

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

-----	X	
DYLAN BRANDT, et al.,	:	
Plaintiff,	:	
v.	:	
LESLIE RUTLEDGE, et al.,	:	Case No. 4:21-CV-00450-JM
Defendant.	:	
	:	
	:	
-----	X	

**RESPONSE IN OPPOSITION TO DEFENDANTS’
MOTION TO EXCLUDE PLAINTIFFS’
EVIDENTIARY DEPOSITION DESIGNATIONS**

Plaintiffs designated portions of the deposition of Amy Embry, the Federal Rule of Civil Procedure (“FRCP”) 30(b)(6) designee of Defendant Arkansas State Medical Board (“the Board”) for use at trial. Defendants’ Motion to Exclude objects to all but one of Plaintiffs’ designations based on four objections; none have merit.

First, Defendants mistakenly assert that because Ms. Embry will be available to testify at trial, use of her deposition “transcripts as evidence at trial is not permissible under Fed. R. Civ. P. 32(a)(4).”¹ But Ms. Embry and the Board are

¹ *Defendants’ Motion to Exclude Plaintiffs’ Evidentiary Deposition Designations and Incorporated Brief in Support* (ECF 158) at ¶ 5 (“Motion”).

Defendants in this action,² and under FRCP 32(a)(3), “an adverse party may use for any purpose the deposition of a party[.]” Thus Ms. Embry’s deposition may be used for any purpose consistent with the Federal Rules of Evidence (“FRE”), irrespective of her availability to testify at trial. *Second*, Defendants make relevance objections. But as discussed below and in the accompanying *Appendix A: Responses to Objections*, each of the designated portions of Ms. Embry’s deposition is relevant to this action. *Third*, Defendants claim that Ms. Embry’s 30(b)(6) testimony constitutes improper lay opinion or legal conclusions. But this objection is meritless given that Ms. Embry was testifying as the 30(b)(6) representative of the Board, one of the entities charged with enforcing Act 626 (the “Health Care Ban”). *Fourth*, Defendants assert that certain portions of Ms. Embry’s testimony were speculative because she lacks knowledge of how the Board “may act in the future or in a hypothetical scenario.”³ Although this objection, too, is meritless, Defendants have waived these form objections under FRCP 32(d)(3)(B) by failing to timely object during Ms. Embry’s deposition. Further, a review of the actual testimony that Defendants claim to be speculative reveals that most of this testimony concerns the actual knowledge or practices of the Board. Contrary to Defendants’ arguments, Plaintiffs’ designations pertain to relevant testimony that is admissible under the

² See *Complaint for Declaratory and Injunctive Relief* (ECF 1) (“Complaint”).

³ *Motion* at ¶ 9.

FRE.⁴ As such, under FRCP 32(a), this Court should allow all of Plaintiffs' designations of Ms. Embry's deposition to be used at trial.

I. Plaintiffs' Deposition Designations are Admissible Under the Federal Rules of Evidence

A. Plaintiffs' Deposition Designations are Appropriate Whether or Not Ms. Embry is Available to Testify at Trial.

Citing FRCP 32(a)(4), Defendants argue that Plaintiffs may not designate portions of Ms. Embry's deposition because she will be available to testify at trial.⁵ But Ms. Embry was the 30(b)(6) designee of the Arkansas State Medical Board and both Ms. Embry and the Board are Defendants in this action.⁶ Under FRCP 32(a)(3), "an adverse party may use for any purpose the deposition of a party[.]" Thus Ms. Embry's deposition may be used for any purpose consistent with the FRE regardless of her availability to testify at trial.

B. Plaintiffs' Deposition Designations are Relevant.

FRE 401 and 402 provide that "relevant evidence is admissible at trial," and that "evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Defendants claim that nearly every topic about which Ms. Embry

⁴ Plaintiffs respond to each of Defendants' objections with particularity in the attached appendix. *See* Appendix A: Responses to Objections.

⁵ *Motion* at ¶ 5.

⁶ *See Complaint*.

testified and Plaintiffs designated is irrelevant.⁷ But evidence is relevant if it pertains to a claim in the action, and Ms. Embry's testimony—as the representative of the State entity charged with regulating the field of medicine and one of the entities charged with enforcing the Health Care Ban—relates to whether the Health Care Ban is sufficiently related to the government's asserted interests in the law and to the harms that would result should the law be enforced.

Plaintiffs allege violations of the Equal Protection Clause, the Due Process Clause, and the First Amendment of the United States Constitution.⁸ For each of these claims, one element is the relationship of the legislation to the government's stated interests.⁹ Ms. Embry's testimony provides evidence that makes it less probable that the Health Care Ban is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest. Her testimony also provides evidence that makes it difficult to credit the government's asserted interests in the Ban at all.

⁷ See *Motion* at 4-6.

⁸ See *Complaint*.

⁹ Heightened scrutiny on the Equal Protection claim requires that the statute be substantially related to an important government interest. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). Heightened scrutiny on the Due Process and First Amendment claims requires that the statute be narrowly tailored to a compelling government interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The government bears the burden of proof on these points. Even under rational basis review, there has to be a rational relationship between the law and a legitimate government interest. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating state constitutional amendment under rational basis review when asserted interests were “impossible to credit” given the facts). This testimony is relevant.

Ms. Embry’s testimony about other medical regulations—specifically, how and why certain regulations were drafted and passed—is relevant to the relationship between the Health Care Ban and the government’s asserted interests in support of the law.¹⁰ Ms. Embry testified that the Board has never enacted a regulation banning medical treatment, and she is not aware of any other statute that does so in Arkansas.¹¹ She additionally testified it is the Board’s belief that “what is prescribed between a patient and the physician is between the physician and the patient”¹² even where a treatment is known to be harmful to patients and to be ineffective.¹³ This

¹⁰ Ms. Embry’s testimony about the Board’s general regulatory and enforcement processes also lays a foundation for relevant testimony. *See, e.g., Exhibit 1* (30(b)(6) Deposition of Defendant Arkansas State Medical Board, May 10, 2022) at 46:15-25; 61:9-18.

¹¹ *Exhibit 1* at 116:13-21; *Exhibit 1* at 136:18-137:20 (“Does the Board prohibit any medical treatment across the Board?/ A. No./ Q. And has the Board ever considered, to your knowledge, a proposal to prohibit a particular medical treatment across the Board?/ A. Not to my knowledge, no. . . . Q. Okay. Are you aware of, as the Director of the Board, of any State statutes that prohibit a particular medical treatment?/ A. The only one that I am aware of is the one that we’re here today to discuss, Act 626.”)

¹² *Exhibit 1* at 208:6-9.

¹³ Ms. Embry testified that the Board believes the decision whether to treat COVID with Ivermectin should be left to doctors and patients even though there are known risks of such treatment and no evidence of effectiveness. *See, e.g., Exhibit 1* at 144:14-148:16 (providing an example of the Board’s investigation into complaints about a physician prescribing Ivermectin to treat COVID-19 in prisons); *id.* at 208:10-21 (“Q. So even if there are known risks for using Ivermectin for COVID and no evidence of its effectiveness, the Board leaves that decision to patients and their physicians?/ A. It is left between physicians and patients, yes./ Q. And the Board

testimony that the Health Care Ban uniquely categorically prohibits particular medical treatments—taking the decision away from doctors and patients and departing from the way medicine is regulated—makes it difficult to credit the asserted state interests of protecting the health of minors and brings into question the relationship between the state’s alleged interests and the Health Care Ban.

Relatedly, though Defendants object specifically to Ms. Embry’s testimony on regulations pertaining to “gastric bypass surgery, or opioids” as “wholly irrelevant”¹⁴ in fact this testimony is very relevant—particularly to the State’s asserted concern that gender-affirming medical care is being provided without thorough patient evaluations and without adequate informed consent—as it shows that in each of these scenarios, the legislature identified harm to patients associated with the way healthcare was being provided and regulated that healthcare to address the specific concerns; it did not ban the care.¹⁵ In contrast to these examples, in this

is in agreement with that position, that that should be between the patients and their physicians?/ A. Yes.”)

