

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF IDAHO

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4 ADREE EDMO (a/k/a MASON EDMO),) CASE NO. 1:17-cv-00151-BLW
))
5 Plaintiff,) **TELEPHONIC STATUS CONFERENCE**
))
6 vs.))
))
7 IDAHO DEPARTMENT OF))
CORRECTION; HENRY ATENCIO, in))
8 his official capacity; JEFF))
ZMUDA, in his official))
9 capacity; HOWARD KEITH YORDY,))
in his official and individual))
10 capacities; CORIZON, INC.;))
SCOTT ELIASON; MURRAY YOUNG;))
11 RICHARD CRAIG; RONA SIEGERT;))
CATHERINE WHINNERY; and DOES))
12 1-15,))
))
13 Defendants.))
_____))

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16 **TRANSCRIPT OF PROCEEDINGS**
BEFORE THE HONORABLE B. LYNN WINMILL
17 **THURSDAY, MARCH 21, 2019, 10:00 A.M.**
BOISE, IDAHO

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21 Proceedings recorded by mechanical stenography, transcript
22 produced by computer.

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P R O C E E D I N G S

March 21, 2019

(Telephonic status conference.)

THE COURT: Counsel, this is Judge Winmill. A couple people joined just at the last moment there.

From the plaintiff, I have Ms. Rifkin, Ms. Ferguson, and Ms. Whelan. Is there anyone else?

If someone tried to speak, it didn't come through.

All right. We'll proceed just assuming those three are the only three for the plaintiffs. Then we have Mr. Eaton for Corizon, Mr. Hall. And who was the other person with you, Mr. Hall?

MR. HALL: Melissa Crecelius, Your Honor.

THE COURT: All right. Counsel, obviously, the major thing that has affected this is the Ninth Circuit's decision -- I think it was just yesterday -- to stay the enforcement of the court's order. And I even thought about canceling this conference call because I wasn't sure what could be accomplished. But the more I thought about it, the more I'm convinced that we absolutely need to talk about where we are in the case.

My concern is -- well, twofold. We're on the record here, so I want this to be completely transparent. I would have to say that I'm gravely concerned by the defendants' failure to move forward in the manner that I anticipated towards

1 accomplishing this surgery.

2 I won't get into detail except to say that I have reviewed
3 both parties' submissions for this conference call, which are I
4 think part of the record. And my concern is that there is -- I
5 question whether there has been anything close to an adequate
6 effort to proceed in the way that the court ordered.

7 The suggestion that the -- that they cannot provide the
8 necessary references to the doctor who has been lined up to
9 perform the surgery, clearly, that can be resolved by simply
10 using the healthcare providers that testified on behalf of the
11 plaintiff during the hearing. And it's just a number of
12 concerns I have in that regard.

13 And I'm now concerned that, with the stay in effect, that
14 that may well -- whatever effort was being undertaken will now
15 stop until after a decision is issued by the Ninth Circuit,
16 which presumably will be in late May or early June; and then the
17 process is started over at that point, and then we will be
18 looking at a minimum of four to six months after that before the
19 surgery can be performed if I'm confirmed -- if I'm affirmed,
20 rather, by the Ninth Circuit. I don't think that's -- I'll just
21 say that's troubling.

22 I want to, I guess, first inquire of the defendants. Is it
23 your intent to essentially stop all efforts complying with the
24 court's order while a stay is in effect, and not undertake any
25 of the presurgical steps that would have been required to ensure

1 that a surgery is performed promptly after the Ninth Circuit's
2 decision if I'm affirmed?

3 Mr. Eaton or Mr. Hall.

4 MR. HALL: I can go first, Your Honor.

5 THE COURT: Is that Mr. Hall? You need to identify --
6 is that Mr. Hall?

7 MR. HALL: It is. It is, Your Honor.

8 I know my clients are just now, you know, looking at the
9 stay. And, you know, the entire court's order is stayed, and so
10 there is no obligation to take any efforts whatsoever to comply
11 with the court's order.

12 I think -- I don't have a formal position from the state on
13 that. I think that they would like to confer with Corizon on
14 some of these matters. But I think at this point, my response
15 is that, because it's stayed, no further efforts can or should
16 be taken.

17 There's -- notwithstanding that, I think there are some
18 issues to address regarding the court's order and how to prepare
19 for this. The defendants disagree with the court's and
20 plaintiff's characterization that no efforts have been taken, or
21 adequate effort. The defendant did identify the surgeon in
22 Idaho. That surgeon has agreed to a surgical consult.

23 Judge, we are -- we are at the mercy of the surgeon. He is
24 not a contractor of the state; he is an independent surgeon. We
25 are blessed in the state of Idaho to have someone that will

1 perform these surgeries, which makes it a lot more cost
2 effective, more secure procedure. And logistically, it makes a
3 lot more sense for the taxpayers of the state of Idaho and for
4 Ms. Edmo if this surgery goes forward.

5 We can't dictate to this surgeon how he is going to perform
6 this surgery or when if he is going to perform it. The WPATH is
7 very clear that, ultimately, the ethical and legal
8 responsibility to provide the surgery rests with him, and he has
9 got to feel very comfortable with it.

10 The referral letters, Your Honor, I think the fact that, in
11 a way, the court's order has put the cart before the horse in
12 that the court's order requires a surgery to occur even though
13 no surgeon has said that they will perform it, that they have
14 received the referrals, that they agree that Ms. Edmo meets the
15 criteria, and that Ms. Edmo also is a good candidate for surgery
16 in that she will follow all pre- and post-surgical requirements,
17 which is very important.

18 And as the court knows, the defendants' medical providers
19 as well as her mental health providers all have grave concerns
20 about that. So, ethically, professionally, morally, they cannot
21 provide those referrals, which leaves it really to an
22 independent source.

23 And as of now, the record before the court, this court is
24 devoid of that. The plaintiff's experts' reports were not done
25 in an evaluative method whereby there was a patient-provider

1 relationship. The WPATH is very clear that those evaluators
2 would share in the legal and ethical responsibility.

3 And, Judge, another issue that's really come up with this
4 is: How do we get these evaluations done in a way that they are
5 done -- in a way that provides adequate information to the
6 surgeon? Plaintiffs propose restricting the flow of information
7 to the surgeon from evaluators that have an opinion.

8 And the problem is it's not up to the evaluators; it's up
9 to the surgeon, and he needs to have the full story, Judge. I
10 worry that the court and the parties and my client will take
11 part in a process that does not provide the full story to this
12 surgeon.

13 And if he's -- if there are concerns out there that
14 Ms. Edmo is not -- does not meet the criteria for surgery, does
15 not -- does not have the compliance history to show that she
16 will make a good candidate for surgery, I think that surgeon
17 needs to know.

18 I think we all have an ethical and moral obligation to make
19 sure that that surgeon isn't set up for failure, that he has the
20 whole story. Because, ultimately, it's that surgeon's decision.
21 The WPATH is very clear on that.

22 Judge, we're really concerned about this. We do have a
23 date for initial surgical evaluation. And my client, the IDOC,
24 have already scheduled Ms. Edmo for transport. There is some
25 things that Dr. Stiller needs to look at, including an

1 examination of Ms. Edmo, before he can even determine if she is
2 suitable. And, again, we're beholden to his schedule.

3 What we don't want to do is -- and I'm very alarmed with
4 the plan of plaintiff's counsel to provide referrals directly to
5 Dr. Stiller. I think we need to be very cautious before he even
6 goes and does that, because we don't want to sabotage this
7 process or make the surgeon feel uncomfortable with getting a
8 bunch of information, and they just decide to back out because
9 they don't feel comfortable with it.

10 The alternative the plaintiffs have proposed is to allow
11 them to provide these evaluation referrals, which, again, I have
12 expressed concern with that. But I think that what the parties
13 need to do before any action is taken further is we need to
14 discuss this.

15 In the event that the court's order is affirmed and we're
16 back on the clock of providing a surgery, the state and Corizon
17 are dedicated to complying with the court's orders. But there
18 are some very real issues that we need to address here. This
19 isn't just a simple surgery, Your Honor.

20 THE COURT: Mr. Eaton, do you want to add anything?

21 MR. EATON: Well, we adopt the position by Mr. Hall.
22 The risk is repeating some of the -- you know, defendants
23 identified a qualified surgeon who voluntarily has agreed to
24 work with the parties and work toward a surgery.

25 And we also object to the characterization the defendants

1 have not been making reasonable attempts to work towards this
2 surgery. There's been -- there's been -- there was an initial
3 consult or is an initial consult in April, and we got a date
4 reserved prior to the fifth month in late May for the surgery.

5 Now, that doesn't mean that there aren't prerequisites the
6 surgeon has for the surgery. And this is a very complicated
7 surgery, as Mr. Hall indicated. This is not something where you
8 just set up the initial consult, do a little blood work, and
9 then proceed with surgery. I do believe that's outlined in the
10 declaration of Aaron Hofer that was provided to the court.

11 It's a process, and the defendants have been working
12 through that process and have been updating the court and the
13 plaintiffs as we go forward and identify some of the
14 complications with the surgery.

15 I'm concerned as well about what representations
16 plaintiff's counsel is making to the surgeon. They are
17 (inaudible) to the client. And our own meet-and-confer already
18 indicated that they want to hand-select information to provide
19 to the surgeon by way of the referral letter.

20 And especially in light of today, we would ask the court
21 to, you know, order plaintiffs to cease any attempts to send
22 referral letters to Dr. Stiller at this point, including trying
23 to get consults from offsite providers.

24 If the scheduling of the GCS, the gender confirmation
25 surgery, is to continue after the appeal, we believe there

1 should be some direction from the court as to how to fairly
2 proceed at that time.

3 I want to avoid plaintiff's counsel not providing a
4 complete picture to the surgeon, who has his own obligation to
5 make an independent determination as to the surgery and whether
6 it's indicated.

7 As Mr. Hall indicated, Corizon does not provide the
8 surgery. And the surgeon is an independent party, not a party
9 to this lawsuit, and we're working with him.

10 I don't know if I'm still on the phone. I have another
11 call coming in on my cellphone, so...

12 THE COURT: No. You're still on. We were able to
13 hear that.

14 MR. EATON: Okay. And I would just indicate I would
15 also need to speak with IDOC's counsel and my client about their
16 positions going forward, but I don't believe there is an
17 obligation to continue the process, working towards the surgery
18 at this point given the stay by the Ninth Circuit.

19 THE COURT: Right. Well, the situation is as I
20 suspected, which is the defendants do not intend to proceed
21 further until the stay has lifted or the decision of my decision
22 is affirmed. So that's really all I wanted to establish, but I
23 heard a great deal more, which was helpful.

