that there was one ETF staff -- excuse me.  
6 Two ETF staff people present, myself and -- I'm  
7 certain there was one staff person present, and  
8 I'm kind of certain there was a second based on  
9 how it works. I believe it was the male, the  
10 gentleman who -- he probably wouldn't like me to  
11 term his duties this way but who operates the  
12 sound system, the microphone system. He was --  
13 that's an ETF staff person, so it would have been  
14 that individual and myself. Not this group of  
15 people that you see listed on page 1.  
16 So that's the long answer to invited. I  
17 don't know where that term -- that phrase  
18 necessarily comes in. I do know -- or excuse me.  
19 Perhaps it was the usual as I just described, the  
20 typical. Many people were going to be but I'm  
21 certain, as I just said, it was myself and most  
22 likely the person who operates the microphone  
23 system.  
24 Q Got it. And then after the closed session -- so  
25 then there's a paragraph where it describes

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1 Mr. Farrell making an announcement about the  
2 closed session. Is this paragraph that's  
3 described there an accurate reflection of what  
4 happened?  
5 A One moment, please. Yes, sir. To the best of my  
6 recollection, that's an accurate paragraph.  
7 Q Do you know what the -- what he is saying about  
8 the Board receiving an update on this matter in  
9 January of 2017?  
10 A I do not, sir. The reason I answered the way I  
11 did to your earlier question is that typically the  
12 Board does meet in January, and that's why without  
13 any current recollection of the meeting date being  
14 the 18th, that's what I'm understanding that  
15 sentence to mean. As far as your current  
16 question, receive an update, I don't have any  
17 recollection of that -- as to what that would  
18 consist of or who would provide such an update.  
19 Q Okay. And then there's a reflection of a motion  
20 by Mr. Hurlburt to reinstate the exclusion  
21 contingent on certain things happening that's  
22 listed right below.  
23 A I see that.  
24 Q Is that accurate? Is that what happened when  
25 Mr. Hurlburt made that motion?

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1 A Is that what happened in open session that  
2 Mr. Hurlburt --  
3 Q Correct. Correct.  
4 A That's accurate in my opinion, yes.  
5 Q And then it lists that Mr. Wieske --  
6 A Wieske.  
7 Q Mr. Wieske seconded and then there was a vote. Is  
8 this an accurate reflection of the vote then?  
9 A One moment, please. Yes, sir. I believe you  
10 asked me is it accurate Mr. Wieske seconded the  
11 motion? I have a recollection of that and about  
12 the members voting. I believe that also is  
13 accurate with respect to aye, nay, and those  
14 absent.  
15 Q I guess, let me preface my question with I've seen  
16 reference to how if board members can be -- or  
17 someone can serve in place of a board member in  
18 certain instances. Am I remembering that  
19 correctly that this statute provides for that?  
20 A I believe you're remembering it correctly that  
21 there are instances and the statute would -- I  
22 defer to the statute for how that reads and what  
23 it says, but there are instances where someone  
24 can -- to use my terminology lay person right  
25 now -- sit in for that board member at a meeting.

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1 Q Were these actual board members, or were any of  
2 these people sitting in for people that are a  
3 board member?  
4 A I should do better when I say sit in. I believe  
5 the statute says designee.  
6 Q Designee, yeah.  
7 A I believe the only individual listed in the aye,  
8 nay, or absent grouping, if you will, who was not  
9 on that date a board member was Mr. Hurlburt. I  
10 believe he was a designee.  
11 Q Who is Mr. Hurlburt -- or who is Mr. Hurlburt, I  
12 should say?  
13 A I don't know his title. I should. He is -- who  
14 is he? He is currently a board member. And he is  
15 a Department of Administration employee. Those  
16 two statements I'm confident of.  
17 Q Does he also have a position on the governor's  
18 staff?  
19 A That I don't know, sir.  
20 Q Who designated him?  
21 A That was part of my hesitation earlier trying to  
22 recall. When I said I should know and the reason  
23 I said that is -- well, there are 11 board members  
24 but there's not often instances where -- well,  
25 there are instances where someone appears, let's