Ms. Embry also testified that the Department of Health in Arkansas, in response to concerns about the use of hydroxychloroquine to treat COVID-19, provided guidance recommending against its off-label use, but not prohibiting it. *See Exhibit 1* at 138:2-143:24 (“Q. Yes. I understand from here the State is -- the Department of Health is allowing the off-label use of hydroxychloroquine to treat COVID despite the State's awareness of the lack of evidence of effectiveness for this purpose and the serious risks of using it; is that correct?/ A. According to this document, it says it's allowing the decision to be left to the individual clinicians and their patients.”)

¹⁴ *Motion* at ¶ 7.

¹⁵ Ms. Embry testified that, in response to a problem with over-prescription of opioids in Arkansas causing addiction, the Board enacted a regulation providing sanctions that the Board

case the government has banned all gender-affirming medical care for transgender minors, though Ms. Embry testified that targeted regulations addressing specific issues could be enacted if there were concerns about the provision of gender-affirming medical care to minors.¹⁶ That the Health Care Ban prohibits gender-affirming medical care for transgender minors across the board, regardless of how that care is being provided, rather than take targeted steps to address the specific concerns about care as the State's designated medical regulators do, shows a lack of sufficient relationship between the Ban and these purported government interests.

Ms. Embry's testimony about how the Board would enforce the Health Care Ban should it take effect, and concerns about the Ban conflicting with another regulation prohibiting patient abandonment, are relevant to understanding the scope of the Health Care Ban and its harm. This includes Ms. Embry's testimony on the

could impose on its licensees for over-prescription of pain medicine. *Exhibit 1* at 126:20-132:12. She additionally testified that no one proposed a ban on prescribing opioids. *Exhibit 1* at 131:23-132:8. Ms. Embry also testified that, in response to concerns about the substantial risks of gastric bypass surgery the Board passed a regulation laying out numerous requirements for informed consent for gastric bypass surgery. *Exhibit 1* at 132:13-136:17.

¹⁶ See *Exhibit 1* at 211:25-212:24 (“Q. If there were an issue with, say, some doctors in the State providing gender-affirming medical care to minors and specifically overprescribing hormone therapy, similar to the way opioids have been overprescribed, would it be possible for the Board to enact a regulation to address that problem?/ A. Yes. If they found it necessary, yes./ Q. And similarly, if the Board were to learn that some doctors in Arkansas who provide gender-affirming medical care to minors were not providing sufficient information in the informed consent process about the risks and benefits of these treatments, could the Board enact regulations to impose informed consent requirements?/ A. The Board can create a regulation on any subject they choose. Whether or not it passes the promulgation process is what determines if it goes into effect.”)

Board’s enforcement processes generally (*e.g.*, reviewing complaints, running investigations, holding licensing hearings, sanctioning licensees) and her testimony providing examples of how the Board enforces other regulations.¹⁷ Ms. Embry’s testimony on enforcement—including that if a doctor providing gender-affirming medical care to a minor was before the Board, the Board would need to make a finding of unprofessional conduct as directed by the Health Care Ban¹⁸—makes it more probable that the minor Plaintiffs, the doctor Plaintiffs, and other minor patients and healthcare providers in Arkansas will be harmed by the Health Care Ban. Ms. Embry’s testimony that the Ban would require a doctor who has been providing gender-affirming medical care to abandon that patient during the course of treatment in violation of another regulation further shows the harm of the Ban.¹⁹ That this conflict would concern the Board is also relevant to the lack of connection

¹⁷ See, *e.g.*, *Exhibit 1* at 72:6-72:18; 92:14-94:23.

¹⁸ *Exhibit 1* at 182:4-186:22; see also *id.* at 184:25-185:21 (“[Q] Would the Board have to make a finding of unprofessional conduct as directed by Act 626 if a doctor admitted to providing prohibited care under the statute?/ A. Yes./ Q. Okay. Would the doctor be subject to discipline by the Board?/ A. Yes.”)

¹⁹ *Exhibit 1* at 223:25-224:18 (“Q. So if doctors are currently treating adolescents with gender-affirming hormones, would the doctor be violating their ethical duty to discontinue treatment for a patient without referring them to an alternative provider?/ A. According to this law, yes./ Q. And by “this law” you mean 20-6-202?/ A. Yes./ Q. Okay. So that would be unprofessional conduct on the part of a doctor to discontinue gender-affirming hormones without providing a referral to another doctor to continue that care; is that correct?/ A. Yes, that is my understanding.”); *Exhibit 1* at 240:11-18 (“Q. And there is a possibility that you would have concerns or there is a possibility that if Act 626 takes effect that the government would be intruding on medical decisions families make with their doctors? I’m not sure I understood your answer./ A. I would say yes to both.”)

between the Ban and the government's asserted interests.

Ms. Embry also provided testimony that the Board has never received any complaints about the provision of gender-affirming medical care for adults or minors, and that the Board has not discussed a concern with gender-affirming medical care.²⁰ Given the Board's role in licensing and regulating the medical profession, the fact that the Board has been previously unconcerned with gender-affirming medical care tends to make it more probable that gender-affirming medical care is not harmful, undermining the state's asserted interest in protecting minors from harmful medical treatment.

For the foregoing reasons, all of Ms. Embry's designated testimony is relevant and Defendants' objection based on relevancy should be overruled.

C. Plaintiffs' Designations do not Constitute Improper Lay Opinion or Legal Conclusions.

Defendants object that "it is improper and inadmissible" to "draw a legal conclusion from the testimony of Ms. Embry" and that "because Ms. Embry is not an attorney, it renders any of her lay opinions on the meaning of a law irrelevant

²⁰ *Exhibit 1* at 152:3-153:19; *see also id.* at 154:7-154:11 ("Q. Did the Board ever see a need for a regulation concerning gender-affirming medical care?/ A. It was not communicated to me if they did."); *id.* at 227:17-228:6 ("Q. Okay. Is the Board aware of any minors in Arkansas who have been harmed by gender-affirming medical care?/ A. The Board has not received any complaints and that's how they would learn about that. So, no.")

under Rules 401 and 402.”²¹ It is of no matter that Ms. Embry “is not an attorney.”²² Ms. Embry does not offer any legal conclusions, and to the extent that her testimony pertains to the interpretation or meaning of any laws or regulations, that testimony is within the scope of her capacity as a 30(b)(6) witness for the Board, which is charged with enforcing laws and regulations governing medical providers.²³

FRE 701 and 702 outline admissible opinion testimony by a lay witness and an expert witness. FRE 602 requires that a witness have “personal knowledge” about the matters to which they testify. The unique position of a 30(b)(6) witness as an institutional representative expands the scope of permissible testimony. A 30(b)(6) witness is not limited to the individual’s own personal knowledge, but to the corporate knowledge of the entity for which they are the designee. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (“[A] rule 30(b)(6) designee does not give his personal opinions, but presents the corporation’s “position” on the topic. . . . This extends not only to facts, but also to subjective beliefs and opinions.”) (citations omitted). Courts have allowed corporate representatives to testify to the subjective beliefs of a corporation on legal issues if

²¹ *Motion* at ¶ 8.

²² *Motion* at ¶ 8.

²³ Notably, Ms. Embry’s testimony does not concern what the law is, but rather the Board’s understanding of the law. She is not opining on the law itself, but on the ways the Board applies the law, which is clearly within the Board’s collective knowledge.

the issues are within the corporate knowledge. *Id.* at 434 (“[B]ecause, under the rule 30(b)(6) framework, Grisby acts as the agent for the corporation, he should be able to present Cajun’s subjective beliefs as to whether the products were in breach of warranty, as long as those beliefs are based on the collective knowledge of Cajun personnel.”).²⁴ Anything reasonably within the Board’s collective knowledge, including its understanding of the law it is charged with enforcing, is assumed to be known to Ms. Embry, and is within the scope of permissible lay opinion testimony for her.²⁵

As Ms. Embry herself testified, the Board has knowledge of the sources of its authority and of its own processes, including its process for drafting and passing regulations, enforcing regulations, licensing physicians, and investigating and sanctioning its licensees.²⁶ That the Board’s corporate knowledge extends to legal

²⁴ These views are supported by courts in the 8th circuit. *See, e.g., ResCap Liquidating Exhibit 1 at v. Primary Residential Mortg., Inc.*, No. 0:13-cv-3451 (SRN/HB), 2020 WL 504661, at *29 (D. Minn. Jan. 31, 2020) (“Federal Rule of Civil Procedure 30(b)(6) allows corporate representatives to testify to matters within the corporation’s knowledge during deposition, and Rule 32(a)(3) permits an adverse party to use that deposition testimony during trial.”) (citing *Union Pump Co. v. Centrifugal Tech., Inc.*, 404 F. App’x 899, 907-08 (5th Cir. 2010)); *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 5:14-CV-5262, 2017 WL 1391457, at *4 (W.D. Ark. Apr. 6, 2017) (considering “that a corporate witness does not necessarily have to be expert-qualified in order to offer lay opinion under Fed. R. Evid. 701 about the amount of damages that corporation has allegedly suffered.”) (citations omitted).