24 Ms. Rifkin, what -- what is the way forward here? My
25 perception is that there is a desperate need for me to be deeply

1 involved in this presurgical process to ensure that we're -- we,
2 in fact, are in good faith proceeding, that we are doing what
3 the identified doctor has required, and assess and ensure that
4 that, in fact, is done.

5 But it seems to me that -- you know, I thought this would
6 have been done months ago; probably within 30 days after I
7 issued my decision, that these kind of issues would have been
8 flushed out. Here we are 90 days out and -- I think more than
9 90 days out, and it's -- it hasn't happened. And I think it
10 probably won't happen in the absence of direct court
11 intervention.

12 However, I went back and reread the stay. In fact, I have
13 it in front of me on my screen, and it's very clear that my
14 decision was stayed in its entirety. So I think I lack any
15 authority to do that.

16 So, Ms. Rifkin, your thoughts.

17 MS. RIFKIN: Yes, Your Honor.

18 We agree that the order is stayed in its entirety. I want
19 to address several of the points, though, your question and
20 several of the points that Mr. Hall and Mr. Eaton made.

21 First, I want to be very clear. Mr. Hall said that, given
22 the stay, no future efforts, quote, "can or should be taken" by
23 their client. And that is not the case.

24 Future efforts -- his client can choose to move forward
25 with providing medically necessary treatment to our client. The

1 stay does not prevent defendants from providing necessary
2 medical treatment on their own, voluntarily, in compliance with
3 the Eighth Amendment to our client.

4 Now, it's true they are not obligated to by this court's
5 order while there is this stay in effect and that Your Honor
6 cannot enforce that. But I want to be clear that defendant's
7 can choose to do that. And just as always, knowledge of
8 necessary -- of serious medical condition and failure to provide
9 necessary treatment is continuing evidence of deliberate
10 indifference, and that will be our position ongoing in this
11 litigation.

12 So that's in terms of the issue of whether they can move
13 forward even in the absence of court enforcement.

14 Given defendants' statements, it seems pretty clear that
15 they -- or they seem to suggest that they will not do that.
16 And, you know -- and so I want to address Mr. Eaton's request
17 that this court somehow order plaintiffs to cease any attempts
18 to get consults.

19 I'm not aware of any authority for that. I'm not aware of
20 any authority that would impede -- allow an order impeding
21 plaintiff's counsel access to our client and for us to move
22 forward with expert assessments of our client. This is ongoing
23 litigation, and I do not believe the stay order affects that.

24 And I think that if the defendants want to proceed with
25 that, they would need to file a motion for protective order and

1 have briefing. So I'm not aware of any authority that would
2 support Mr. Eaton's position on that.

3 And I think that any attempts by defendants to impede
4 plaintiff's counsel's access to our client would be problematic
5 and would put us in a terrible position should the Ninth Circuit
6 uphold this court's order, which we believe that it will.

7 Defendants have delayed compliance with the order. And a
8 lot of the representations made by Mr. Hall and Mr. Eaton about
9 what the surgeon requires are inaccurate.

10 And our information is that they have never, in fact,
11 spoken with the surgeon directly. So these representations
12 about what the surgeon requires and the compliance with WPATH
13 are erroneous.

14 WPATH does not require treating mental health providers or
15 a provider-patient relationship. In fact, It talks about
16 independent evaluations. There is no reason Dr. Ettner and
17 another outside provider can't provide these referral letters.

18 Plaintiff has never sought to prevent the provision of
19 medical records -- of Ms. Edmo's medical records to surgeons.
20 However, the idea that defendants want to use medical
21 requirements to relitigate the underlying issues in this case is
22 objectionable.

23 Again, some of that, I think, comes up when we see what
24 happens with the Ninth Circuit's ruling. But our position is
25 that if the Ninth Circuit affirms this court's decision,

1 defendants need to be prepared to comply with it immediately.

2 So, you know, that's our position on the issues. We don't
3 think defendants can impede our efforts to meet with our client
4 in the meantime. And I want to make it clear that defendants,
5 in fact, can move forward at any point with providing Ms. Edmo
6 necessary medical treatment, including surgery.

7 THE COURT: All right. Well --

8 MR. HALL: Your Honor, this is Brady Hall.

9 THE COURT: Yes, Mr. Hall.

10 MR. HALL: Can I interject quick?

11 THE COURT: Yes.

12 MR. HALL: The first point is I didn't -- I didn't
13 hear Mr. Eaton to say that plaintiffs can't speak with their
14 counsel. I think that's gross misrepresentation.

15 Our concern is not with plaintiff's counsel accessing
16 Ms. Edmo. And just for the record, they have full right and
17 authority to go forward and do all that. If they want to have
18 other providers or medical health providers go see her at the
19 facility and do an evaluation, that is their right, and we are
20 not asking to impede that.

21 The issue that was raised by Mr. Eaton -- and I support
22 fully, and I think I addressed this -- is our grave concern with
23 plaintiffs then sending those evaluations that they get
24 unilaterally to the surgeon that IDOC and Corizon have selected.
25 That's the scope of our concern. It's not with impeding access

1 to the client. I think that -- I think that was -- was a poor
2 misrepresentation of our position.

3 But let it be very clear that's not what we are arguing.
4 We are just raising grave concerns that we all be fair to the
5 surgeon, that he has got a difficult job to do. He's got to
6 make sure that he is ethically and morally able to do this
7 surgery, and he needs to have the information.

8 I can't set him up for failure. I can't be exposed to --
9 or expose my client to future liability if one day he is sued by
10 Ms. Edmo for providing the surgery. If he says to us, "Well,
11 you guys organized this, but you didn't tell me about all this
12 other stuff. You didn't tell me about her significant mental
13 health history. You didn't tell me that she would not listen to
14 your medical and mental health providers and undergo treatment
15 and therapy." Those are our big concerns, Your Honor.

16 On the issue of speaking with the surgeon, he is a busy
17 man. And Corizon's representative has been diligent in talking
18 with his surgical coordinator who the surgeon has elected and
19 appointed to address these issues.

20 I have had a number of surgeries. And I have never, ever
21 spoken to the surgeon on the phone myself prior to the surgical
22 consult. We need to be very respectful of the surgeon's wishes,
23 and we need to keep him in a position where we are not asking
24 him to do too much here or more than he is expected to do for
25 any other client.

1 On the issue of the evaluations, Ms. Rifkin is correct that
2 the WPATH does not say that those evaluations have to come from
3 treating providers, nor is that the defendants' position. The
4 defendants' position is that those evaluations, which is clear
5 under the WPATH, must come from individuals who have a
6 relationship, who have evaluated Ms. Edmo, and have done so in a
7 context where, quote, "they will share in the legal and ethical
8 responsibility" with the surgeon providing that surgery.

9 We don't think that's been done at this point, which
10 really, in my mind, has exposed recently this lack of the
11 requisite evidence to support an order to provide a surgery at
12 this time. It seems overly broad and, again, puts the cart
13 before the horse.

14 Your Honor, we'll confer with our clients. And plaintiffs
15 are free to call us and ask us what we're doing and what we
16 intend to do. I don't think I need to say anything more at this
17 point, though, Your Honor.

18 Thank you.

19 THE COURT: Mr. Hall, Mr. Eaton, I want a very brief
20 response to this. And perhaps Ms. Rifkin or Ms. Ferguson,
21 Ms. Whelan have zero interest in this. But why shouldn't
22 Ms. Edmo's representatives -- medical, legal, psychiatric -- be
23 able to confer with Dr. Ettner about the surgery and provide him
24 with the insights that were gained from the hearing and from the
25 court's decision?

1 My sense is from -- I think it was Mr. Eaton suggests that
2 the plaintiffs desist in their efforts to obtain consults,
3 suggests that you're trying to limit their ability to
4 communicate with Dr. Ettner.

5 This is a unique situation in which the patient here,
6 Ms. Edmo, is being represented by the person -- the entity who
7 has her in custody. And it strikes me that she should have --
8 or at least it would not be inappropriate for her chosen
9 representatives to also be involved in the communications with
10 Dr. Ettner.

11 I guess first I should ask: Ms. Rifkin, is that something
12 that you have no interest in doing because you're afraid it
13 might actually make the situation worse, or is that something
14 that you think would be profitable and helpful?

15 MS. RIFKIN: Yes, Your Honor. And just because we're
16 on the record, I just want to clarify: Dr. Stiller is the
17 surgeon. I think Your Honor just misspoke.

18 THE COURT: Oh, I'm sorry. I -- you're correct. I
19 misspoke. Thank you.

20 MS. RIFKIN: Sure.

21 No. Your Honor is correct. I think from our filing, we
22 have had contact with Dr. Stiller, because that's how we found
23 out that defendants misrepresented in their January 2019 status
24 report, contact they had with him and his office and that, in
25 fact, nobody had contacted him.

1 Mr. Hall's representations about Dr. Stiller's schedule,
2 that he is a busy man and he is somehow unwilling or unable to
3 be in contact with defendants is a misrepresentation.

4 Ms. Edmo is the patient. Patients should be able to have
5 access to their doctors. Obviously, Ms. Edmo is in custody, and
6 so there are issues with that. And so we believe that, as her
7 lawyers, it is perfectly acceptable for us to have contact with
8 Dr. Stiller, who, as defendants have made clear, is not their
9 employee or their contractor.

10 The idea about putting the surgeon at ethical and moral
11 crosshairs, I think this is just -- this is really just the
12 defendants' disagreement with the underlying order and the
13 underlying evidence which is now before the Ninth Circuit.

14 The idea that unqualified providers should be providing
15 information to the surgeon, or need to, I think is clearly
16 addressed by this court's order. In the event it is upheld, we
17 should proceed as such.

18 I think the WPATH's requirement that a qualified provider
19 assess the client -- which Dr. Ettner has already done and as we
20 updated, as we provided information -- has handwritten a letter.
21 And so we are insistent in being able to communicate with the
22 surgeon, especially -- we think it's especially important
23 because we have continued to uncover material representations or
24 mistakes that defendants made regarding their communications
25 with the surgeon and what his requirements are.

1 THE COURT: All right. Mr. Eaton, Mr. Hall, do you
2 disagree with Ms. Rifkin's position that she should -- she and
3 the other, I assume, psychologists, psychiatrists should be
4 allowed to have direct access and communication with Dr. Stiller
5 in anticipation of the surgery?