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1 see, as someone's designee, and usually I can  
2 recall that but my best answer is the person who  
3 was in that seat, which I cannot -- I do not know  
4 for certain, but my recollection is the person  
5 from the Department of Administration who occupied  
6 that seat who is not able to attend would have  
7 been the person to designate Mr. Hurlburt. That's  
8 my answer. I don't know if that's how it  
9 happened. That's my best recollection.  
10 Q Would Mr. Conlin know that, the Secretary?  
11 A I don't know if Mr. Conlin would know that for  
12 certain.  
13 Q Do you know where the four contingencies came  
14 from?  
15 MR. KILPATRICK: I'm going to  
16 object to the extent it's legal advice  
17 regarding the closed session designation.  
18 MR. KNIGHT: Well, I believe it's  
19 been waived. That's a Board decision. It's  
20 a public Board decision. The reasons for  
21 that decision, I think, are something that  
22 are no longer privileged.  
23 MR. ROTH: I think we're going to  
24 have to disagree on that. I mean, we can  
25 litigate that, but I think we've taken the

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1 position that you know what the contingencies  
2 are. They derive from advice given during a  
3 closed session. And the reasons that they  
4 are written the way they were are privileged.  
5 And if we need to bring that to the Court, I  
6 think that's something we might have to do.  
7 Q Can you answer the question?  
8 MR. KILPATRICK: I'm going to  
9 instruct him not to answer.  
10 Q You're going to follow your counsel's instruction?  
11 A I am, sir.  
12 Q All right. So what is the existing or anticipated  
13 litigation that justifies the closed session?  
14 MR. ROTH: This is going to be the  
15 issue that we litigate, I think.  
16 MR. DUPUIS: No. You have to have  
17 a reason that's public for the litigation.  
18 What litigation are you talking about?  
19 That's public information.  
20 MR. ROTH: Is that a question for  
21 him to answer, or is that a question for our  
22 motion to the Court?  
23 MR. DUPUIS: That's not a motion  
24 for the Court. You have to have a public  
25 justification for going into closed session.

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1 MR. ROTH: Well, there is one.  
2 Does it have to have a case number and a  
3 district and a --  
4 MR. DUPUIS: No. But you have to  
5 be able to identify the basis for it,  
6 otherwise you can cloak anything in this.  
7 MR. ROTH: I'm not saying we don't  
8 have to. I'm questioning whether this is the  
9 witness who gives that explanation or whether  
10 that's part of the issue that we're going to  
11 brief.  
12 MR. DUPUIS: Well, we can ask him  
13 that question if he knows.  
14 Q Do you know the answer to the question?  
15 A I do not, sir.  
16 (Exhibit No. 10 marked for  
17 identification)  
18 BY MR. KNIGHT:  
19 Q Okay. So, Mr. Nispel, again, I'll ask you to  
20 disregard the name at the top.  
21 A Yes, sir.  
22 Q And ask if this is an e-mail that was directed to  
23 you. It has your name on the to line?  
24 A Sure. Just a moment, sir, if I can please review  
25 that --

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1 Q Sure.  
2 A -- or the first page.  
3 MR. KNIGHT: I think I realize it's  
4 ETF1631, and we should write on the bottom of  
5 that.  
6 A Yes, sir. I read the first page of the e-mail.  
7 Q Okay. And then this is an e-mail it looks like  
8 sending a draft agenda, which is an attachment for  
9 the -- excuse me -- February 8th, 2017, board  
10 meeting; is that right?  
11 A That's right.  
12 Q And this reflects that the January meeting was  
13 canceled and rescheduled to February 8th. Do you  
14 know why that happened?  
15 A I don't, sir, but I have a definite recollection  
16 of looking at this e-mail and knowing that it was  
17 canceled or knowing and understanding that it was  
18 being canceled. I don't recall the specific  
19 reason or reasons.  
20 Q And looking at the agenda itself where there's a  
21 number 4, the Uniform Benefits and Services  
22 Related to Gender Reassignment or Sexual  
23 Transformation - HHS Nondiscrimination Rule,  
24 there's a gavel there.  
25 A Yes, sir.