²⁵ Ms. Embry has been a member of the Board since 2014 and is currently the Board’s Executive Director. *Exhibit 1* at 18:13-19:7.

²⁶ *Exhibit 1* at 46:2-6. The Board’s knowledge also extends to its own regulations. *See, e.g., Exhibit 1* at 51:24-52:24.

areas is a function of the Board’s role. As the entity tasked with enforcing the Health Care Ban,²⁷ the Board’s opinions on the statute and its enforcement are within the scope of the Board’s corporate knowledge.²⁸ This includes the Board’s opinions on any conflict between the Health Care Ban and other regulations the Board is charged with enforcing.²⁹

The court should overrule Defendants’ objections as to improper lay opinion testimony and legal conclusion testimony.³⁰

D. Plaintiffs’ Designations Are Not Speculative.

Defendants object that Ms. Embry offered “speculative testimony on how the Board as a whole, or an individual Board member, may act in the future or in a hypothetical scenario.”³¹ But Defendants have already waived their objection. Under FRCP 32(d)(3)(B), “[a]n objection on an error or irregularity at an oral examination is waived if: (i) it relates to . . . the form of a question or answer . . . or other matters that might have been corrected at that time; and (ii) it is not timely made during the

²⁷ HB 1570 § 3, ARK. CODE ANN. § 20-9-1504 (a) (“Any referral for or provision of gender transition procedures to an individual under eighteen (18) year of age is unprofessional conduct and is subject to discipline by the appropriate licensing entity or disciplinary review board with competent jurisdiction in this state.”).

²⁸ *See, e.g., Exhibit 1* at 180:15-186:22; *id.* at 240:11-243:21.

²⁹ *See, e.g., Exhibit 1* at 197:6- 201:9; *id.* at 224:19-227:16; *id.* at 236:12-241:21.

³⁰ *See* Appendix A: Responses to Objections.

³¹ *Motion* at ¶ 9.

deposition.” Objections on the basis of speculation are form objections, which must be raised during the deposition so that the noticing attorney has the opportunity to cure the question, or else the objection is waived. *See Otis v. Demarasse*, 399 F. Supp. 3d 759, 765–66 (E.D. Wis. 2019) (“‘Form’ objections is a category that includes objections to . . . lack of personal knowledge [and] speculative . . . questions.”) (citations omitted). Defendants have waived their speculation objections in every instance where they failed to make a form objection during Ms. Embry’s deposition.³²

Defendants also object as speculative to questions that are clearly not speculative. Ms. Embry provides testimony on the Board’s disciplinary capabilities and provides examples of the types of discipline the Board can impose in different scenarios.³³ This testimony is based on the Board’s actual enforcement processes, and the testimony clarifies the scope of the Board’s authority, which is not

³² See Appendix A: Responses to Objections.

³³ *Exhibit 1* at 109:7-16 (“Q. I’m just trying to think of --for example, somebody says; I went to a surgeon and the surgeon did this treatment that left me disfigured, would that potentially be a basis to suspend a license?/ A. They would have to research, they would have to do an investigation, unless there was an immediate threat to the public.”); *id.* at 113:15-22 (“Q. But even with, say, issues concerning, you know, prescription of drugs improperly there couldn’t be a consent order that says you can continue practicing but you can’t prescribe drugs? Could that be something?/ A. Sure. It could be in the consent order, yes.”); *id.* at 115:16-22 (“Q. If the Board learned that a doctor were using a treatment that is unsafe, could the Board issue a rule prohibiting the use of that treatment?/ A. They could. They could draft a rule and put it through the promulgation process.”)

speculative.³⁴ And given that the Health Care Ban has already been passed by the legislature and the Board could be required to enforce it as soon as October 2022 (when this case is scheduled for trial on the merits), testimony about the Board's concerns regarding the Health Care Ban's enforcement are hardly speculative.³⁵

Defendants' last effort to exclude their own 30(b)(6) witness's testimony relies on a personal knowledge objection. Defendants claim that "Ms. Embry does not have personal knowledge of any specific Board member's future thought processes."³⁶ But Ms. Embry did not testify about any individual Board member's thought processes, or about how any individual Board member "may act in the future or in a hypothetical scenario."³⁷ Rather, Ms. Embry testified to the Board's general contemplative process, including examples of when individual Board members' expertise is sought, and does not draw any conclusions about the decisions that the individual Board members might come to.³⁸ The Court should thus overrule

³⁴ See, e.g., *Exhibit 1* at 116:12-21 ("Q. So let me ask it differently. Has the Board ever promulgated a rule that prohibits anyone from performing a particular service or medical treatment?/ A. Not to my knowledge, no. Q. But it could if that came to its attention that there was a harmful treatment going around?/ A. Yes.")

³⁵ See *Exhibit 1* at 236:12-237:14. Ms. Embry's testimony about concerns about patient abandonment other Board members have raised during past Board meetings are not speculative. See *Exhibit 1* at 237:10-239:4.

³⁶ *Motion* at ¶ 9.

³⁷ *Motion* at ¶ 9.

³⁸ See, e.g., *Exhibit 1* at 82:4-82:19 ("Q. But for the Board to determine whether this is something that should be investigated for failing to comply with accepted medical practices, how do they determine that?/ A. There are 14 Board members, so each one determines that individually.

Defendants' objections due to calling for speculation under Rule 602.³⁹

II. Conclusion

Amy Embry's deposition testimony may be designated regardless of her availability to testify, is relevant, does not contain improper lay opinion or legal conclusions, and is not speculative. For the foregoing reasons, the Court should overrule Defendants' objections and allow Plaintiffs' designations of Ms. Embry's deposition to be used at trial.

Dated: July 15, 2022

/s/ Leslie Cooper

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I think what I was trying to get to is that if they ask the surgeons their expertise and the surgeon says; this never should have happened, they would have been taught in medical school, or something like that. So it could be from medical education, it could be from continuing education, it could be from certifications.”)

³⁹ See Appendix A: Responses to Objections.

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**Admitted pro hac vice*

Attorney for Plaintiffs

Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF ARKANSAS
3 CENTRAL DIVISION
4 CASE NO. 4:21-CV-00450-JM

5 -----X

6 DYLAN BRANDT, by and through his
7 Mother, JOANNA BRANDT, et al.,
8 Plaintiffs,

9 V.

10 LESLIE RUTLEDGE, et al.,
11 Defendants.

12 -----X

13

14

15 REMOTE/ORAL/WEB VIDEOCONFERENCE
16 VIDEOTAPED DEPOSITION OF AMY E. EMBRY
17 (Sitting in Little Rock, Arkansas)

18 May 10, 2022

19 10:00 a.m.

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23

24 Reported by:

25 Maureen Ratto, RPR, CCR

* * *

Videotape deposition of Amy E. Embry, held virtually via Zoom Teleconference, hosted from Veritext Legal Solutions, pursuant to notice, before Maureen Ratto, Certified Court Reporter, License No. XI01165, Registered Professional Reporter, License No. 817125, and Notary Public.

* * *

A P P E A R A N C E S :

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GILL RAGON OWEN, PA 425 West Capitol Avenue Little Rock, Arkansas 72201 BY: DRAKE MANN, ESQ. BETH ECHOLS, ESQ.

A P P E A R A N C E S, continued:

Counsel for the Defendants: SENIOR ASSISTANT ATTORNEY GENERAL, PUBLIC PROTECTION DIVISION OFFICE OF ARKANSAS ATTORNEY GENERAL 323 Center Street Little Rock, Arkansas 72201 BY: AMANDA LAND, ESQ.

ALSO PRESENT: Randy Schoening, Legal Video Specialist

VIDEOGRAPHER: We are on the audio and video record. It is 10:05 a.m. The date is May 10th, 2022.