6 MR. HALL: Your Honor, I can take the first shot at
7 that.

8 THE COURT: That's Mr. Hall, I assume?

9 MR. HALL: Yeah. Brady Hall.

10 There is -- there is, in all candor, a lot of logic to
11 Ms. Rifkin's request; I don't disagree with that. And the issue
12 that I have is: How do we do this in a way that one doesn't
13 over --

14 THE COURT: I'm sorry. Could you repeat that, "that
15 one doesn't" what?

16 MR. HALL: Overwhelm this surgeon with -- so he is not
17 getting information from multiple sources, and he doesn't feel
18 like he is being set up in something that's uncomfortable for
19 him.

20 THE COURT: Shouldn't Dr. Stiller be the judge of
21 that, Mr. Hall?

22 MR. HALL: Well, Your Honor, I think so. But then I
23 think it begs the question of: Aren't we then just leaving it
24 to Dr. Stiller and really kind of relitigating these issues to
25 Dr. Stiller, the ultimate decider of whether or not he is going

1 to feel comfortable providing the surgery?

2 So if plaintiffs are allowed to present their side, their
3 evaluations, to Dr. Stiller, I think it makes sense to allow
4 defendants to also, at the same time, provide their thoughts,
5 their evaluations to Dr. Stiller. Perhaps that's the only way
6 to really -- you know, to have Dr. Stiller be comfortable to
7 provide this surgery.

8 And I think from our perspective -- and, again, we disagree
9 with the court's order; we think it was improper -- but in
10 looking for how to comply, if we are forced to comply with this
11 order, perhaps the only way to make sure that this is done in a
12 way that is safe, is ethical, and is fair to Ms. Edmo as well as
13 Dr. Stiller, is to have Dr. Stiller have the opportunity to hear
14 from both sides, to hear all the information, so he can make
15 that decision.

16 THE COURT: Well, Mr. Hall, my concern is, up to this
17 point, all he has heard is from IDOC and Corizon. And I think
18 we're probably at a point where -- well, let me hear from
19 Mr. Eaton.

20 Mr. Eaton, is there anything you want to add? I mean, do
21 you disagree with the notion that --

22 MR. EATON: Yes, Your Honor.

23 THE COURT: -- Ms. Edmo and her representatives should
24 have the ability to communicate with Dr. Stiller and provide him
25 with information necessary to her treatment?

1 MR. EATON: Your Honor, thank you.

2 Since my words are at issue here, I just wanted to clarify
3 that I wasn't saying that treatment providers and consultants
4 should be restricted from seeing Ms. Edmo at the prison.

5 What I was trying to say, and what I thought I put in
6 context, was what Mr. Hall was saying, that my concern is that I
7 want there to be fair information provided to the surgeon. And
8 my concern is that there is only letters from plaintiff's
9 experts who are retained and hired and paid. By Dr. Ettner
10 going to Dr. Stiller, then there may be information that
11 defendants think would be appropriate for Dr. Stiller to
12 consider, as well, and should have an opportunity to provide
13 that information.

14 Ultimately, Dr. Stiller, I agree, would determine what
15 information he needs or doesn't need, but information should not
16 necessarily be restricted to the surgeon.

17 As far as plaintiffs continuing to say that we haven't
18 talked to the surgeon, my client has indicated that they
19 initially started to request -- and requested to talk to the
20 surgeon, and then the response they got, it was my
21 understanding, was, you know, please talk to the GCS
22 coordinator, who is not just a scheduler, not somebody who just
23 puts things on a calendar, but is intimately involved in, is my
24 understanding, the process for scheduling and the GCS and
25 actually meets with the patient at the initial consult.

1 And I don't believe plaintiffs have identified any specific
2 information that I think we should have obtained from
3 Dr. Stiller that we haven't been able to obtain from his
4 right-hand person for getting ready for the surgery.

5 And I also -- I'm having a little struggle understanding
6 why communication to the surgeon is necessary right now at this
7 point from either party, other than perhaps talking about what
8 the consequences are of the stay at this point.

9 It seems a little premature to be discussing, if there is a
10 stay from the Ninth Circuit, what information should or
11 shouldn't be provided to the surgeon, and that may very well be
12 contrary to the Ninth Circuit stay.

13 So I guess that's all I have to say at this point.

14 THE COURT: All right.

15 Well, Counsel, I -- I went back and looked at the
16 transcript, Mr. Eaton. And I think your comment was that you
17 asked that I order the plaintiffs to desist in any efforts to
18 send letters to Dr. Stiller and trying to get consult from
19 offsite providers. That's pretty much what I saw in the
20 transcript. So I think that's what we were dealing with here.

21 And I would indicate that that absolutely would be contrary
22 to any authority that I think I have and would be inconsistent,
23 I think, with the notion that if, indeed, Dr. Stiller is the
24 person who, if my order is affirmed, will conduct the surgery,
25 it seems to me that, indeed, Ms. Edmo absolutely has the right

1 to communicate, through her representatives, with Dr. Stiller.

2 And I'm further concerned, though, that Dr. Stiller has to
3 have a balanced understanding of this situation. And I feel
4 that, quite strongly, that he needs to understand the basis for
5 the court's order, perhaps a copy of my decision or at least a
6 summary of my decision, the evidence I relied upon, so he will
7 understand both sides of this.

8 And I totally agree there are two sides. There is no
9 question but that the experts retained by the defendants and
10 their in-house care providers opined that the surgery was not
11 warranted. I'm sure that Dr. Stiller will be aware of that and,
12 likewise, should be aware that the experts retained by the
13 plaintiffs, who I found to be very credible, had a diametrically
14 opposed view of the situation.

15 So I don't think anyone should try in any way to affect
16 Dr. Stiller other than to give him a complete picture of what is
17 about to occur.

18 Now, let me turn to the problem immediately at hand.

19 Ms. Rifkin, I think I'm going to have to leave it in your
20 court -- no pun intended -- in terms of what, if any, action you
21 want the court to take. I could see possibly requesting a
22 modification of the stay from the circuit to allow presurgical
23 procedures to be continued with, since that certainly is not
24 irreversible.

25 If -- ultimately, if my decision is not affirmed, that if

1 that presurgical steps are not taken, we're probably going to be
2 looking at a six-month delay after the circuit issues its
3 decisions if I am affirmed.

4 Whether the circuit would entertain that or not, I don't
5 know. The only other thing is, if you want the court to do
6 anything, you're going to have to persuade me that what you're
7 requesting would not violate or be inconsistent with the stay
8 imposed by the circuit.

9 I do feel strongly, as I did when I issued the decision in
10 this case, that time is of the essence for Ms. Edmo. And
11 unnecessary and unwarranted delays are inconsistent with that
12 sense of urgency that I tried to reflect in my decision.

13 And I would note I very much appreciate, in that light, the
14 circuit putting this on an expedited briefing and decision
15 schedule so that if I'm right, we'll know that very quickly; if
16 I'm wrong, we will know that as well very quickly. And I think
17 that's critical, and I very much appreciate the circuit's
18 willingness to do that.

19 But in the meantime, I can't do anything until there is
20 something pending before me. And as I noted, unless the circuit
21 modifies the stay, I don't intend to do anything inconsistent
22 with that stay, although there may be some things I can do.

23 I certainly agree, Ms. Rifkin, with the idea that the
24 defendants could cooperatively continue with the preoperative
25 steps; but that, of course, given the stay, they are not

1 compelled to do. So I think that's kind of where we are.

2 I had given some thought to actually encourage -- since the
3 decision is stayed, that we might take a hard look at the case
4 management order in this case and actually move the process up.
5 But given the time that I think you're going to be spending on
6 appeal and other matters, maybe that's not going to bear any
7 fruit, and it just may not be possible.

8 The one thing I would say, finally -- and this may be in
9 closing, although I will give each side to chance to weigh in on
10 anything else you want to talk about -- that if I were not
11 stayed, based upon what I read here, I would plan to be very
12 aggressively involved in getting with Dr. Stiller and
13 essentially becoming involved directly in ensuring that we're
14 not just, like ships in the night, not connecting.

15 I would want -- might even -- I don't know what I would do,
16 but I do think there needs to be some direct communication with
17 Dr. Stiller and a communication back to the court so I have
18 directly from him his view rather than having it interpreted and
19 translated by parties.

20 And if he is simply unwilling to perform the procedure,
21 then we need to know that very quickly. If he is willing, we
22 need to know what his preconditions are, and we need to work
23 together proactively to satisfy those preconditions in an effort
24 to comply with my order in this case.

25 And this idea that we're both talking at him, but we're not

1 involving him in this discussion I think is counterproductive.
2 And if I were not stayed by the circuit, that's precisely what I
3 would do, is to come up, after consulting with the parties, with
4 a process by which we can get Dr. Stiller involved in this
5 discussion.

6 So -- but at this point, I can't do that until -- because
7 the stay is in effect. And unless the circuit modifies the stay
8 in some way or the plaintiffs can persuade me that I can, I
9 guess, nibble at the edges of the stay without violating their
10 order, I think we are left with essentially where we are, which
11 is sitting in place, not able to do anything.

12 So let me start with plaintiffs. Ms. Rifkin, I don't know
13 if there is anything else we can take up here. But is there
14 anything else that you want me to be aware of or that you want
15 to put on the record before we terminate this status conference?

16 MS. RIFKIN: Yes, Your Honor. I want to clarify
17 something and then move to the questions you just posed.

18 I want to clarify that plaintiffs don't have any objection
19 to defendants' provision of the records to Dr. Stiller that a
20 surgeon typically receives in connection with a surgery, the
21 medical records.

22 And when we take this question up again after the
23 Ninth Circuit rules, the idea that defendants' unqualified
24 providers, who do not have the requisite experience, training,
25 and qualifications with treating gender dysphoria, need to make

1 a case to Dr. Stiller, I think that's just, again, relitigating
2 the underlying issues.

3 I appreciate Your Honor's suggestion that Dr. Stiller
4 should be directly involved in this process. And I think that
5 the court's involvement in this, so that we make sure we work
6 cooperatively and we actually know what Dr. Stiller requires,
7 and information, I think that is an appropriate way to proceed
8 when we get to that point.

9 Because right now, Dr. Stiller is defendants' hand-picked
10 surgeon to do this. We don't have any basis for objecting to
11 Dr. Stiller based on what we know. But, again, this process
12 needs to be transparent. It needs to have transparency to the
13 court and to plaintiff because plaintiff is a patient.

14 So I agree that what Your Honor has discussed is a good way
15 to move forward.

16 We will think about any modification of the stay we might
17 move for that would allow the presurgical procedures to be moved
18 forward with. And right now, we agree with Your Honor's
19 position about the limits the stay puts on you. We will, of
20 course, give further thought to this, but we don't disagree with
21 the court's position.