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1 Q And that, I believe you said before, is an  
2 indication that there's supposed to be Board  
3 action, there's expected to be Board action?  
4 A I believe the way I answered it in two or three  
5 times I did it is the reason there's a gavel is  
6 that the Board is -- there's an expectation that  
7 the Board may go into closed session, and in order  
8 to inform the public of that possibility, there is  
9 a gavel.  
10 The reason I phrase my answer that way is I'm  
11 aware of instances -- I can't recite them now --  
12 where the expectation is that there's a  
13 possibility a board, including the GIB, may go  
14 into closed session when the board does not, in  
15 fact, go into closed session, but we've done our  
16 job, if you will, of informing the public and  
17 complying with the open meetings law.  
18 Q So I guess -- all right. It looks like on -- I  
19 just refer you to the last page of this agenda.  
20 There's an asterisk that says The Board may be  
21 required to meet in closed session.  
22 A Now where is that, sir?  
23 Q Where it says Appeal. Do you see the asterisk in  
24 the very small language there?  
25 MR. DUPUIS: Number 13.

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1 MR. KILPATRICK: I think you're on  
2 the wrong page.  
3 THE WITNESS: It always helps to be  
4 on the right page.  
5 Q Last page of the exhibit, which is action number  
6 13?  
7 A I now have it, sir, being on the correct page.  
8 Q Do you see -- did you see where I'm reading in  
9 terms of the asterisk?  
10 A I do, sir.  
11 Q So I guess what I'm referencing is that my  
12 understanding from what you said earlier is that  
13 the gavel indicates an action item, and it looks  
14 like the asterisk is indicating the possibility of  
15 a closed session. Was that what you told me  
16 before? Is that accurate?  
17 A What I told you before is accurate, and this is  
18 accurate. By this, I mean what appears at agenda  
19 item 13.  
20 Q Okay. Well, item number 4 on the first page of  
21 the agenda has no asterisk beside it.  
22 A It does not.  
23 Q So just looking at what's here on the paper, that  
24 would indicate that it's not going to be in closed  
25 session -- or that's not the expectation?

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1 A That's correct. The expectation was, as I recall,  
2 that agenda item 4 would not be discussed in  
3 closed session.  
4 Q But it's a possibility of Board action?  
5 A That's correct.  
6 Q I was apparently confused about that.  
7 (Exhibit No. 11 marked for  
8 identification)  
9 BY MR. KNIGHT:  
10 Q Okay. So Exhibit 11 is a memo from the Secretary  
11 dated January 30, 2017, to the board; is that  
12 right?  
13 A I'm sorry, sir. Can you say that again, please?  
14 Q Is Nispel Exhibit 11 a January 30, 2017, memo from  
15 the Secretary, Mr. Conlin, to the Board?  
16 A It is.  
17 Q And this reflects the determination that the four  
18 contingencies have been met? I'm sorry. Yeah.  
19 That the four contingencies have been met?  
20 A One moment, sir.  
21 Q Sure.  
22 A I believe if I'm understanding your question, sir,  
23 that this memo reflects that the four  
24 contingencies have been met.  
25 Q Okay. And is it your understanding that the

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1 Secretary or ETF made that determination?  
2 A That the four contingencies were met?  
3 Q Correct.  
4 A That is my understanding.  
5 Q And one of the contingencies that was listed as  
6 contingency number 2 -- I'm sorry -- was number 4  
7 that the Department of Justice had provided an  
8 opinion confirming that the action does not  
9 constitute breach of the Board's fiduciary duties;  
10 is that right?  
11 A Are you asking me was that contingency number 4?  
12 Q I am.  
13 A It is.  
14 Q Is it your understanding that had been met based  
15 on what is provided here -- stated here in this  
16 memo?  
17 A Based on what is stated in the memo, that is my  
18 understanding.  
19 Q And you had taken a position in an earlier memo  
20 that the exclusion -- or reinstating the exclusion  
21 could be constituted breach of the Board's  
22 fiduciary duties?  
23 A I believe you're referring to the position that I  
24 took and declared in what I believe is in both the  
25 June 22, 2016, and the August 11, 2016, memos. My

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1 position is set forth in one or both of those  
2 memos.  
3 Q Okay. Obviously the Department of Justice had a  
4 different position about the fiduciary positions  
5 of the Board; is that correct?  
6 A I would request that you tell me what you're  
7 meaning by different.  
8 Q They took the position as listed here that Board  
9 action would not breach the Board's fiduciary  
10 duties?  
11 MR. KILPATRICK: I'm objecting to  
12 the question to the extent it goes beyond  
13 what's stated on the January 30th memo on the  
14 basis of attorney/client privilege and  
15 attorney work product getting to the bases of  
16 the opinion.  
17 A My understanding, sir, is that the Department of  
18 Justice said to the Group Insurance Board that the  
19 action taken by the Board did not constitute a  
20 breach of the Board's fiduciary duties.  
21 Q And did you agree with the Department of Justice  
22 reasoning behind that conclusion?  
23 MR. KILPATRICK: I'm going to  
24 object to the extent it seeks attorney work  
25 product now.