This is the videotape recorded deposition of Amy Embry, taken by counsel for the Plaintiff in the matter of Dylan Brandt, et al versus Leslie Rutledge et al, filed in the United States District Court Eastern, District of Arkansas, Central Division, Case No. 4:21-CV-00450-JM.

This deposition is being held at Gill Ragon & Owen, PA, 425 West Capitol, Suite 3800, Little Rock, Arkansas.

My name is Randy Schoening from the firm of Veritext, I'm the videographer. The court reporter is Maureen Ratto, from the firm Veritext.

Will counsel please introduce themselves for the record.

MS. COOPER: Yes. Thank you.

1 Leslie Cooper from the ACLU for
2 Plaintiffs.

3 MR. LESTER: John Lester from
4 Sullivan & Cromwell for the
5 Plaintiffs.

6 MR. RICHARDSON: Daniel
7 Richardson from Sullivan & Cromwell
8 for the Plaintiffs.

9 MR. SULLIVAN: Gary Sullivan,
10 ACLU of Arkansas for the
11 Plaintiffs, in person.

12 MR. MANN: Drake Mann, Gill
13 Ragon Owen for the Plaintiffs.

14 MS. LAND: Amanda Land of the
15 Arkansas Attorney General on behalf
16 of the Defendants.

17 VIDEOGRAPHER: Will the
18 witness please be sworn?

19 * * *

20 A M Y E. E M B R Y, having been duly
21 sworn by an authorized Notary of the
22 State of Arkansas, testifies as
23 follows:

24 DIRECT EXAMINATION BY MS. COOPER:

25 VIDEOGRAPHER: You may

1 AMY E. EMBRY

2 proceed.

3 Q. Thanks so much. Good morning,
4 Ms. Embry. I'm Leslie Cooper. I'm with
5 the ACLU, counsel for Plaintiffs and I'll
6 be taking your deposition today.

7 Before we get started, can I
8 just ask you to state your full name for
9 the record?

10 A. My name is Amy Elizabeth
11 Embry.

12 Q. Thank you. And have you ever
13 had your deposition taken before?

14 A. Yes.

15 Q. Okay. How many times?

16 A. Once.

17 Q. Was that in your capacity as
18 an employee of the Board?

19 A. Yes.

20 Q. Okay. Can you tell me what
21 that case was about?

22 A. It was a lawsuit basically for
23 a license action or action against a
24 license, I guess I should say.

25 Q. So a medical provider

1 AMY E. EMBRY
2 challenging a decision concerning a
3 licensing --

4 A. Correct.

5 Q. -- issue?

6 A. Correct.

7 Q. So you have been deposed once
8 before, so what I'm about to say may
9 sound familiar, but just to make sure so
10 we get a clean record I'm going to go
11 over some of the groundrules for
12 deposition taking so the transcript is
13 clear.

14 First thing is, the best we
15 can, to the best we can we should really
16 try to avoid speaking over one another.
17 So if you could give me a chance to
18 finish my question, even if you
19 anticipate what I'm asking, before
20 answering it will prevent the court
21 reporter from having to try to hear two
22 things at once. Does that sound okay?

23 A. Yes.

24 Q. Okay. And I similarly will try
25 to wait until you complete your answer to

1 AMY E. EMBRY

2 ask a new question.

3 Also, unlike regular
4 conversations, we have to always answer
5 verbally. We can't nod or even say a-hum
6 because that's kind of hard to understand
7 in -- typed out what that means. So I'm
8 just going to ask you to do your best to
9 answer verbally each time. Okay?

10 A. Okay.

11 Q. It may be that I'll ask
12 questions that you don't fully understand
13 or are confusing. If that happens, just
14 let me know that the question wasn't
15 clear to you and I can try to ask the
16 question in a different way to clarify
17 it. So please make sure to do that if a
18 question is not clear. Okay?

19 A. Okay.

20 Q. Because if you do answer a
21 question we will assume that means you
22 understood it. Okay?

23 We will take breaks as we go
24 through. I will take them periodically,
25 but if you feel you need to break at any

AMY E. EMBRY

1 time before I bring it up just let me
2 know and we can find a breaking point to
3 do that. We will just need to make sure
4 we get completed answers to any questions
5 pending and then I'll find a time to take
6 a break. So no problem if you need to
7 take a break. Okay?

8 A. Okay.

9 Q. Is there anything that would
10 prevent you from giving complete and
11 accurate testimony today?

12 A. No.

13 Q. Okay. Is there any material
14 you're consulting today in connection
15 with your deposition, any notes or
16 written materials?

17 A. I do not have any notes or
18 anything with me.

19 Q. Okay. Did you do anything to
20 prepare for your deposition today?

21 A. Just -- I reviewed the
22 documents received for the deposition, I
23 reviewed that, and spoke with Amanda
24 Land.
25

AMY E. EMBRY

1 Q. And when you say the documents
2 received, what documents are you
3 referring to?

4 A. That was the document stating
5 that I was going to be deposed today.

6 Q. Okay. We'll look at that just
7 to confirm. I understand you to be
8 referring to the notice of your
9 deposition; is that your understanding?

10 A. Yes.

11 Q. And that included topics for
12 the deposition?

13 A. Yes.

14 Q. Okay. You didn't review
15 anything else?

16 A. No.

17 Q. Okay. And you said you met
18 with Ms. Land; is that correct?

19 A. Yes.

20 Q. And without sharing any
21 content of your conversation, how long
22 did you meet with her?

23 A. Maybe an hour, maybe an hour.
24 I didn't write down the beginning time or
25

AMY E. EMBRY

1 ending time, but maybe an hour.

2 Q. When was that?

3 A. Yesterday.

4 Q. And just the one time?

5 A. Yes.

6 Q. Okay. Did you review any
7 documents with counsel?

8 MS. LAND: Objection.

9 MS. COOPER: I'm sorry. I
10 didn't hear.

11 MS. LAND: I made an
12 objection.

13 A. Again, it was the document
14 that I received for my deposition and
15 what I would be responsible for answering
16 today.

17 Q. And I probably should have
18 mentioned this before, that your counsel
19 may from time to time object to some of
20 my questions. Some of them may be
21 objections about the form of my question,
22 in which case she's making the record and
23 I can either correct the question or you
24 can -- or leave it as is and you can
25

AMY E. EMBRY

1 answer. Unless she makes a privilege
2 objection and instructs you not to
3 answer, otherwise you can continue
4 answering. Okay?

5 A. Okay.

6 Q. Have you spoken with anyone
7 besides Ms. Land about your deposition
8 today?

9 A. I spoke with higher-ups at the
10 Department of Health to let them know I
11 would be in a deposition today. I also
12 informed the Board that they were being
13 sued and that I would be deposed.

14 Q. Okay. And when you say you
15 informed the Board, I know that's a lot
16 of people, how did you inform them?

17 A. I believe it was at a meeting
18 and I just told them that we had received
19 documents that we were being sued because
20 of the legislation that was passed and
21 the question from them was; why are they
22 suing us? And I said I don't know.

23 Q. And when did this happen?

24 A. I believe the lawsuit was
25

1 AMY E. EMBRY
2 filed last fall, so I don't have a date,
3 a specific date, but it would have been
4 in the fall or shortly after the lawsuit
5 was filed.

6 Q. So that was a meeting you --
7 that occurred some time shortly after the
8 lawsuit was filed in this case; is that
9 right?

10 A. It could be. And again, I have
11 to say this was months ago. So it may be
12 that I only spoke with one Board member.
13 I just don't recall. I do know that I did
14 tell a Board member that we're being
15 sued.

16 Q. Okay. Did you notify the Board
17 at any time in writing that they were
18 being sued?

19 A. Not to my knowledge.

20 Q. Okay. And did anybody else
21 notify the Board in writing, besides you,
22 that the Board was being sued?

23 A. No, just the documents that
24 came.

25 Q. Okay. And then so that was at

1 AMY E. EMBRY
2 least several months ago that
3 communication with at least one Board
4 member about being sued. But more
5 recently, since you've been notified
6 about your deposition, did you speak to
7 anyone in the Board about that?

8 A. No.

9 Q. Okay. And I'd like to mark as
10 Exhibit 1 the 30(b)(6) notice of the
11 Board. That will be posted on Exhibit
12 Share in a moment.

13 (Exhibit 1, 30(b)(6) notice
14 for Defendant Arkansas State
15 Medical Board was received and
16 marked on this date for
17 identification.)