22 But I do want to point out that I think if the
23 Ninth Circuit affirms this court's order, there is no barrier to
24 this court enforcing its order and on the timeline that this
25 court sets forward, which is to enforce the order consistent

1 with the court's expectation that what would have happened in
2 the three months before this order was stayed, should have
3 happened. And that if this order is affirmed, defendants must
4 be starting from the place that they should have been in at this
5 point, which is three months from surgery and preparing to
6 provide Ms. Edmo surgery within three months.

7 And so I think it's in defendants' hands whether they want
8 to take action or not to be prepared to move forward on that
9 time line. But I think that there will be nothing wrong with
10 this court, the moment the order is affirmed, moving forward
11 with a time line that requires Ms. Edmo to have surgery within
12 the number of days from when the stay was issued until June
13 13th. And so I think that defendants need to be prepared to
14 comply with the order on that time line.

15 THE COURT: All right. Thank you.

16 Mr. Hall, anything else?

17 MR. HALL: Just a couple points, Your Honor.

18 I think we can take it up when we -- if and when we get
19 there as to whether or not the court's direct involvement with
20 the surgeon is warranted, is a good idea. I haven't done any
21 research on that, Your Honor.

22 I think there is certainly the ability for a court to
23 appoint an independent expert to consult with the court. I do
24 have concerns about the court having direct conversation with a
25 third party in this regard, as it may create some greater

1 significance on the surgeon's behalf of the court's wishes or,
2 again, something to consider.

3 I think that we're all in agreement that Dr. Stiller, the
4 surgeon, needs to have the information he has and that we
5 all -- we all need to provide the facts, the whole story, and
6 let Dr. Stiller make that decision.

7 I'm glad that plaintiffs don't have any objections to
8 Dr. Stiller. And I think it's worth noting that Dr. Stiller is
9 a doctor who has fought to provide a vulnerable population with
10 the surgery and should be commended for that. I'm really glad
11 that he is involved and he is cooperating with this.

12 I do worry that any surgeon may become scared of the
13 process if we get too much going to him. But, again, it's kind
14 of a premature issue at this point.

15 As far as a representation that Ms. Rifkin has said a
16 number of times in this case -- she stated that the court has
17 found that IDOC defendants and Corizon don't have any mental
18 health or medical providers qualified to render treatment or
19 surgical consults.

20 And, you know, perhaps I can go back and read the court's
21 order, but I do not understand that's what the court said. And
22 I think the evidence was absolutely contrary to that in that we
23 presented testimony of many who meet all the criteria and
24 qualifications under the WPATH.

25 So not only do I think that's unfair, but it's insulting to

1 my clients, their education, their beliefs, many of whom are
2 very compassionate towards the transgender community. And I
3 think it's worth noting that. And it's unfair to them.

4 And it also begs the question that, really, what plaintiffs
5 are saying is that there is a only a handful of people that can
6 provide this information in a qualified manner to a surgeon,
7 which really, I think, undermines their whole argument in this
8 case that defendants were deliberately indifferent.

9 There is only, as they believe, a few people who can
10 actually understand and are qualified to render adequate
11 opinions on this complex issue.

12 THE COURT: All right.

13 MR. HALL: I don't think there is anything further to
14 say at this point. Although I would just like to say that, you
15 know, we -- the State of Idaho and our firm here, we have been
16 taking the court's order very seriously, looking at these
17 issues. It is complex.

18 I do resent a lot of the implications from plaintiff's
19 counsel that we haven't been deliberately or adequately
20 addressing these issues. And I just want to reiterate for the
21 record that we do take this court's order seriously in complying
22 with it, and we need to make reasonable efforts if and when the
23 court's order is affirmed.

24 THE COURT: Mr. Eaton, anything?

25 MR. EATON: IDOC agrees with what Mr. Hall said. I

1 also agree that Corizon and our firm has also been taking the
2 order seriously and will continue to as this case plays out.

3 You know, I would indicate that, like Mr. Hall said, this
4 is a very complex process and for scheduling a surgery and a lot
5 of complex issues, some of which I wasn't aware of until
6 recently, such as the potential length of electrolysis, for
7 instance, or the specifics for multiple different vaginoplasty
8 surgery that could be done.

9 Plaintiffs did not raise these issues in their motion.
10 They did not raise the issue of prerequisites for surgery and
11 show that they were met.

12 So, you know, some of these issues are truly unique, and
13 defendants and Corizon are trying to deal with them. But they
14 were not on the record, and they were not addressed at the
15 hearing. And so we're working through the process in trying to
16 comply with the order.

17 But, again, we respect the court's order and have been
18 trying to comply with it. And it's our understanding that
19 that's been stayed, and there is a process that we're all
20 working through here now, which is the appeal and what happens
21 after that.

22 THE COURT: All right. Well, thank you, Counsel.

23 I think at this point, unless there is a request from one
24 of the parties for a further status conference, I'm not sure
25 there is any value in doing this until the Ninth Circuit issues

1 its decision.

2 Now, the claim for damages, of course -- well, again, even
3 the -- depending on what the circuit decides, there is -- there
4 may be a number of issues left open, but certainly at least the
5 claim for damages would continue. I don't see anything about
6 the stay from the Ninth Circuit that affects that.

7 So the scheduling plan that we have already agreed upon and
8 put in place will continue. I'm assuming counsel is conducting
9 the discovery and identifying experts and is preparing to comply
10 with all of those deadlines. But I don't intend to have another
11 status conference.

12 I'll probably have Mr. Coit, who is filling in here, set
13 up -- as soon as the circuit reaches a decision, we will
14 probably have a status conference held within a week so we can
15 immediately decide where we are and then go from there.

16 And in the meantime, if anything is brought to the court's
17 attention or a request is made for a status conference, then, of
18 course, we'll address that.

19 If there are any motions with regard to compliance or
20 noncompliance with the court's order or if the circuit is asked
21 and agrees to modify the stay so as to permit presurgical steps
22 to be taken, then, that, of course, would change things as well.
23 If a decision on that is issued, then I do intend to immediately
24 conduct a status conference and engage in the kind of process
25 that I described in which we will set up a cooperative effort in

1 which both sides are allowed to communicate with the surgeon
2 and -- but on his terms.

3 That's why I suggested that I think there needs to be some
4 communication from him to the court as to what his requirements
5 are; not that I would intervene, but just so that I would be
6 advised as to exactly what he is requiring -- and I want to hear
7 it from him directly in some format -- and then proceed from
8 there.

9 But I'm not going to do any of that at this point because
10 of the stay. So we'll leave it at that.

11 All right. Thank you, Counsel.

12 (Proceedings concluded at 10:56 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Tamara Hohenleitner, Federal Official Realtime Court Reporter, in and for the United States District Court for the District of Idaho, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 26th day of March, 2019.