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1 MR. KNIGHT: And I'm going to state  
2 clearly that we believe that to the extent  
3 there was an attorney/client privilege, it's  
4 been waived.  
5 MR. ROTH: I think the position is  
6 you're asking for his opinion right now as an  
7 attorney, and I think that's still work  
8 product what Mr. Nispel thinks here today,  
9 his legal opinion on a memo.  
10 MR. KNIGHT: He's taken a position  
11 on the fiduciary obligations of the Board  
12 already. I'm simply asking about that  
13 opinion.  
14 Q Can you answer my question, Mr. Nispel?  
15 A I can answer your question, sir, in the way I did  
16 several moments ago in that my position as general  
17 counsel for ETF on the issue of fiduciary duty is  
18 set forth in one or both of the memos that I  
19 referenced June 22 and/or August 11th.  
20 (Exhibit No. 12 marked for  
21 identification)  
22 BY MR. KNIGHT:  
23 Q I'd like to ask a question about the four  
24 contingencies that we talked about before. Do you  
25 recall the Board action that was based on

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1 contingencies of this sort listed in the minutes  
2 that we talked about before and the memo that you  
3 just reviewed?  
4 A I'm sorry, sir. I may not be comprehending what  
5 would otherwise be a straightforward question. I  
6 heard you ask me do I recall the four  
7 contingencies that are set forth in a memo?  
8 Q No. I'm asking whether you recall the Board ever  
9 making a decision like that where they said we're  
10 going to decide something upon the occurrence of  
11 certain conditions?  
12 A Thank you. You say ever and we're talking about  
13 the GIB. As I sit here today, sir, I do not  
14 recall that.  
15 Q Okay.  
16 A I do not recall that occurring.  
17 Q Okay. I've marked what is Nispel Exhibit 12. And  
18 I will ask that you identify that there's a  
19 five-page letter from you to the EEOC with respect  
20 to a charge of Ms. Alina Boyden. Is this your  
21 letter to the EEOC?  
22 A It is, in fact, the position statement in this  
23 case, a letter with my signature with that date,  
24 yes.  
25 Q Okay. And it lists a number of attachments in it.

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1 And I will tell you that what I have submitted for  
2 the record is not the entire document, which is  
3 quite long. I don't know. If you'd like, we  
4 could go through your copy and identify exactly  
5 what is -- I'm not sure that it's going to matter  
6 particularly, but if you'd like, we can go through  
7 and put that into the record.  
8 A If I can have a two-part answer to that. If we  
9 can get started -- as we get started as you refer  
10 me to some part, as I anticipate you're going to  
11 do, to Exhibit 4, I may ask that you -- I may take  
12 you up on your offer, but I don't know that it's  
13 needed.  
14 Q If you need the whole thing, my copy has the whole  
15 thing.  
16 A Sir, I don't know if I'm going to need that. I  
17 haven't been asked a question yet.  
18 Q I'm just trying to be fully clear about what it is  
19 I'm giving you. So this, as you said, was the  
20 position statement with respect to Alina Boyden.  
21 Before getting into this, I guess I'm just  
22 wondering, did you also complete a position  
23 statement for Ms. Andrews, Shannon Andrews?  
24 A I did not.  
25 Q Do you know who did, or do you know if one was

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1 prepared for her?  
2 A I'm not certain I can, as I sit here today, answer  
3 the second question, but I have the recollection  
4 of the first question and I believe -- I forget  
5 how it was phrased, but I believe the answer is  
6 the Department of Justice.  
7 Q Do you know why they would have prepared that one  
8 instead of you or your office?  
9 A I have a recollection as to how that difference,  
10 if you will, transpired. As I'm sitting here  
11 today, this is my recollection. The complaint  
12 filed by Ms. Boyden, I believe -- I was going to  
13 say landed -- was served at the offices of ETF and  
14 with what I'm going to term, sir, a short response  
15 time for whatever the deadline was.  
16 I recall that being a factor in my drafting  
17 and filing a position statement in the Boyden case  
18 and then at some future date filing -- or sending  
19 with the Department of Justice a request for  
20 representation, which is what ETF does in -- I'm  
21 going to say situations like this where -- well,  
22 where ETF needs -- wants to request representation  
23 by the Department of Justice.  
24 Now, another part of your question is why not  
25 in the Ms. Andrews' case is my recollection is the