18 MS. LAND: This is my first
19 time using Exhibit Share, so I'm
20 just making sure I find it as well.
21 Leslie, has it been uploaded to
22 Exhibit Share yet? I am not seeing
23 it.

24 MS. COOPER: I think it's
25 still uploading. Sorry about that.

1 AMY E. EMBRY
2 Let's give it another minute before
3 we abandon Exhibit Share.

4 MR. SULLIVAN: I'm going to
5 try and reload the exhibit. I
6 apologize.

7 MS. COOPER: Thank you.

8 MR. RICHARDSON: If you reload
9 the folder named Marked Exhibits
10 you should see Exhibit 1, Notice of
11 30(b)(6) deposition.

12 VIDEOGRAPHER: This is the
13 court reporter, we're going to need
14 someone to share that to a screen
15 share because the witness is not
16 able, I mean, I'm not able to go
17 out of the feed into the share. So
18 can you actually share it on the
19 screen?

20 MS. COOPER: I think given
21 that tech issue that we didn't
22 realize would be an issue, we
23 should resort to the hardcopies.
24 Can we go off the record for just a
25 moment?

1 AMY E. EMBRY
2 VIDEOGRAPHER: Yes. We are off
3 the record at 10:18 a.m.
4 (Discussion is held off the
5 record.)

6 VIDEOGRAPHER: We are back on
7 the record at 10:20 a.m.

8 Q. Thank you. Ms. Embry, you've
9 been shown a document that we'd like to
10 mark as as Exhibit 1. Do you recognize
11 this document?

12 A. Yes.

13 Q. Is this the Notice of
14 Deposition that you referred to earlier?

15 A. Yes.

16 Q. Okay. And you've reviewed this
17 entire document?

18 A. Yes.

19 Q. Okay. And do you understand
20 that you have been designated by the
21 Defendant Arkansas State Medical Board to
22 testify on its behalf concerning a number
23 of topics listed in this notice?

24 A. Yes.

25 Q. And are you prepared to

1 AMY E. EMBRY
 2 testify on behalf of the Board regarding
 3 the topics listed in this notice?
 4 A. Yes.
 5 Q. You can put that aside for
 6 now. Are you currently employed by the
 7 Arkansas State Medical Board?
 8 A. I am.
 9 Q. And if I say "the Board" will
 10 you understand that I mean the Arkansas
 11 State Board?
 12 A. Yes.
 13 Q. And are you currently the
 14 Executive Director of the Board?
 15 A. Yes.
 16 Q. Okay. Since when?
 17 A. 2018.
 18 Q. And did you hold any position
 19 with the Board before 2018?
 20 A. Yes.
 21 Q. What position was that?
 22 A. It was the Administrative
 23 Services Manager.
 24 Q. And what were your
 25 responsibilities in that position?

1 AMY E. EMBRY
 2 A. I was responsible for the
 3 human resources, accounting, budget,
 4 general office management of the Board.
 5 Q. When did you start that
 6 position?
 7 A. 2014.
 8 Q. Prior to that did you hold any
 9 employment with the Board?
 10 A. No.
 11 Q. What did you do before that?
 12 A. I worked at the Department of
 13 Finance and Administration for the State
 14 of Arkansas.
 15 Q. Do you have any medical
 16 training?
 17 A. No.
 18 Q. Any training at all related to
 19 healthcare?
 20 A. No.
 21 Q. Can you tell me what your
 22 responsibilities are as the Executive
 23 Director of the Board?
 24 A. I manage the day-to-day
 25 functions of the Board, I have managers

1 AMY E. EMBRY
 2 that manage certain sections, I also work
 3 closely with the Board for Board meetings
 4 and each section within the Board works
 5 with the Board in their own way. In a
 6 nutshell, that's what I do.
 7 Q. Now, you mention sections.
 8 Could you tell me what the sections are?
 9 A. We have a regulatory section,
 10 licensure, we have IT and we have a
 11 credentialing section.
 12 Q. And those are all of the
 13 sections?
 14 A. Yes.
 15 Q. And you have someone who is a
 16 manager for each of those sections; is
 17 that right?
 18 A. Yes.
 19 Q. And are there other employees
 20 of the Board besides you and those
 21 managers?
 22 A. Yes. Those --
 23 Q. I'm sorry.
 24 A. Those managers do have
 25 employees and we have right now I would

1 AMY E. EMBRY
 2 say 25, between 25 and 30 total
 3 employees, including the managers and
 4 myself.
 5 Q. Okay. And can you tell me
 6 within the regulatory section who the
 7 employees are or what their positions are
 8 and what they do?
 9 A. There are three employees, one
 10 of those is a manager. The manager's
 11 name is Juli Carlson and she had two
 12 employees who are fairly new, one is
 13 Penny Henderson and the other is
 14 Elizabeth Jones.
 15 Q. And what are their jobs?
 16 A. They handle all the complaints
 17 that come in that need to be processed to
 18 the Board, they also handle any letters
 19 or communication from the Board to the
 20 licensees. They handle continuing medical
 21 education audits, any questions that come
 22 in as far as how to file a complaint.
 23 Q. And do I assume correctly that
 24 the licensing or licensure section has to
 25 do with doctors and other healthcare

AMY E. EMBRY

providers getting their license to practice in Arkansas; is that correct?

A. It is the healthcare providers that we license, that is what they deal with.

Q. But any complaints regarding any licensed healthcare providers go to the regulation section; is that right?

A. Correct.

Q. Or regulatory, is that what you called it?

A. Yes, ma'am.

Q. Okay. Thank you. The employees in the regulatory section, do any of those employees have medical or healthcare training?

A. Not to my knowledge.

Q. Okay. I want to ask you a few questions about the current Board members of the Board. You have at this point, I'm going to count here. Maybe you can just tell me how many because you probably know it, how many Board members you have?

A. In all we have 14 Board

AMY E. EMBRY

members.

Q. And of those Board members that are currently on the Board, are all -- have they all been on the Board since, say, the beginning of 2021?

A. With the exception of one. I would have to go back and check my records to see when they came in. I only know of one that was not on the Board as of 2021.

Q. And who was that?

A. Dr. Brian McGee. He was just appointed within the past two months.

Q. And any of the members who were on the Board in January 2021, if you look at that list of people, are any of those members no longer on the Board?

A. Yes.

Q. Who is that?

A. You have Dr. Rutledge, Dr. Staggs. Bear with me, I have to think about this. I think that's it. We've lost two.

Q. So you've lost two and you

AMY E. EMBRY

gained one?

A. Correct.

Q. Okay.

MS. COOPER: Can we mark as Exhibit 2, tab 2, please, the Arkansas Medical Practices Act and Regulations.

(Exhibit 2, Arkansas Medical Practices Act and Regulations, revised as of December 2, 2020 was received and marked on this date for identification.)

Q. Do you have that in front of you, Ms. Embry?

MS. LAND: I'm showing her my Exhibit Share.

MS. COOPER: I'm sorry. Is there someone speaking that I can't hear on the record?

MS. LAND: That was Amanda Land. I asked if I could have a copy because I don't believe you are uploading these to --

MS. COOPER: Yeah. We can

AMY E. EMBRY

upload to Exhibit Share simultaneously. You're able to review that, Amanda?

MS. LAND: I'm on Exhibit Share. It seems to be working because I can see the first exhibit that you did upload, but if -- whether it's in paper or Exhibit Share, I don't have a preference.

MS. COOPER: Okay. We will upload all of the exhibits on Exhibit Share for counsel to be able to review while giving hardcopies to the witness. Okay. So we're in the process of uploading Exhibit 2.

And Amanda, if you can let me know when you're able to see that.

MS. LAND: It has popped up for me.

MS. COOPER: Amanda, I can't hear you so well. If you can speak a little louder or adjust the mic.