/S/ TAMARA I. HOHENLEITNER

TAMARA I. HOHENLEITNER, CSR NO. 619, CRR
FEDERAL OFFICIAL COURT REPORTER

1	32:6 affirmed [10] - 4:19, 5:2, 8:15, 10:22, 22:24, 23:25, 24:3, 28:3, 28:10, 30:23 affirms [2] - 13:25, 27:23 afraid [1] - 17:12 aggressively [1] - 25:12 ago [1] - 11:6 agree [8] - 6:14, 11:18, 21:14, 23:8, 24:23, 27:14, 27:18, 31:1 agreed [3] - 5:22, 8:23, 32:7 agreement [1] - 29:3 agrees [2] - 30:25, 32:21 alarmed [1] - 8:3 allow [5] - 8:10, 12:20, 20:3, 23:22, 27:17 allowed [3] - 19:4, 20:2, 33:1 alternative [1] - 8:10 Amendment [1] - 12:3 anticipated [1] - 3:25 anticipation [1] - 19:5 appeal [3] - 9:25, 25:6, 31:20 appoint [1] - 28:23 appointed [1] - 15:19 appreciate [3] - 24:13, 24:17, 27:3 appropriate [2] - 21:11, 27:7 April [1] - 9:3 arguing [1] - 15:3 argument [1] - 30:7 assess [2] - 11:3, 18:19 assessments [1] - 12:22 assume [2] - 19:3, 19:8 assuming [2] - 3:9, 32:8 attempts [4] - 9:1, 9:21, 12:17, 13:3 attention [1] - 32:17 authority [6] - 11:15, 12:19, 12:20, 13:1, 14:17, 22:22 avoid [1] - 10:3 aware [7] - 12:19, 13:1, 23:11, 23:12,	26:14, 31:5	chosen [1] - 17:8 Circuit [12] - 4:15, 4:20, 10:18, 13:5, 13:25, 18:13, 22:10, 22:12, 26:23, 27:23, 31:25, 32:6 circuit [11] - 23:22, 24:2, 24:4, 24:8, 24:14, 24:20, 26:2, 26:7, 32:3, 32:13, 32:20 Circuit's [3] - 3:15, 5:1, 13:24 circuit's [1] - 24:17 claim [2] - 32:2, 32:5 clarify [4] - 17:16, 21:2, 26:16, 26:18 clear [11] - 6:7, 7:1, 7:21, 11:13, 11:21, 12:6, 12:14, 14:4, 15:3, 16:4, 18:8 clearly [2] - 4:9, 18:15 client [17] - 7:10, 7:23, 9:17, 10:15, 11:23, 11:24, 11:25, 12:3, 12:21, 12:22, 13:4, 14:3, 15:1, 15:9, 15:25, 18:19, 21:18 clients [3] - 5:8, 16:14, 30:1 clock [1] - 8:16 close [1] - 4:5 closing [1] - 25:9 Coit [1] - 32:12 comfortable [4] - 6:9, 8:9, 20:1, 20:6 coming [1] - 10:11 commended [1] - 29:10 comment [1] - 22:16 communicate [5] - 17:4, 18:21, 20:24, 23:1, 33:1 communication [5] - 19:4, 22:6, 25:16, 25:17, 33:4 communications [2] - 17:9, 18:24 community [1] - 30:2 compassionate [1] - 30:2 compelled [1] - 25:1 complete [2] - 10:4, 23:16 completely [1] - 3:23 complex [4] - 30:11, 30:17, 31:4, 31:5 compliance [5] - 7:15, 12:2, 13:7,	13:12, 32:19 complicated [1] - 9:6 complications [1] - 9:14 comply [9] - 5:10, 14:1, 20:10, 25:24, 28:14, 31:16, 31:18, 32:9 complying [3] - 4:23, 8:17, 30:21 concern [9] - 3:22, 4:4, 8:12, 14:15, 14:22, 14:25, 20:16, 21:6, 21:8 concerned [5] - 3:24, 4:13, 7:22, 9:15, 23:2 concerns [6] - 4:12, 6:19, 7:13, 15:4, 15:15, 28:24 concluded [1] - 33:12 condition [1] - 12:8 conduct [2] - 22:24, 32:24 conducting [1] - 32:8 confer [4] - 5:13, 9:17, 16:14, 16:23 conference [9] - 3:3, 3:18, 4:3, 26:15, 31:24, 32:11, 32:14, 32:17, 32:24 confirmation [1] - 9:24 confirmed [1] - 4:19 connecting [1] - 25:14 connection [1] - 26:20 consequences [1] - 22:8 consider [2] - 21:12, 29:2 consistent [1] - 27:25 consult [8] - 5:22, 9:3, 9:8, 15:22, 21:25, 22:18, 28:23 consultants [1] - 21:3 consulting [1] - 26:3 consults [4] - 9:23, 12:18, 17:2, 29:19 contact [4] - 17:22, 17:24, 18:3, 18:7 contacted [1] - 17:25 context [2] - 16:7, 21:6 continue [6] - 9:25, 10:17, 24:24, 31:2,
2		B		
3		balanced [1] - 23:3 barrier [1] - 27:23 based [2] - 25:11, 27:11 basis [2] - 23:4, 27:10 bear [1] - 25:6 become [1] - 29:12 becoming [1] - 25:13 begs [2] - 19:23, 30:4 behalf [2] - 4:10, 29:1 beholden [1] - 8:2 beliefs [1] - 30:1 big [1] - 15:15 blessed [1] - 5:25 blood [1] - 9:8 Brady [2] - 14:8, 19:9 brief [1] - 16:19 briefing [2] - 13:1, 24:14 broad [1] - 16:12 brought [1] - 32:16 bunch [1] - 8:8 busy [2] - 15:16, 18:2		
9		C		
A		calendar [1] - 21:23 canceled [1] - 3:17 candidate [2] - 6:15, 7:16 candor [1] - 19:10 cannot [3] - 4:7, 6:20, 12:6 care [1] - 23:10 cart [2] - 6:11, 16:12 case [11] - 3:21, 11:23, 13:21, 24:10, 25:3, 25:4, 25:24, 27:1, 29:16, 30:8, 31:2 cautious [1] - 8:5 cease [2] - 9:21, 12:17 cellphone [1] - 10:11 certainly [4] - 23:23, 24:23, 28:22, 32:4 chance [1] - 25:9 change [1] - 32:22 characterization [2] - 5:20, 8:25 choose [2] - 11:24, 12:7		
10:56 [1] - 33:12 13th [1] - 28:13				
2019 [2] - 3:2, 17:23 21 [1] - 3:2				
30 [1] - 11:6				
90 [2] - 11:8, 11:9				
a.m [1] - 33:12 Aaron [1] - 9:10 ability [3] - 17:3, 20:24, 28:22 able [7] - 10:12, 15:6, 16:23, 18:4, 18:21, 22:3, 26:11 absence [2] - 11:10, 12:13 absolutely [4] - 3:20, 22:21, 22:25, 29:22 acceptable [1] - 18:7 access [5] - 12:21, 13:4, 14:25, 18:5, 19:4 accessing [1] - 14:15 accomplished [1] - 3:19 accomplishing [1] - 4:1 action [3] - 8:13, 23:20, 28:8 add [2] - 8:20, 20:20 address [6] - 5:18, 8:18, 11:19, 12:16, 15:19, 32:18 addressed [3] - 14:22, 18:16, 31:14 addressing [1] - 30:20 adequate [4] - 4:5, 5:21, 7:5, 30:10 adequately [1] - 30:19 adopt [1] - 8:21 advised [1] - 33:6 affect [1] - 23:15 affected [1] - 3:15 affects [2] - 12:23,				