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1 complaint filed by Ms. Andrews was served directly  
2 on the Department of Justice, and this is where my  
3 recollection falls off is that I don't know  
4 anything about time line and all of the rest, but  
5 I -- as I sit here today, I do not recall ETF  
6 being served with the Andrews' complaint, nor do I  
7 recall asking on behalf of ETF for DOJ  
8 representation.  
9 Q Got it. Okay. So in reviewing the position  
10 statement, my understanding is that you concluded  
11 that Ms. Boyden did not face any discrimination?  
12 A I would need to have a request that if you can  
13 point me to that part of the five-page letter.  
14 Q Sure. On page 3 there's Allegation No. 1, so at  
15 the top of the page 3, there appears to be a  
16 response to Allegation No. 1, and that allegation  
17 was that she has been denied health care benefits  
18 based on her sex, female gender identity, and then  
19 on page 3 you state that as a result of our  
20 investigation, ETF and GIB found no evidence that  
21 she was denied health care benefits pursuant to  
22 the group health insurance plan administered by  
23 ETF and GIB.  
24 A I see that.  
25 Q Do you see what I'm getting at?

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1 A I do, sir.  
2 Q So that was your conclusion that she faced no  
3 discrimination based on the facts that you  
4 reviewed?  
5 A Sir, that's not what that paragraph says. It says  
6 that ETF and GIB found no evidence that Ms. Boyden  
7 was denied health care benefits pursuant to -- and  
8 you can read the rest. That's what that  
9 sentence/paragraph is saying in my opinion, sir.  
10 Q Okay. Well, I guess what I was just drawing the  
11 conclusion from that if she hadn't been denied  
12 health care benefits, then she faced no  
13 discrimination. That's what I was understanding.  
14 That's why this would be responsive to her  
15 allegation that she faced discrimination.  
16 MR. KILPATRICK: I'm going to  
17 object as to lack of foundation. This is a  
18 discussion about discrimination, but there's  
19 no basis for the discussion about the laws  
20 upon which the discrimination charge is  
21 based.  
22 A Sir, the Allegation No. 1 says in pertinent part  
23 to me I have been denied health care benefits  
24 based on my sex, female (gender identity). That  
25 paragraph that you and I were talking about says

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1 that I wrote says that ETF and GIB found no  
2 evidence that she was denied health care benefits.  
3 That's what I'm saying.  
4 Q Okay.  
5 A I didn't write the part that's underscored on  
6 page 2. My recollection is that is Allegation  
7 No. 1 that also appears on page 1, Roman numeral  
8 I, I believe. Yes.  
9 Q What facts did you review to reach this  
10 conclusion?  
11 A What evidence I reviewed I do not recall at this  
12 time as I sit here today. I'm not sure if  
13 there's -- excuse me, sir.  
14 MR. KILPATRICK: I'm going to  
15 object anyway on the basis of attorney work  
16 product.  
17 A What evidence did I review is I'm recalling  
18 putting this document together, this position  
19 statement, and as I'm skimming over the pages and  
20 recalling the attachments, my answer to your  
21 question, sir, is that's the information -- I  
22 would have reviewed that information. What else,  
23 I don't know.  
24 The only other thing I can add, sir, is  
25 unless it's attached here, is -- I'm not -- there

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1 was a complaint filed that ETF had regarding  
2 Ms. Boyden, as I recall, and I believe I would  
3 have looked at that as well. That's the best I  
4 can do.  
5 Q Okay. Well, did you ever speak to Ms. Boyden  
6 directly?  
7 A I did not.  
8 Q And I just refer you to Attachment 2.  
9 A Yes, sir.  
10 Q And this on -- this Attachment 2 appears to be an  
11 affidavit from Arlene Larson?  
12 A It does.  
13 Q Who is Arlene Larson?  
14 A Arlene Larson is an employee in OSHP, which is the  
15 Office of Strategic Health Planning, at ETF.  
16 Q Okay. And this in paragraph 10 indicates that  
17 Attorney Felsmann contacted Ms. Boyden about  
18 signing a medical or authorization to disclose  
19 medical information.  
20 A It does.  
21 Q Did you speak to Ms. Felsmann about her  
22 conversation with Ms. Boyden?  
23 A I have no current recollection of that. However,  
24 I believe it would have been my practice and  
25 Attorney Felsmann's practice that there was such a