MS. LAND: I can see the

1 AMY E. EMBRY
 2 exhibit.
 3 MS. COOPER: Great. Thank you.
 4 Q. Ms. Embry, do you recognize
 5 the document placed in front of you
 6 that's been marked as Exhibit 2?
 7 A. Yes.
 8 Q. Okay. And that is the, for the
 9 record, the title page is Arkansas State
 10 Medical Board, Arkansas Medical Practices
 11 Act and Regulations; is that correct?
 12 A. Yes.
 13 Q. And is this set of -- is this
 14 act and set of regulations what governs
 15 the Board?
 16 A. Yes.
 17 Q. And I take it you've seen this
 18 document before?
 19 A. Yes.
 20 Q. Okay. If you can turn to
 21 Section 17-95-301?
 22 A. Let me go to the table of
 23 contents to get the page.
 24 Q. I believe it's 21. Is this the
 25 provision that dictates the membership of

1 AMY E. EMBRY
 2 the Board?
 3 A. Yes.
 4 Q. And do I understand correctly
 5 that there are 14 members appointed by
 6 the Governor?
 7 A. Yes.
 8 Q. And 10 must be active medical
 9 practitioners?
 10 A. Yes.
 11 Q. And one must be a practicing
 12 physician; did I say that right? If you
 13 look at Subsection 3 --
 14 A. Yes. That is the one that --
 15 yes. There are physicians but this is the
 16 one that is appointed by that specific
 17 organization. That's what was throwing me
 18 on your question.
 19 Q. Understood. Thank you. So
 20 there are other physicians on the Board
 21 as well?
 22 A. Yes.
 23 Q. Okay. And I understand -- do I
 24 understand correctly that two members
 25 must not be medical providers; is that

1 AMY E. EMBRY
 2 correct?
 3 A. Yes.
 4 Q. And one must be an osteopathic
 5 physician?
 6 A. Correct.
 7 Q. Now, I'd like to go through
 8 the current members of the Board and ask
 9 you to tell me what their designated
 10 position is on the Board? In other words,
 11 are they a medical practitioner, are they
 12 a non-medical provider, and what their
 13 area of practice is, if they are medical
 14 providers.
 15 So we can start with -- and if
 16 I read a name and that person is no
 17 longer on the Board just let me know.
 18 Sylvia Simon, is she still on the Board?
 19 A. Yes.
 20 Q. And what is her designated
 21 position on the Board?
 22 A. She is the Chairman of the
 23 Board, Chairperson of the Board.
 24 Q. And she is a physician?
 25 A. Yes.

1 AMY E. EMBRY
 2 Q. What is her practice area?
 3 A. I'm going to say family
 4 practice.
 5 Q. How about Brian Hyatt, is he
 6 still on the Board?
 7 A. Yes.
 8 Q. And what is his designated
 9 position?
 10 A. He is the vice-chair.
 11 Q. And he's a physician as well?
 12 A. Yes.
 13 Q. What is his area of practice?
 14 A. Psychiatry.
 15 Q. How about Veryl Hodges?
 16 A. Yes.
 17 Q. They're on the Board?
 18 A. Yes.
 19 Q. And what is their designated
 20 position?
 21 A. He is the secretary of the
 22 Board.
 23 Q. Is he a physician?
 24 A. Yes.
 25 Q. I see his title says DO, is

1 AMY E. EMBRY
 2 that a doctor of osteopathy, am I saying
 3 that correctly?
 4 A. Yes.
 5 Q. Is John Scribber still on the
 6 Board?
 7 A. That's John Scribner.
 8 Q. Thank you. Is he still on the
 9 Board?
 10 A. Yes.
 11 Q. And what is his designated
 12 position on the Board?
 13 A. He is the treasurer.
 14 Q. And he's a physician?
 15 A. Yes.
 16 Q. What is his area of practice?
 17 A. Family practice.
 18 Q. Okay. Elizabeth Anderson, is
 19 she still on the Board?
 20 A. Yes.
 21 Q. Is she a physician?
 22 A. No.
 23 Q. So she's one of the designated
 24 non-physicians on the Board?
 25 A. Correct.

1 AMY E. EMBRY
 2 Q. Okay. Does she have a title
 3 within the Board, such as secretary or
 4 treasurer?
 5 A. No.
 6 Q. Rhys Branman still on the
 7 Board?
 8 A. Yes.
 9 Q. And what is -- does he have a
 10 designated position or title?
 11 A. All the designated were the
 12 four officers we've already mentioned.
 13 Q. Okay. Is Rhys Branman a
 14 physician?
 15 A. Yes.
 16 Q. What is his area of practice?
 17 A. Plastic surgery.
 18 Q. Is Robert Breving still on the
 19 Board?
 20 A. Yes.
 21 Q. And he's a physician as well?
 22 A. Yes.
 23 Q. What area of practice?
 24 A. Surgery.
 25 Q. Is Edward Gardner still on the

1 AMY E. EMBRY
 2 Board?
 3 A. Yes.
 4 Q. Is he a physician?
 5 A. Yes.
 6 Q. And his area of practice is?
 7 A. He's an ENT doctor, ENT
 8 physician.
 9 Q. Is Rodney Griffin still on the
 10 Board?
 11 A. Yes.
 12 Q. Is he a physician?
 13 A. Yes.
 14 Q. And is his area of practice?
 15 A. Family medicine, as far as I
 16 can recall.
 17 Q. Is Betty Guhman -- am I saying
 18 that right?
 19 A. Guhman.
 20 Q. Is Betty Guhman still on the
 21 Board?
 22 A. Yes.
 23 Q. Is she a physician?
 24 A. No.
 25 Q. Okay. Is Timothy Paden still

1 AMY E. EMBRY
 2 on the Board?
 3 A. Yes.
 4 Q. Is he a physician?
 5 A. Yes.
 6 Q. What area of practice?
 7 A. Family medicine.
 8 Q. Is Don Philips still on the
 9 Board?
 10 A. Yes.
 11 Q. And he's a physician?
 12 A. Yes.
 13 Q. And what is his area of
 14 practice?
 15 A. OBGYN.
 16 Q. Okay. And I believe you said
 17 William Rutledge and David Staggs are no
 18 longer on the Board?
 19 A. That is correct.
 20 Q. Okay. Are they both
 21 physicians?
 22 A. Yes.
 23 Q. And can you tell me what their
 24 areas of practice are?
 25 A. Dr. Rutledge was a surgeon and

AMY E. EMBRY

Dr. Staggs was family practice.

Q. Okay. Thank you. We were looking at the Arkansas Medical Practices Act. If we can go to Section 17-95-303(5) and I understand that Section 303(5) are the duties of the Board and it says, "The Arkansas State Medical Board shall:", and list a number of items. And number (5) says "have the authority to employ a Medical Director who shall hold a valid license to practice medicine in this State to evaluate medical issues and to assist in investigations pending before its Board." Did I read that right?

A. Yes.

Q. Does the Board employ a Medical Director?

A. No.

Q. No. Since you've been with the Board have they ever employed a Medical Director?

A. No.

Q. Do you know why that is?

A. No, I do not.

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Q. Okay. Staying in that same part of the statute, Section 303, under subsection (7) it says, that the Medical Board shall "have the power and authority to employ one or more inspectors as may be necessary to carry out the provisions of the Arkansas Medical Practices Act."

Does the Board employ inspectors?

A. We employed one inspector.

Q. Is that in the past?

A. Yes.

Q. When was that?

A. Within the past year. I don't have exact dates.

Q. But you don't currently have any employed inspectors?

A. Not employed by the Board, no.

Q. Do you work with inspectors who are not employed by the Board?

A. Yes.

Q. What is that arrangement? Can you explain that to me?

A. It is in the Arkansas code

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that we are to use Pharmacy Services at the Arkansas Department of Health for inspections, investigations -- not inspections, investigations.

Q. Is that only for investigations concerning issues relating to prescription of drugs?

A. Yes, and other things, we use it also for others besides just the prescription of drugs.

Q. So these are inspectors that are employed by Pharmacy Services at the Department of Health?

A. Correct, but it's investigators not inspectors. I believe they're investigators.

Q. So just I want to make sure I understand how this works. If there is a complaint against a physician, for example, and the Board feels the need to do an investigation it would work with an investigator from Pharmacy Services; is that right?

A. Yes.

AMY E. EMBRY

Q. How many investigators do they have at Pharmacy Services that you work with?

A. That I know of, we have worked with three.

Q. But are there others there besides the ones you've worked with?

A. That is my understanding but that's not my staff, so I can't answer truthfully on that.

Q. Okay. You know of three; is that right?

A. Yes. That is correct.

Q. And what is the role of these investigators?

I sort of tried to lay out what I understood but I'm sure that was not a full description.

What do these investigators do when you work with them?

A. Well, if the Board votes that there needs to be an investigation on a complaint that comes in a subpoena will be issued that I sign and those

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investigators serve that subpoena for whatever is listed in the subpoena.