<p>32:5, 32:8 continued [2] - 18:23, 23:23 continuing [2] - 12:9, 21:17 contractor [2] - 5:24, 18:9 contrary [3] - 22:12, 22:21, 29:22 conversation [1] - 28:24 convinced [1] - 3:20 cooperating [1] - 29:11 cooperative [1] - 32:25 cooperatively [2] - 24:24, 27:6 coordinator [2] - 15:18, 21:22 copy [1] - 23:5 Corizon [9] - 3:11, 5:13, 8:16, 10:7, 14:24, 20:17, 29:17, 31:1, 31:13 Corizon's [1] - 15:17 correct [3] - 16:1, 17:18, 17:21 cost [1] - 6:1 counsel [11] - 3:4, 3:14, 8:4, 9:16, 10:3, 10:15, 12:21, 14:14, 14:15, 30:19, 32:8 Counsel [3] - 22:15, 31:22, 33:11 counsel's [1] - 13:4 counterproductive [1] - 26:1 couple [2] - 3:4, 28:17 course [5] - 24:25, 27:20, 32:2, 32:18, 32:22 court [26] - 4:6, 6:18, 6:23, 7:10, 9:10, 9:12, 9:20, 10:1, 11:10, 12:13, 12:17, 23:20, 23:21, 24:5, 25:17, 27:13, 27:24, 27:25, 28:10, 28:22, 28:23, 28:24, 29:16, 29:21, 33:4 court's [30] - 3:17, 4:24, 5:9, 5:11, 5:18, 5:19, 6:11, 6:12, 8:15, 8:17, 12:4, 13:6, 13:25, 16:25, 18:16, 20:9, 23:5, 27:5, 27:21, 27:23, 28:1, 28:19, 29:1, 29:20,</p>	<p>30:16, 30:21, 30:23, 31:17, 32:16, 32:20 create [1] - 28:25 Crecelius [1] - 3:13 credible [1] - 23:13 criteria [3] - 6:15, 7:14, 29:23 critical [1] - 24:17 crosshairs [1] - 18:11 custody [2] - 17:7, 18:5</p> <p style="text-align: center;">D</p> <p>damages [2] - 32:2, 32:5 date [2] - 7:23, 9:3 days [4] - 11:6, 11:8, 11:9, 28:12 deadlines [1] - 32:10 deal [2] - 10:23, 31:13 dealing [1] - 22:20 decide [2] - 8:8, 32:15 decider [1] - 19:25 decides [1] - 32:3 decision [22] - 3:15, 4:15, 5:2, 7:20, 10:21, 11:7, 11:14, 13:25, 16:25, 20:15, 23:5, 23:6, 23:25, 24:9, 24:12, 24:14, 25:3, 29:6, 32:1, 32:13, 32:23 decisions [1] - 24:3 declaration [1] - 9:10 dedicated [1] - 8:17 deeply [1] - 10:25 defendant [1] - 5:21 defendant's [1] - 12:6 defendants [27] - 4:22, 5:19, 8:22, 8:25, 9:11, 10:20, 12:1, 12:24, 13:3, 13:7, 13:20, 14:1, 14:3, 14:4, 17:23, 18:3, 18:8, 18:24, 20:4, 21:11, 23:9, 24:24, 28:3, 28:13, 29:17, 30:8, 31:13 defendants' [10] - 3:24, 6:18, 12:14, 16:3, 16:4, 18:12, 26:19, 26:23, 27:9, 28:7 delay [1] - 24:2 delayed [1] - 13:7</p>	<p>delays [1] - 24:11 deliberate [1] - 12:9 deliberately [2] - 30:8, 30:19 described [1] - 32:25 desist [2] - 17:2, 22:17 desperate [1] - 10:25 detail [1] - 4:2 determination [1] - 10:5 determine [2] - 8:1, 21:14 devoid [1] - 6:24 diametrically [1] - 23:13 dictate [1] - 6:5 different [1] - 31:7 difficult [1] - 15:5 diligent [1] - 15:17 direct [5] - 11:10, 19:4, 25:16, 28:19, 28:24 direction [1] - 10:1 directly [6] - 8:4, 13:11, 25:13, 25:18, 27:4, 33:7 disagree [6] - 5:19, 19:2, 19:11, 20:8, 20:21, 27:20 disagreement [1] - 18:12 discovery [1] - 32:9 discuss [1] - 8:14 discussed [1] - 27:14 discussing [1] - 22:9 discussion [2] - 26:1, 26:5 doctor [3] - 4:8, 11:3, 29:9 doctors [1] - 18:5 done [11] - 6:24, 7:4, 7:5, 11:4, 11:6, 16:6, 16:9, 18:19, 20:11, 28:20, 31:8 Dr [46] - 7:25, 8:5, 9:22, 13:16, 16:23, 17:4, 17:10, 17:16, 17:22, 18:1, 18:8, 18:19, 19:4, 19:20, 19:24, 19:25, 20:3, 20:5, 20:6, 20:13, 20:24, 21:9, 21:10, 21:11, 21:14, 22:3, 22:18, 22:23, 23:1, 23:2, 23:11, 23:16, 25:12, 25:17, 26:4, 26:19, 27:1, 27:3, 27:6, 27:9, 27:11,</p>	<p>29:3, 29:6, 29:8 during [1] - 4:11 dysphoria [1] - 26:25</p> <p style="text-align: center;">E</p> <p>early [1] - 4:16 Eaton [14] - 3:10, 5:3, 8:20, 11:20, 13:8, 14:13, 14:21, 16:19, 17:1, 19:1, 20:19, 20:20, 22:16, 30:24 EATON [5] - 8:21, 10:14, 20:22, 21:1, 30:25 Eaton's [2] - 12:16, 13:2 edges [1] - 26:9 Edmo [20] - 6:4, 6:14, 6:15, 7:14, 7:24, 8:1, 14:5, 14:16, 15:10, 16:6, 17:6, 18:4, 18:5, 20:12, 20:23, 21:4, 22:25, 24:10, 28:6, 28:11 Edmo's [2] - 13:19, 16:22 education [1] - 30:1 effect [4] - 4:13, 4:24, 12:5, 26:7 effective [1] - 6:2 effort [5] - 4:6, 4:14, 5:21, 25:23, 32:25 efforts [10] - 4:23, 5:10, 5:15, 5:20, 11:22, 11:24, 14:3, 17:2, 22:17, 30:22 Eighth [1] - 12:3 either [1] - 22:7 elected [1] - 15:18 electrolysis [1] - 31:6 employee [1] - 18:9 encourage [1] - 25:2 enforce [2] - 12:6, 27:25 enforcement [2] - 3:16, 12:13 enforcing [1] - 27:24 engage [1] - 32:24 ensure [3] - 4:25, 11:1, 11:3 ensuring [1] - 25:13 entertain [1] - 24:4 entire [1] - 5:9 entirety [2] - 11:14, 11:18 entity [1] - 17:6 erroneous [1] - 13:13</p>	<p>especially [3] - 9:20, 18:22 essence [1] - 24:10 essentially [3] - 4:23, 25:13, 26:10 establish [1] - 10:22 ethical [6] - 6:7, 7:2, 7:18, 16:7, 18:10, 20:12 ethically [2] - 6:20, 15:6 Ettner [6] - 13:16, 16:23, 17:4, 17:10, 18:19, 21:9 evaluated [1] - 16:6 evaluation [3] - 7:23, 8:11, 14:19 evaluations [8] - 7:4, 13:16, 14:23, 16:1, 16:2, 16:4, 20:3, 20:5 evaluative [1] - 6:25 evaluators [3] - 7:1, 7:7, 7:8 event [2] - 8:15, 18:16 evidence [5] - 12:9, 16:11, 18:13, 23:6, 29:22 exactly [1] - 33:6 examination [1] - 8:1 except [1] - 4:2 expectation [1] - 28:1 expected [1] - 15:24 expedited [1] - 24:14 experience [1] - 26:24 expert [2] - 12:22, 28:23 experts [4] - 21:9, 23:9, 23:12, 32:9 experts' [1] - 6:24 expose [1] - 15:9 exposed [2] - 15:8, 16:10 expressed [1] - 8:12</p> <p style="text-align: center;">F</p> <p>facility [1] - 14:19 fact [8] - 6:10, 11:2, 11:4, 11:12, 13:10, 13:15, 14:5, 17:25 facts [1] - 29:5 failure [4] - 3:24, 7:19, 12:8, 15:8 fair [3] - 15:4, 20:12, 21:7 fairly [1] - 10:1 faith [1] - 11:2</p>
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<p>far [2] - 21:17, 29:15 Ferguson [2] - 3:6, 16:20 few [1] - 30:9 fifth [1] - 9:4 file [1] - 12:25 filing [1] - 17:21 filling [1] - 32:12 finally [1] - 25:8 firm [2] - 30:15, 31:1 first [6] - 4:22, 5:4, 11:21, 14:12, 17:11, 19:6 flow [1] - 7:6 flushed [1] - 11:8 follow [1] - 6:16 forced [1] - 20:10 formal [1] - 5:12 format [1] - 33:7 forward [15] - 3:25, 6:4, 9:13, 10:16, 10:24, 11:24, 12:13, 12:22, 14:5, 14:17, 27:15, 27:18, 27:25, 28:8, 28:10 fought [1] - 29:9 four [1] - 4:18 free [1] - 16:15 front [1] - 11:13 fruit [1] - 25:7 full [3] - 7:9, 7:11, 14:16 fully [1] - 14:22 future [3] - 11:22, 11:24, 15:9</p>	<p>Hall [22] - 3:11, 3:12, 5:3, 5:5, 5:6, 8:21, 9:7, 10:7, 11:20, 11:21, 13:8, 14:8, 14:9, 16:19, 19:8, 19:9, 19:21, 20:16, 21:6, 28:16, 30:25, 31:3 HALL [12] - 3:13, 5:4, 5:7, 14:8, 14:10, 14:12, 19:6, 19:9, 19:16, 19:22, 28:17, 30:13 Hall's [1] - 18:1 hand [4] - 9:18, 22:4, 23:18, 27:9 hand-picked [1] - 27:9 hand-select [1] - 9:18 handful [1] - 30:5 hands [1] - 28:7 handwritten [1] - 18:20 hard [1] - 25:3 health [6] - 6:19, 13:14, 14:18, 15:13, 15:14, 29:18 healthcare [1] - 4:10 hear [6] - 10:13, 14:13, 20:13, 20:14, 20:18, 33:6 heard [2] - 10:23, 20:17 hearing [3] - 4:11, 16:24, 31:15 held [1] - 32:14 helpful [2] - 10:23, 17:14 hired [1] - 21:9 history [2] - 7:15, 15:13 Hofer [1] - 9:10 Honor's [2] - 27:3, 27:18 horse [2] - 6:11, 16:13 house [1] - 23:10</p>	<p>identifying [1] - 32:9 IDOC [5] - 7:23, 14:24, 20:17, 29:17, 30:25 IDOC's [1] - 10:15 immediately [4] - 14:1, 23:18, 32:15, 32:23 impede [4] - 12:20, 13:3, 14:3, 14:20 impeding [2] - 12:20, 14:25 implications [1] - 30:18 important [2] - 6:17, 18:22 imposed [1] - 24:8 improper [1] - 20:9 in-house [1] - 23:10 inaccurate [1] - 13:9 inappropriate [1] - 17:8 inaudible [1] - 9:17 including [3] - 7:25, 9:22, 14:6 inconsistent [4] - 22:22, 24:7, 24:11, 24:21 indeed [2] - 22:23, 22:25 independent [6] - 5:24, 6:22, 10:5, 10:8, 13:16, 28:23 indicate [3] - 10:14, 22:21, 31:3 indicated [5] - 9:7, 9:18, 10:6, 10:7, 21:18 indifference [1] - 12:10 indifferent [1] - 30:8 individuals [1] - 16:5 information [21] - 7:5, 7:6, 8:8, 9:18, 13:10, 15:7, 18:15, 18:20, 19:17, 20:14, 20:25, 21:7, 21:10, 21:13, 21:15, 22:2, 22:10, 27:7, 29:4, 30:6 initial [5] - 7:23, 9:2, 9:3, 9:8, 21:25 inquire [1] - 4:22 insights [1] - 16:24 insistent [1] - 18:21 instance [1] - 31:7 insulting [1] - 29:25 intend [5] - 10:20, 16:16, 24:21, 32:10, 32:23</p>	<p>intended [1] - 23:20 intent [1] - 4:23 interest [2] - 16:21, 17:12 interject [1] - 14:10 interpreted [1] - 25:18 intervene [1] - 33:5 intervention [1] - 11:11 intimately [1] - 21:23 involved [8] - 11:1, 17:9, 21:23, 25:12, 25:13, 26:4, 27:4, 29:11 involvement [2] - 27:5, 28:19 involving [1] - 26:1 irreversible [1] - 23:24 issue [10] - 7:3, 12:12, 14:21, 15:16, 16:1, 19:11, 21:2, 29:14, 30:11, 31:10 issued [5] - 4:15, 11:7, 24:9, 28:12, 32:23 issues [17] - 5:18, 8:18, 11:7, 13:21, 14:2, 15:19, 18:6, 19:24, 24:2, 27:2, 30:17, 30:20, 31:5, 31:9, 31:12, 31:25, 32:4</p>	<p>late [2] - 4:16, 9:4 lawsuit [1] - 10:9 lawyers [1] - 18:7 least [3] - 17:8, 23:5, 32:4 leave [2] - 23:19, 33:10 leaves [1] - 6:21 leaving [1] - 19:23 left [2] - 26:10, 32:4 legal [4] - 6:7, 7:2, 16:7, 16:22 length [1] - 31:6 letter [2] - 9:19, 18:20 letters [5] - 6:10, 9:22, 13:17, 21:8, 22:18 liability [1] - 15:9 lifted [1] - 10:21 light [2] - 9:20, 24:13 likewise [1] - 23:12 limit [1] - 17:3 limits [1] - 27:19 line [3] - 28:9, 28:11, 28:14 lined [1] - 4:8 listen [1] - 15:13 litigation [2] - 12:11, 12:23 logic [1] - 19:10 logistically [1] - 6:2 look [2] - 7:25, 25:3 looked [1] - 22:15 looking [5] - 4:18, 5:8, 20:10, 24:2, 30:16</p>
G			J	
<p>gained [1] - 16:24 GCS [3] - 9:24, 21:21, 21:24 gender [2] - 9:24, 26:25 given [6] - 10:18, 11:21, 12:14, 24:25, 25:2, 25:5 glad [2] - 29:7, 29:10 grave [3] - 6:19, 14:22, 15:4 gravely [1] - 3:24 great [1] - 10:23 greater [1] - 28:25 gross [1] - 14:14 guess [4] - 4:22, 17:11, 22:13, 26:9 guys [1] - 15:11</p>			<p>January [1] - 17:23 job [1] - 15:5 joined [1] - 3:5 judge [1] - 19:20 Judge [5] - 3:4, 5:23, 7:3, 7:9, 7:22 June [2] - 4:16, 28:12</p>	
			K	
			<p>keep [1] - 15:23 kind [5] - 11:7, 19:24, 25:1, 29:13, 32:24 knowledge [1] - 12:7 knows [1] - 6:18</p>	
			L	M
<p>H</p> <p>hall [1] - 19:1</p>	<p>I</p> <p>Idaho [4] - 5:22, 5:25, 6:3, 30:15 idea [7] - 13:20, 18:10, 18:14, 24:23, 25:25, 26:23, 28:20 identified [3] - 8:23, 11:3, 22:1 identify [3] - 5:5, 5:21, 9:13</p>		<p>lack [2] - 11:14, 16:10 last [1] - 3:5</p>	<p>major [1] - 3:14 man [2] - 15:17, 18:2 management [1] - 25:4 manner [2] - 3:25, 30:6 March [1] - 3:2 material [1] - 18:23 matters [2] - 5:14, 25:6 mean [2] - 9:5, 20:20 meantime [3] - 14:4, 24:19, 32:16 medical [12] - 6:18, 12:2, 12:8, 13:19, 13:20, 14:6, 14:18, 15:14, 16:22, 26:21, 29:18 medically [1] - 11:25 meet [4] - 7:14, 9:17,</p>