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1 conversation.  
2 Q And I also believe you'll find Attachment 8 --  
3 A Yes, sir.  
4 Q So this is Attachment 8 to the physician  
5 statement?  
6 A Oh, excuse me. I only have six.  
7 MR. ROTH: It's probably the second  
8 to last page of what he gave you, I think.  
9 A Yes. Now I have it, sir.  
10 Q So this appears to be an affidavit from  
11 Mr. Bogardus?  
12 A It does.  
13 Q And this -- this indicates that Mr. Bogardus  
14 reviewed the Navitus records. Is Navitus the  
15 pharmacy provider or the pharmacy -- or who is  
16 Navitus?  
17 A Just for any benefit it might have in the future,  
18 that's pronounced Navitus.  
19 Q Navitus.  
20 A Right. And the terminology I would use, sir, is  
21 Navitus is the pharmacy benefit manager.  
22 Q Got it.  
23 A The term used in paragraph three is ETF's  
24 self-insured pharmacy benefits provider. I would  
25 use the term I mentioned, but that's what appears

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1 in number three by Jeff Bogardus.  
2 Q Did you speak directly to Mr. Bogardus about his  
3 review of Ms. Boyden's records?  
4 MR. KILPATRICK: I'm going to  
5 object on attorney/client privilege and  
6 attorney work product. You're getting into  
7 behind the answer itself and that speaks for  
8 itself. The answer being the response to the  
9 EEOC.  
10 Q Can you answer my question?  
11 MR. KILPATRICK: Directing the  
12 deponent not to answer based on attorney work  
13 product and attorney/client privilege.  
14 MR. KNIGHT: I actually think if we  
15 could take a break, I think we are probably  
16 on our way to finishing up here.  
17 (Recess taken)  
18 MR. KNIGHT: Let's go back on the  
19 record. Could we mark that as Nispel  
20 Exhibit 13.  
21 (Exhibit No. 13 marked for  
22 identification)  
23 BY MR. KNIGHT:  
24 Q Okay. So is Nispel Exhibit 13 the minutes of the  
25 July 12th board meeting, GIB meeting?

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1 A It is.  
2 Q On page 3, there are minutes with respect to the  
3 decision to get rid of the exclusion. I just ask  
4 if you would take a look at those minutes and let  
5 me know if those minutes are accurate in terms of  
6 your memory.  
7 A Your request extends onto page 4, as well, or not?  
8 Q Right. It looks like that discussion goes into  
9 page 3, 4. Yeah. That looks like that's the end.  
10 A Thank you. I will review that now then. Okay,  
11 sir. I've completed my review.  
12 Q So my question was whether this accurately  
13 reflects what happened at that meeting?  
14 A I believe it does accurately reflect that, sir.  
15 Q And in the discussion of -- I'm sorry. I'm  
16 actually looking at page 4. So it says that ETF's  
17 Office of Legal Services -- so that would be your  
18 office?  
19 A That's correct.  
20 Q Analyzed the new law. This was the Affordable  
21 Care Act; is that right?  
22 A Yes. And I don't know if you're later going to  
23 refer to it, but the words you didn't read are and  
24 Segal Consulting.  
25 Q Right. How did the Segal Consulting analysis

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1 figure in? I think there was some cost data in  
2 your previous memo; is that your memory? Or is  
3 there any other way that Segal Consulting figured  
4 into this decision?  
5 A I see now. Sir, I believe the paragraph that you  
6 and I are now talking about is referencing, as I  
7 think you just did, that paragraph in the  
8 August 11th memo in reference to the Maryland  
9 study, I believe, by Segal Consulting.  
10 Q I'm guessing it's not the August 11th since this  
11 is the July meeting; right?  
12 A Oh, excuse me.  
13 Q So would it have been your June memo?  
14 A Yeah. You're right. It could not have been.  
15 That's where my firm -- what I thought was a firm  
16 recollection was coming from. It would most  
17 likely have been in the June 22 memo. We could  
18 look at that. But there was, as we've already  
19 talked, a discussion in the June 22 memo regarding  
20 ETF's Office of Legal Services, and now that you  
21 refresh my memory, I believe also a reference to  
22 that Maryland study by Segal.  
23 Q And the determination that ETF is a covered entity  
24 relies on the fact that there is federal money  
25 that is provided with respect to health insurance