Q. Do they do anything else?

A. They gather that information, they do -- they evaluate it and they present a report back to the Board offices to present to the Board members.

Q. When you say they gather information, is that information that they gather documents that are requested by a subpoena that they then deliver; is that what you mean?

A. That is correct.

Q. That might be some of their medical records, that kind of thing?

A. It could be, yes.

Q. So the investigator serves the subpoena that asks for documents and then collects those materials and then writes a report about the materials; did I get that right?

A. Yes, they take them back. They will look through them and try to gather what information they can, and then

AMY E. EMBRY

present a report to the Board office.

Q. And who identifies the documents that are being requested in the subpoena? Is that an employee of the Board?

A. I need you to clarify that question.

Q. Sure. So you mention that the investigators from Pharmacy Services will serve the subpoena. Who writes the subpoena?

A. The Board office does, staff at the office writes the subpoena.

Q. Which staff? Let's say it's in -- presumably it's always in a regulatory context, right?

A. Yes, regulatory section.

Q. So that would be the manager or the other employees in the regulatory section would write that subpoena?

A. Correct.

Q. Presumably with counsel is that involved or no?

A. Yes. It's a very generic

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subpoena listing exactly what we need, so...

Q. And then the report is provided to those within the regulatory section when it's done?

A. Yes.

Q. And then what happens after that in the investigation process?

A. It is prepared, that report is prepared to be presented to the Board members, it's discussed at the next meeting or if they feel they have enough information from that investigation to present it to the Board. If not, there may be other things that need to be done and then the Board discusses it and they make a decision on what needs to be done next.

Q. Thank you. While we're in this part of the Arkansas Medical Practices Act, if you can look at 17-95-303 subsection (9), bottom of the same page and it's again, "The Arkansas State Medical Board shall consider and give

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deference to data, studies consensus documents and conclusions issued by the Center For Disease Control and Prevention or the National Institute of Health whenever their data, studies consensus documents and conclusions are relevant to any decision made pursuant to the Board's powers and duties under the Arkansas Medical Practices Act."

Is that something the Board does?

A. I have not seen it in my tenure at Director. I don't know if a situation has come up that they have to do that. So during the time that I've been the Board Director, I can't say that I've seen that --

Q. Okay.

A. -- from these organizations listed in this section.

Q. Okay. Have you seen data, studies, consensus documents or conclusions issued by other organizations that were considered by the Board in

AMY E. EMBRY

making any decisions concerning regulation of medical professionals?

A. I do not recall that. I would have to go back and look at documents to see.

Q. Okay. Is it fair to say the Board is the State entity in Arkansas charged with regulating the practice of medicine; is that correct?

A. Yes.

Q. And what does that mean, to regulate the practice of medicine to the Board?

MS. LAND: Object to form. You may answer.

A. Well, they put it in the code that the State Medical Board is -- is -- let me start that over.

We are responsible for regulating those healthcare professionals that we license. If someone is practicing medicine without a license it is usually referred to our Board. So if someone has another license with another healthcare

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licensing board, but it does not fall within their scope of practice what the complaint is being made against that individual, then it will probably be referred to the Medical Board as practicing medicine, this individual is practicing medicine.

Q. And for those who are licensed by the Board, those medical professionals licensed by the Board, you said you're responsible for regulating those healthcare professionals. What do you mean by "regulating" them?

A. Well, maybe that wasn't the best term but we are responsible for those individuals that are licensed by us, but we work on a complaint basis.

So we have between 19 and 20 thousand liscensees at the Board right now in various practice and various types of licenses. And if a complaint comes in every single complaint is reviewed by the Board, every single complaint is reviewed by the Board, and from there it is

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determined what needs to be done. We do get complaints that it may be, for example, on a nurse, we do not regulate nurses, we forward it onto the Nursing Board.

Q. Thank you.

A. And we work on a complaint basis.

MS. COOPER: Can we see tab 3 and mark that as Exhibit 3?

(Exhibit 3, printout of the homepage of the Arkansas State Medical Board website was received and marked on this date for identification.)

MS. COOPER: Amanda, if you can let me know if that's available to you.

MS. LAND: Yes, it is. I'll let you know each time going forward.

Q. Thank you. Ms. Embry, do you recognize what's been marked as Exhibit 3?

AMY E. EMBRY

A. Yes.

Q. And can you tell me what that is?

A. This is -- it is the homepage or a page from our website.

Q. So I'd like you to read along with me the box to the section in the middle that says, "The Medical Board's mission is to protect the public" -- excuse me, I'll start that again. "The Medical Board's mission is to protect the public and act as their advocate by effectively regulating the practices of medical doctors, osteopathic medical directors, physician assistants, medical corporations, respiratory therapists, occupational therapists, occupational therapy assistants, radiology practitioner assistants and radiologist assistants." Did I read that right?

A. Yes, ma'am.

Q. Is this an accurate statement of the Board's mission?

A. Yes.

AMY E. EMBRY

Q. And I understand the Board has authority to enact regulations to carry out the purposes and intentions of the Medical Practices Act; is that right?

A. Yes.

Q. So under what circumstances can the Board enact regulations?

A. If it is in the law where it says that a licensing board shall or will promulgate a rule or if we are requested by the legislature to do so.

Q. Okay. So I want to unpack that a little bit.

So the first scenario is if a statute says the Board shall enact a regulation concerning a particular topic, you will -- the Board will enact a regulation; is that correct?

A. Yes.

Q. Okay. And then a separate scenario is if the legislature requests the Board to enact a regulation; did I understand that right?

A. Yes.

AMY E. EMBRY

Q. And that's outside of the context of a statute?

A. Yes. That is very rare.

Q. Has that ever happened since you've been with the Board?

A. Yes. It finished up when I became Director. It started with a previous Director and even though we were requested by the legislature to come up with a rule, the rule did not pass and it was not enacted.

Q. What was the issue that the legislature asked you to come up with a rule about?

A. It was basically about cosmetic procedures, as far as what was happening at medical spas, what can be considered the practice of medicine, what cannot be considered the practice of medicine.

Q. And how was that communicated to the Board by the legislature that they wanted you to to come up with a regulation?

AMY E. EMBRY

A. They can either make a request to the Board, themselves, through attorneys, they can ask a Board member, say we're interested in a rule about this. But again, that is very rare and since I've been with the Board since 2014 that's only happened once, which the rule did not pass.

Q. Okay. And given that the legislature includes a lot of people, does it have to be that the legislature as a body has voted by majority vote to request that regulation or could an individual legislator ask the Board to enact a regulation?

A. I can only speak to my understanding. I do not have any knowledge of how the legislature would handle that, but to my knowledge and my understanding is that anybody can ask.

Q. Anybody within the legislature?

A. Yes.

Q. Can ask -- let me make sure I

AMY E. EMBRY

asked that question that's not broken up for the record.

So anybody who is a member of the legislature can ask the Board to enact a regulation; that's your understanding?

A. That is my understanding, but that would be a question for the legislature.

Q. And in the example that you mention, the one time that happened since you've been with the Board, the cosmetic procedure issue, was that a single member of the Board asked for that or how did that come to you?

A. That I do not know because I was not on the front end of that when it began, so I cannot answer to that.

Q. Okay. Can anyone outside of the legislature, who is not a member of the legislature, ask the Board to enact a regulation on a topic?

A. I suppose. I suppose. It has not happened but there is a whole process

1 AMY E. EMBRY
 2 that the legislature must approve all the
 3 rules. So even if we draft a rule, it has
 4 to be approved by the legislature before
 5 it can be considered an active rule.
 6 Q. And that's true of all of the
 7 rules that have been passed by the Board
 8 so far?
 9 A. Correct. Correct.
 10 Q. And I believe there's
 11 something like 30-something rules; is
 12 that right?
 13 A. That's right.
 14 Q. They've all been approved by
 15 the legislature?
 16 A. Yes.
 17 Q. Okay. Has, to your knowledge,
 18 any other government official, outside of
 19 the legislature, let's say within the
 20 executive branch of government, ever
 21 asked the Board to enact a regulation?
 22 A. Not to my knowledge, not that
 23 I know of.
 24 Q. That would include the
 25 Governor's Office has never asked?