<p>14:3, 29:23 meet-and-confer [1] - 9:17 meets [2] - 6:14, 21:25 Melissa [1] - 3:13 mental [5] - 6:19, 13:14, 15:12, 15:14, 29:17 mercy [1] - 5:23 met [1] - 31:11 method [1] - 6:25 might [4] - 17:13, 25:3, 25:15, 27:16 mind [1] - 16:10 minimum [1] - 4:18 misrepresentation [3] - 14:14, 15:2, 18:3 misrepresented [1] - 17:23 misspoke [2] - 17:17, 17:19 mistakes [1] - 18:24 modification [2] - 23:22, 27:16 modifies [2] - 24:21, 26:7 modify [1] - 32:21 moment [2] - 3:5, 28:10 month [2] - 9:4, 24:2 months [5] - 4:18, 11:6, 28:2, 28:5, 28:6 moral [2] - 7:18, 18:10 morally [2] - 6:20, 15:6 motion [2] - 12:25, 31:9 motions [1] - 32:19 move [10] - 3:25, 11:24, 12:12, 12:21, 14:5, 25:4, 26:17, 27:15, 27:17, 28:8 moved [1] - 27:17 moving [1] - 28:10 MR [17] - 3:13, 5:4, 5:7, 8:21, 10:14, 14:8, 14:10, 14:12, 19:6, 19:9, 19:16, 19:22, 20:22, 21:1, 28:17, 30:13, 30:25 MS [4] - 11:17, 17:15, 17:20, 26:16 multiple [2] - 19:17, 31:7 must [2] - 16:5, 28:3</p>	<p style="text-align: center;">N</p> <p>necessarily [1] - 21:16 necessary [8] - 4:8, 11:25, 12:1, 12:8, 12:9, 14:6, 20:25, 22:6 need [22] - 3:20, 5:5, 8:5, 8:13, 8:18, 10:15, 10:25, 12:25, 14:1, 15:22, 15:23, 16:16, 18:15, 21:15, 25:21, 25:22, 26:25, 28:13, 29:5, 30:22 needs [11] - 7:9, 7:17, 7:25, 15:7, 21:15, 23:4, 25:16, 27:12, 29:4, 33:3 never [3] - 13:10, 13:18, 15:20 nibble [1] - 26:9 night [1] - 25:14 Ninth [15] - 3:15, 4:15, 4:20, 5:1, 10:18, 13:5, 13:24, 13:25, 18:13, 22:10, 22:12, 26:23, 27:23, 31:25, 32:6 nobody [1] - 17:25 noncompliance [1] - 32:20 note [1] - 24:13 noted [1] - 24:20 nothing [1] - 28:9 noting [2] - 29:8, 30:3 notion [2] - 20:21, 22:23 notwithstanding [1] - 5:17 number [5] - 4:11, 15:20, 28:12, 29:16, 32:4</p>	<p>18:5 occur [2] - 6:12, 23:17 office [1] - 17:24 offsite [2] - 9:23, 22:19 one [5] - 15:9, 19:12, 19:15, 25:8, 31:23 ongoing [2] - 12:10, 12:22 open [1] - 32:4 opined [1] - 23:10 opinion [1] - 7:7 opinions [1] - 30:11 opportunity [2] - 20:13, 21:12 opposed [1] - 23:14 order [43] - 3:17, 4:24, 5:9, 5:11, 5:18, 6:11, 6:12, 8:15, 9:21, 11:18, 12:5, 12:17, 12:20, 12:23, 12:25, 13:6, 13:7, 16:11, 18:12, 18:16, 20:9, 20:11, 22:17, 22:24, 23:5, 25:4, 25:24, 26:10, 27:23, 27:24, 27:25, 28:2, 28:3, 28:10, 28:14, 29:21, 30:16, 30:21, 30:23, 31:2, 31:16, 31:17, 32:20 ordered [1] - 4:6 orders [1] - 8:17 organized [1] - 15:11 outlined [1] - 9:9 outside [1] - 13:17 overly [1] - 16:12 overwhelm [1] - 19:16 own [3] - 9:17, 10:4, 12:2</p>	<p>people [3] - 3:5, 30:5, 30:9 perception [1] - 10:25 perfectly [1] - 18:7 perform [6] - 4:9, 6:1, 6:5, 6:6, 6:13, 25:20 performed [2] - 4:19, 5:1 perhaps [6] - 16:20, 20:5, 20:11, 22:7, 23:5, 29:20 permit [1] - 32:21 person [4] - 3:11, 17:6, 22:4, 22:24 perspective [1] - 20:8 persuade [2] - 24:6, 26:8 phone [2] - 10:10, 15:21 picked [1] - 27:9 picture [2] - 10:4, 23:16 place [3] - 26:11, 28:4, 32:8 plaintiff [5] - 3:6, 4:11, 13:18, 27:13 plaintiff's [10] - 5:20, 6:24, 8:4, 9:16, 10:3, 12:21, 13:4, 14:15, 21:8, 30:18 plaintiffs [21] - 3:10, 7:6, 8:10, 9:13, 9:21, 12:17, 14:13, 14:23, 16:14, 17:2, 20:2, 21:17, 22:1, 22:17, 23:13, 26:8, 26:12, 26:18, 29:7, 30:4, 31:9 plan [3] - 8:4, 25:11, 32:7 plays [1] - 31:2 point [21] - 4:17, 5:14, 9:22, 10:18, 14:5, 14:12, 16:9, 16:17, 20:17, 20:18, 22:7, 22:8, 22:13, 26:6, 27:8, 27:22, 28:5, 29:14, 30:14, 31:23, 33:9 points [3] - 11:19, 11:20, 28:17 poor [1] - 15:1 population [1] - 29:9 posed [1] - 26:17 position [14] - 5:12, 8:21, 12:10, 13:2, 13:5, 13:24, 14:2,</p>	<p>15:2, 15:23, 16:3, 16:4, 19:2, 27:19, 27:21 positions [1] - 10:16 possible [1] - 25:7 possibly [1] - 23:21 post [1] - 6:16 post-surgical [1] - 6:16 potential [1] - 31:6 pre [1] - 6:16 precisely [1] - 26:2 preconditions [2] - 25:22, 25:23 premature [2] - 22:9, 29:14 preoperative [1] - 24:24 prepare [1] - 5:18 prepared [3] - 14:1, 28:8, 28:13 preparing [2] - 28:5, 32:9 prerequisites [2] - 9:5, 31:10 present [1] - 20:2 presented [1] - 29:23 presumably [1] - 4:16 presurgical [6] - 4:25, 11:1, 23:22, 24:1, 27:17, 32:21 pretty [2] - 12:14, 22:19 prevent [2] - 12:1, 13:18 prison [1] - 21:4 proactively [1] - 25:23 problem [2] - 7:8, 23:18 problematic [1] - 13:4 procedure [2] - 6:2, 25:20 procedures [2] - 23:23, 27:17 proceed [9] - 3:9, 4:6, 9:9, 10:2, 10:20, 12:24, 18:17, 27:7, 33:7 proceeding [1] - 11:2 Proceedings [1] - 33:12 process [17] - 4:17, 7:11, 8:7, 9:11, 9:12, 10:17, 11:1, 21:24, 25:4, 26:4, 27:4, 27:11, 29:13, 31:4,</p>
	<p style="text-align: center;">O</p> <p>object [1] - 8:25 objecting [1] - 27:10 objection [1] - 26:18 objectionable [1] - 13:22 objections [1] - 29:7 obligated [1] - 12:4 obligation [4] - 5:10, 7:18, 10:4, 10:17 obtain [2] - 17:2, 22:3 obtained [1] - 22:2 obviously [2] - 3:14,</p>	<p style="text-align: center;">P</p> <p>paid [1] - 21:9 part [2] - 4:4, 7:11 parties [6] - 7:10, 8:12, 8:24, 25:19, 26:3, 31:24 parties' [1] - 4:3 party [4] - 10:8, 22:7, 28:25 patient [6] - 6:25, 13:15, 17:5, 18:4, 21:25, 27:13 patient-provider [1] - 6:25 patients [1] - 18:4 pending [1] - 24:20</p>		