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1 coverage; is that right?  
2 A Well, as you see on page 4 of the first bullet  
3 point under These provisions are required  
4 references what you just said, sir, about federal  
5 financial assistance.  
6 I'm not sure if what I'm about to say is in  
7 the June 22 memo or the August 11 memo, but I  
8 believe there's a reference to another reason why  
9 ETF in the opinion of OLS would be a covered  
10 entity.  
11 Q Let's talk about this one. If necessary, we can  
12 go back to that previous memo.  
13 A I don't know. That's my best recollection.  
14 Q Well, I'm talking about the fact that there's -- I  
15 mean, the Medicare Part D subsidies, that's the  
16 federal money you're talking about?  
17 A That's what the first bullet point in this meeting  
18 minutes is definitely referring to. That's  
19 correct. And it is Medicare Part D.  
20 Q And that federal money is provided for purposes of  
21 health insurance coverage administered by ETF? Is  
22 that the way that works?  
23 A I am not the most appropriate person to answer  
24 that. My hesitation was to think who might be. I  
25 believe Lisa Ellinger as the director of OSHP,

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1 Office of Strategic Health Policy. She may not  
2 agree with me, but in my opinion, she's in a  
3 better position. I just don't know. I know  
4 enough to have made the statement with confidence  
5 in that memo.  
6 Q Right. Well, I guess what I'm trying to  
7 understand is when the federal money or these  
8 federal subsidies go into the health insurance  
9 coverage or are accepted as a part of the  
10 administration of the coverage, these must be  
11 health insurance plans that are administered by  
12 GIB; is that right?  
13 A I'm sure -- my understanding of this is that GIB  
14 is involved. I can't answer regarding the first  
15 part about health plans, and I just don't know  
16 that connection or recall that, sir.  
17 Q But you knew at the time for purposes of reaching  
18 the conclusion you came to here?  
19 A In order to reach that conclusion that I did and  
20 have done my job right, I would have consulted or  
21 talked to somebody who knew those answers or I  
22 would not have made that -- hopefully would not  
23 have made that conclusion.  
24 Q Right. And you think that would have been Lisa  
25 Ellinger?

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1 A No. That's not what I said.  
2 Q Then what would you say? Who would you have  
3 consulted?  
4 A Well, that's a different question. It very may  
5 well have been Lisa Ellinger. I don't know.  
6 Q Anyone else you think it would have been? Who  
7 were the possible people you would have consulted  
8 with?  
9 A I think with more confidence than my previous  
10 answer, sir, is that it was someone in OSHP, the  
11 Office of Strategic Health Policy. Beyond that,  
12 without listing everybody in that exhibit there  
13 that has -- I guess it doesn't have names but in  
14 the organization chart, I don't know.  
15 Q Okay. Is it your -- I mean, I've seen this  
16 reference in various places, but is it your  
17 understanding that all of the plans offered by ETF  
18 at least in 2016 were self-insured plans?  
19 A I believe the appropriate terminology would have  
20 been they're considered fully insured plans.  
21 Ms. Ellinger, I believe, would be able to answer  
22 that, and I'm confident she's in a better position  
23 than I am to answer that.  
24 Q Okay. I just -- there's a reference here to  
25 covered entity due to offering self-insured plans?