<p>31:15, 31:19, 32:24 professionally [1] - 6:20 profitable [1] - 17:14 promptly [1] - 5:1 propose [1] - 7:6 proposed [1] - 8:10 protective [1] - 12:25 provide [20] - 4:7, 6:8, 6:21, 7:11, 8:4, 8:11, 9:18, 10:7, 12:8, 13:17, 16:11, 16:23, 20:4, 20:7, 20:24, 21:12, 28:6, 29:5, 29:9, 30:6 provided [4] - 9:10, 18:20, 21:7, 22:11 provider [4] - 6:25, 13:15, 13:17, 18:18 provider-patient [1] - 13:15 providers [15] - 4:10, 6:18, 6:19, 9:23, 13:14, 14:18, 15:14, 16:3, 18:14, 21:3, 22:19, 23:10, 26:24, 29:18 provides [1] - 7:5 providing [9] - 8:16, 10:3, 11:25, 12:1, 14:5, 15:10, 16:8, 18:14, 20:1 provision [2] - 13:18, 26:19 psychiatric [1] - 16:22 psychiatrists [1] - 19:3 psychologists [1] - 19:3 pun [1] - 23:20 put [5] - 6:11, 13:5, 21:5, 26:15, 32:8 puts [3] - 16:12, 21:23, 27:19 putting [2] - 18:10, 24:14</p>	<p>quote [2] - 11:22, 16:7</p>	<p>representative [1] - 15:17 representatives [4] - 16:22, 17:9, 20:23, 23:1 represented [1] - 17:6 request [5] - 12:16, 19:11, 21:19, 31:23, 32:17 requested [1] - 21:19 requesting [2] - 23:21, 24:7 require [1] - 13:14 required [2] - 4:25, 11:3 requirement [1] - 18:18 requirements [4] - 6:16, 13:21, 18:25, 33:4 requires [5] - 6:12, 13:9, 13:12, 27:6, 28:11 requiring [1] - 33:6 requisite [2] - 16:11, 26:24 reread [1] - 11:12 research [1] - 28:21 resent [1] - 30:18 reserved [1] - 9:4 resolved [1] - 4:9 respect [1] - 31:17 respectful [1] - 15:22 response [3] - 5:14, 16:20, 21:20 responsibility [3] - 6:8, 7:2, 16:8 restricted [2] - 21:4, 21:16 restricting [1] - 7:6 rests [1] - 6:8 retained [3] - 21:9, 23:9, 23:12 reviewed [1] - 4:2 Rifkin [10] - 3:6, 10:24, 11:16, 16:1, 16:20, 17:11, 23:19, 24:23, 26:12, 29:15 RIFKIN [4] - 11:17, 17:15, 17:20, 26:16 Rifkin's [2] - 19:2, 19:11 right-hand [1] - 22:4 risk [1] - 8:22 rules [1] - 26:23 ruling [1] - 13:24</p>	<p style="text-align: center;">S</p> <p>sabotage [1] - 8:6 safe [1] - 20:12 satisfy [1] - 25:23 saw [1] - 22:19 scared [1] - 29:12 schedule [3] - 8:2, 18:1, 24:15 scheduled [1] - 7:24 scheduler [1] - 21:22 scheduling [4] - 9:24, 21:24, 31:4, 32:7 scope [1] - 14:25 screen [1] - 11:13 secure [1] - 6:2 see [4] - 13:23, 14:18, 23:21, 32:5 seeing [1] - 21:4 seem [1] - 12:15 select [1] - 9:18 selected [1] - 14:24 send [2] - 9:21, 22:18 sending [1] - 14:23 sense [4] - 6:3, 17:1, 20:3, 24:12 serious [1] - 12:8 seriously [3] - 30:16, 30:21, 31:2 set [6] - 7:19, 9:8, 15:8, 19:18, 32:12, 32:25 sets [1] - 27:25 several [2] - 11:19, 11:20 share [2] - 7:2, 16:7 ships [1] - 25:14 shot [1] - 19:6 show [2] - 7:15, 31:11 side [2] - 20:2, 25:9 sides [4] - 20:14, 23:7, 23:8, 33:1 significance [1] - 29:1 significant [1] - 15:12 simple [1] - 8:19 simply [2] - 4:9, 25:20 sitting [1] - 26:11 situation [5] - 10:19, 17:5, 17:13, 23:3, 23:14 six [2] - 4:18, 24:2 six-month [1] - 24:2 so.. [1] - 10:11</p>	<p>someone [2] - 3:8, 5:25 soon [1] - 32:13 sorry [2] - 17:18, 19:14 sought [1] - 13:18 source [1] - 6:22 sources [1] - 19:17 speaking [1] - 15:16 specific [1] - 22:1 specifics [1] - 31:7 spending [1] - 25:5 spoken [2] - 13:11, 15:21 start [1] - 26:12 started [2] - 4:17, 21:19 starting [1] - 28:4 state [5] - 5:12, 5:24, 5:25, 6:3, 8:16 State [1] - 30:15 statements [1] - 12:14 status [8] - 3:3, 17:23, 26:15, 31:24, 32:11, 32:14, 32:17, 32:24 stay [28] - 3:16, 4:13, 4:24, 5:9, 10:18, 10:21, 11:12, 11:22, 12:1, 12:5, 12:23, 22:8, 22:10, 22:12, 23:22, 24:7, 24:21, 24:22, 24:25, 26:7, 26:9, 27:16, 27:19, 28:12, 32:6, 32:21, 33:10 stayed [9] - 5:9, 5:15, 11:14, 11:18, 25:3, 25:11, 26:2, 28:2, 31:19 steps [4] - 4:25, 24:1, 24:25, 32:21 still [2] - 10:10, 10:12 Stiller [39] - 7:25, 8:5, 9:22, 17:16, 17:22, 18:8, 19:4, 19:20, 19:24, 19:25, 20:3, 20:5, 20:6, 20:13, 20:24, 21:10, 21:11, 21:14, 22:3, 22:18, 22:23, 23:1, 23:2, 23:11, 23:16, 25:12, 25:17, 26:4, 26:19, 27:1, 27:3, 27:6, 27:9, 27:11, 29:3, 29:6, 29:8 Stiller's [1] - 18:1 stop [2] - 4:15, 4:23 story [4] - 7:9, 7:11,</p>
<p style="text-align: center;">Q</p>	<p style="text-align: center;">R</p>			
<p>qualifications [2] - 26:25, 29:24 qualified [5] - 8:23, 18:18, 29:18, 30:6, 30:10 questions [1] - 26:17 quick [1] - 14:10 quickly [3] - 24:15, 24:16, 25:21 quite [1] - 23:4</p>	<p>raise [2] - 31:9, 31:10 raised [1] - 14:21 raising [1] - 15:4 rather [2] - 4:20, 25:18 reaches [1] - 32:13 read [2] - 25:11, 29:20 ready [1] - 22:4 real [1] - 8:18 really [11] - 6:21, 7:3, 7:22, 10:22, 16:10, 18:11, 19:24, 20:6, 29:10, 30:4, 30:7 reason [1] - 13:16 reasonable [2] - 9:1, 30:22 received [1] - 6:14 receives [1] - 26:20 recently [2] - 16:10, 31:6 record [8] - 3:22, 4:4, 6:23, 14:16, 17:16, 26:15, 30:21, 31:14 records [4] - 13:19, 26:19, 26:21 references [1] - 4:8 referral [4] - 6:10, 9:19, 9:22, 13:17 referrals [4] - 6:14, 6:21, 8:4, 8:11 reflect [1] - 24:12 regard [3] - 4:12, 28:25, 32:19 regarding [2] - 5:18, 18:24 reiterate [1] - 30:20 relationship [3] - 7:1, 13:15, 16:6 relied [1] - 23:6 relitigate [1] - 13:21 relitigating [2] - 19:24, 27:1 render [2] - 29:18, 30:10 repeat [1] - 19:14 repeating [1] - 8:22 report [1] - 17:24 reports [1] - 6:24 representation [1] - 29:15 representations [5] - 9:15, 13:8, 13:11, 18:1, 18:23</p>			

<p>7:20, 29:5 strikes [1] - 17:7 strongly [2] - 23:4, 24:9 struggle [1] - 22:5 stuff [1] - 15:12 submissions [1] - 4:3 sued [1] - 15:9 suggest [1] - 12:15 suggested [1] - 33:3 suggestion [2] - 4:7, 27:3 suggests [2] - 17:1, 17:3 suitable [1] - 8:2 summary [1] - 23:6 support [3] - 13:2, 14:21, 16:11 surgeon [47] - 5:21, 5:22, 5:23, 5:24, 6:5, 6:13, 7:6, 7:7, 7:9, 7:12, 7:16, 7:19, 8:7, 8:23, 9:6, 9:16, 9:19, 10:4, 10:8, 13:9, 13:11, 13:12, 14:24, 15:5, 15:16, 15:18, 15:21, 16:8, 17:17, 18:10, 18:15, 18:22, 18:25, 19:16, 21:7, 21:16, 21:18, 21:20, 22:6, 22:11, 26:20, 27:10, 28:20, 29:4, 29:12, 30:6, 33:1 surgeon's [3] - 7:20, 15:22, 29:1 surgeons [1] - 13:19 surgeries [2] - 6:1, 15:20 surgery [44] - 4:1, 4:9, 4:19, 5:1, 6:4, 6:6, 6:8, 6:12, 6:15, 7:14, 7:16, 8:16, 8:19, 8:24, 9:2, 9:4, 9:6, 9:7, 9:9, 9:14, 9:25, 10:5, 10:8, 10:17, 14:6, 15:7, 15:10, 16:8, 16:11, 16:23, 19:5, 20:1, 20:7, 22:4, 22:24, 23:10, 26:20, 28:5, 28:6, 28:11, 29:10, 31:4, 31:8, 31:10 surgical [6] - 5:22, 6:16, 7:23, 15:18, 15:21, 29:19 suspected [1] - 10:20</p>	<p style="text-align: center;">T</p> <p>talks [1] - 13:15 taxpayers [1] - 6:3 telephonic [1] - 3:3 terminate [1] - 26:15 terms [3] - 12:12, 23:20, 33:2 terrible [1] - 13:5 testified [1] - 4:10 testimony [1] - 29:23 THE [22] - 3:4, 3:14, 5:5, 8:20, 10:12, 10:19, 14:7, 14:9, 14:11, 16:19, 17:18, 19:1, 19:8, 19:14, 19:20, 20:16, 20:23, 22:14, 28:15, 30:12, 30:24, 31:22 therapy [1] - 15:15 third [1] - 28:25 thoughts [2] - 11:16, 20:4 three [5] - 3:9, 3:10, 28:2, 28:5, 28:6 timeline [1] - 27:24 today [1] - 9:20 together [1] - 25:23 totally [1] - 23:8 toward [1] - 8:24 towards [4] - 3:25, 9:1, 10:17, 30:2 training [1] - 26:24 transcript [2] - 22:16, 22:20 transgender [1] - 30:2 translated [1] - 25:19 transparency [1] - 27:12 transparent [2] - 3:23, 27:12 transport [1] - 7:24 treating [3] - 13:14, 16:3, 26:25 treatment [8] - 11:25, 12:2, 12:9, 14:6, 15:14, 20:25, 21:3, 29:18 tried [2] - 3:8, 24:12 troubling [1] - 4:21 true [1] - 12:4 truly [1] - 31:12 try [1] - 23:15 trying [7] - 9:22, 17:3, 21:5, 22:18, 31:13, 31:15, 31:18 turn [1] - 23:18 two [1] - 23:8 twofold [1] - 3:22</p>	<p>typically [1] - 26:20</p> <p style="text-align: center;">U</p> <p>ultimate [1] - 19:25 ultimately [4] - 6:7, 7:20, 21:14, 23:25 unable [1] - 18:2 uncomfortable [2] - 8:7, 19:18 uncover [1] - 18:23 under [2] - 16:5, 29:24 undergo [1] - 15:14 underlying [4] - 13:21, 18:12, 18:13, 27:2 undermines [1] - 30:7 undertake [1] - 4:24 undertaken [1] - 4:14 unfair [2] - 29:25, 30:3 unilaterally [1] - 14:24 unique [2] - 17:5, 31:12 unless [3] - 24:20, 26:7, 31:23 unnecessary [1] - 24:11 unqualified [2] - 18:14, 26:23 unwarranted [1] - 24:11 unwilling [2] - 18:2, 25:20 up [17] - 4:8, 7:3, 7:8, 7:19, 9:8, 13:23, 15:8, 19:18, 20:16, 25:4, 26:3, 26:13, 26:22, 28:18, 32:13, 32:25 updated [1] - 18:20 updating [1] - 9:12 upheld [1] - 18:16 uphold [1] - 13:6 urgency [1] - 24:12</p> <p style="text-align: center;">V</p> <p>vaginoplasty [1] - 31:7 value [1] - 31:25 view [2] - 23:14, 25:18 violate [1] - 24:7 violating [1] - 26:9 voluntarily [2] - 8:23, 12:2</p>	<p>vulnerable [1] - 29:9</p> <p style="text-align: center;">W</p> <p>warranted [2] - 23:11, 28:20 week [1] - 32:14 weigh [1] - 25:9 whatsoever [1] - 5:10 Whelan [2] - 3:7, 16:21 whereby [1] - 6:25 whole [3] - 7:20, 29:5, 30:7 willing [1] - 25:21 willingness [1] - 24:18 Winmill [1] - 3:4 wishes [2] - 15:22, 29:1 words [1] - 21:2 worry [2] - 7:10, 29:12 worse [1] - 17:13 worth [2] - 29:8, 30:3 WPATH [8] - 6:6, 7:1, 7:21, 13:12, 13:14, 16:2, 16:5, 29:24 WPATH's [1] - 18:18</p> <p style="text-align: center;">Y</p> <p>yesterday [1] - 3:16</p> <p style="text-align: center;">Z</p> <p>zero [1] - 16:21</p>
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