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1 A Where's that, sir? The paragraph below the  
2 bullets.  
3 Q The one we were just reading. The one ETF's  
4 Office of Legal Counsel and Legal Consulting.  
5 A I believe two things. That Ms. Ellinger will be  
6 able to clarify that. The second thing is I  
7 believe that's referring to one of the plans,  
8 maybe two of the plans. Not the plans that offer  
9 what we have been talking about, the uniform  
10 benefits. That's my best response as I sit here  
11 right now.  
12 Q Can you give me just a sketch of Conlin's --  
13 Secretary Conlin's responsibilities, at least your  
14 understanding of them, with respect to GIB?  
15 A The responses to the discovery requests would have  
16 that kind of information. I could -- as I sit  
17 here now, recite what I think. What you want, I  
18 would expect, is what, in fact, are those duties  
19 with respect to the GIB. And if that, in fact, is  
20 your question, sir, Mr. Conlin could answer that  
21 without hesitation I would think.  
22 Q Right. I'm sure he could, and I'm sure we'll ask  
23 it.  
24 A I would expect you would.  
25 Q I'm just asking you if you can give me an

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1 overview.  
 2 A I am not able to give you an overview of any  
 3 significance or relevance, sir.  
 4 Q Okay. But you believe that his responsibilities  
 5 are set forth in the discovery answers that have  
 6 already been provided?  
 7 A I -- the reason I answered that way, which wasn't  
 8 part of my earlier answer, sir, is you elicited  
 9 during one of your first series of questions about  
 10 was I -- what extent was I involved in these. I  
 11 was. That's where that thought that I just  
 12 expressed comes from.  
 13 If my recollection is wrong, I would be sorry  
 14 about that, but that's it. I mean, he attends the  
 15 meetings.  
 16 Q I have seen some indications that he speaks for  
 17 the Board or he can speak for the Board. Is that  
 18 your understanding?  
 19 A I'd have to see a document that would say either  
 20 of those two things.  
 21 MR. KNIGHT: Okay. I think we can  
 22 finish up.  
 23 MR. KILPATRICK: Okay.  
 24 MR. KNIGHT: I don't have any  
 25 further questions unless you have any

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1 followup based on what you have to say.  
 2 MR. KILPATRICK: I just have a very  
 3 limited number of questions for the deponent.  
 4 BY MR. KILPATRICK:  
 5 Q Attorney Nispel, I'm going to ask you just very  
 6 few questions, and the same rules apply. If you  
 7 don't understand the question, let me know.  
 8 A Yes, sir.  
 9 Q And answer your questions with words and not head  
 10 nods.  
 11 Earlier in this deposition you had said, I  
 12 believe, quote, "GIB represents Group Insurance  
 13 Board in litigation." Do you want to correct  
 14 that?  
 15 A I heard you say now GIB?  
 16 Q Yes.  
 17 A And you have it in quotes?  
 18 Q Yes.  
 19 A What I meant to say is Department of Justice  
 20 represents -- well -- Department of Justice  
 21 represents GIB in litigation. That, in fact, is  
 22 what I should have said.  
 23 Q So another question. When GIB is named as a  
 24 defendant, for example, in a federal lawsuit, who  
 25 represents GIB?

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1 A DOJ.  
 2 Q When ETF is named as a defendant in a federal  
 3 lawsuit, who represents ETF?  
 4 A DOJ.  
 5 Q Who represents ETF in this lawsuit?  
 6 A DOJ.  
 7 Q Who represents GIB in this lawsuit?  
 8 A DOJ.  
 9 MR. KILPATRICK: No further  
 10 questions.  
 11 MR. KNIGHT: Okay. Thank you for  
 12 your time.  
 13 (Adjourning at 5:14 p.m.)  
 14  
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1 STATE OF WISCONSIN )  
 2 COUNTY OF DANE ) ss.  
 3  
 4 I, Tammy L. Uhl, Certified Realtime Reporter  
 5 and Notary Public in and for the State of Wisconsin,  
 6 do hereby certify that the foregoing deposition of  
 7 DAVID H. NISPEL was taken before me on April 3, 2018,  
 8 and reduced to writing by me, a professional court  
 9 reporter and disinterested person, approved by all  
 10 parties in interest and thereafter converted to  
 11 typewriting using computer-aided transcription.  
 12 I further certify that I am not related to nor  
 13 an employee of counsel or any of the parties to the  
 14 action, nor am I in any way financially interested in  
 15 the outcome of this case.  
 16 IN WITNESS WHEREOF, I have hereunto set my hand  
 17 and affixed my notarial seal of office at Madison,  
 18 Wisconsin, this 9th day of April 2018.  
 19  
 20  
 21  
 22  
 23  
 24  
 25

Notary Public, State of Wisconsin  
 My Commission Expires 8/18/2020

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