1 AMY E. EMBRY
 2 A. Since I've been Director, I
 3 have not received that request.
 4 Q. And are you aware if that's
 5 ever happened before?
 6 A. I am not aware if it's
 7 happened before.
 8 Q. Okay. Can the Board enact a
 9 regulation on its own without being
 10 requested to do so by somebody else?
 11 A. It could but, again, it's
 12 usually never done. I don't know if it
 13 has been done.
 14 Q. So I looked through the
 15 regulations that you have and I see that
 16 there are lots of different topics about
 17 which the Board has passed regulations.
 18 I'm just going to list some and ask if
 19 you're familiar.
 20 I saw one about precautions
 21 concerning HIV. And this is not a test.
 22 Let me back it up. I'm happy to have you
 23 look through.
 24 Do I understand correctly that
 25 Regulation 16, which is in Exhibit 2 --

1 AMY E. EMBRY
 2 A. That's correct.
 3 Q. -- is about precautions
 4 related to HIV and some other
 5 communicable diseases; is that correct?
 6 A. Yes.
 7 Q. And then I understand that
 8 Regulation 22 has some guidelines
 9 concerning laser surgery; is that
 10 correct?
 11 A. Yes.
 12 Q. And there are guidelines, or I
 13 should say regulations concerning
 14 abortion in Regulation 36?
 15 A. Yes.
 16 Q. And there is a Regulation 27
 17 concerns informed consent for gastric
 18 bypass surgeries; is that right?
 19 A. Yes.
 20 Q. And then Provision 21 relates
 21 to -- is a regulation concerning
 22 anorexiant drugs. Am I saying that right,
 23 anorexiant?
 24 A. Anorexiant.
 25 Q. Now, were you on the Board or

1 AMY E. EMBRY
 2 not on the Board -- excuse me.
 3 Were you employed by the Board
 4 when any of those provisions were
 5 enacted?
 6 A. The ones that you mentioned?
 7 Q. Yes.
 8 A. No, I was not at the Board.
 9 Q. Okay. And do you know if all
 10 of these provisions were prompted by a
 11 statutory directive by the legislature?
 12 A. I would need to go back and
 13 research but nearly every rule is
 14 prompted by legislation.
 15 Q. But some are not?
 16 A. I would have to go back and
 17 read the history of each one. So I can't
 18 answer that honestly.
 19 Q. Okay. Can we look at
 20 Regulation 21 concerning anorexiant?
 21 Would looking at this rule, or
 22 I should say regulation, provide you with
 23 the information about whether it was
 24 prompted by a statute?
 25 A. It may.

AMY E. EMBRY

Q. Okay.

A. Again, I could not answer completely honestly without going back and looking how this began.

Q. So from the regulation, itself, where it says at the end, if you look along with me, "history adopted March 13, 1998 amended August 6, 2015 effective December 14, 2015", that doesn't tell you what prompted it?

A. It would not tell me because I was not at the Board. If I was there I may remember.

Q. Okay. If the Board had a concern about how medical care was being provided in a particular field, could the Board get together and put together a regulation?

A. They could.

Q. They could. But you don't know if they've ever done that?

A. Not to my knowledge.

Q. They have not done that, to your knowledge, is that what you're

AMY E. EMBRY

saying?

A. I have no memory of them doing that in my time at the Board.

Q. And do you know whether prior to your time at the Board that was ever done?

A. I do not know.

Q. I want to ask some of the process about enacting regulations. Who within the Board, or is it someone within the Board who drafts these regulations?

A. They're usually drafted either by staff or with the assistance of an attorney.

Q. And who decides on the content?

A. The Board votes on the final draft. They approve what will be the rule that will begin -- that will be sent for the promulgation process.

Q. So if it's a draft that relates to let's say -- I guess they're all within the regulatory context, right, all of these regulations? So if there's

AMY E. EMBRY

-- if somebody were to draft a regulation relating to orthopedics, for example, would the staff who are drafting that regulation look to expertise within the field of orthopedics to draft the regulation?

A. Yes. That would be -- yes.

MS. LAND: Objection to form on that previous question.

Q. Okay. How would they -- how would they do that?

A. They would work with the Board members and the Board members would have their input. The Board members would then say if they did not -- for example, if it was orthopedics, if there is an orthopedic society or association to get some expertise, if they did not have that expertise. And then changes would be made to that and then the Board would vote yay or nay on the draft.

Q. If they were to reach out to an orthopedic society or an organization with expertise, would that mean to then

AMY E. EMBRY

speak with orthopedists who could offer expertise; is that what you mean?

A. It could be, yes.

Q. Could it also be to look at any best practices guidelines they have?

A. Could be, yes.

Q. Have any regulations been enacted by the Board since you've been employed by the Board?

A. Yes.

Q. Can you tell me which ones?

A. I may not have been the Director, but these are the ones that were -- let me get back to the table of contents. It will be the ones towards the end. 39 was amended, 40 was created, 41, 42, 43 and 44 and 45.

Q. Thank you. So let's take, for example, Regulation 40, Arkansas Surgical Technologists. Did the Board reach out to any surgical professional groups in developing that regulation?

A. Let me flip to that. I believe this was taken directly from the code,

AMY E. EMBRY

which is on our rules, it's just cut and paste and put in there what it is.

Q. And by "code" do you mean Arkansas statutes?

A. Yes.

Q. Okay. And let's look at number 43, Genetic Counselor Licensure, was that taken directly from the code?

A. Yes.

Q. All of it?

A. To my knowledge, yes. Without having documents in front of me, to my knowledge yes.

Q. Okay. Is it your understanding that all of the regulations are language from the legislature or -- let me ask it differently. Strike that.

Does the Board ever develop language for regulations, itself?

A. Yes.

Q. And is there ever a case where the statute mandates a regulation and certain requirements but the Board may fill that out with additional details in

AMY E. EMBRY

the regulation?

A. Yes.

Q. And is that where the expertise of professional associations may come in; is that correct?

A. Yes.

Q. Okay. Which professional associations do you recall the Board having relied on?

A. The ones that we work closest with, the ones that we have the most contact with and I would say, okay, the Medical Society, the Hospital Association, Physician Assistant, and these are all within Arkansas, these are all Arkansas organizations. Let's see who else? Occupational Therapy and Respiratory.

Q. So when you say the Medical Society, is that an association called the Arkansas Medical Society, is that its name?

A. Yes.

Q. And is that a professional

AMY E. EMBRY

association of doctors within Arkansas?

A. Yes, it is.

Q. Okay. And when you mentioned, say, the Occupational Therapy, you said Occupational Therapy, is that an association, a professional association of occupational therapists in Arkansas?

A. Yes, ma'am. I can't remember the exact name off the top of my head.

Q. Okay. And when you've worked with these groups did they -- again, did members of those groups provide expertise as professionals within the field?

A. Sometimes, yes.

Q. And when you've worked with these groups did you ever review -- and by "you" I mean the Board -- best practices guidelines of those organizations?

A. Yes.

Q. And does the Board, when it enacts regulations, attempt to try to enact regulations that are consistent with best practices in a particular

AMY E. EMBRY

field?

A. They do try, yes.

Q. Are you familiar with the regulation about opioid prescriptions?

A. Yes.

Q. Was that a regulation that was passed based on a statutory mandate?

A. That was before I was the Director. My understanding is that it was drafted and put through the promulgation process at the request of the legislature because of the opioid epidemic.

Q. So your understanding is that's in that category of a request of the legislature but not a statutory provision?

A. Correct.

Q. That's correct?

A. Yes. That's my understanding.

Q. I may not have heard part of your answer. I understood you to say it was drafted at the request of the legislature because of a concern; is that what I heard?

1 AMY E. EMBRY
2 A. It was because of the opioid
3 epidemic.
4 Q. Okay. That was before your
5 time on the Board; is that right?
6 A. Yes. Before I was Director,
7 yes.
8 Q. You were employed at the Board
9 at that time?
10 A. Yes. But in my previous job I
11 had nothing to do with the rules or
12 anything.
13 Q. Understood. Okay. Thank you.
14 You mentioned that the
15 legislature needs to approve any
16 regulations that the Board enacts. Did I
17 understand that correctly?
18 A. Yes.
19 Q. Has that always been a
20 requirement since you're aware?
21 A. Yes.
22 Q. Since you've been employed by
23 the Board?
24 A. Yes.
25 Q. And the process to get the

1 AMY E. EMBRY
2 legislature approval after you enact a
3 regulation, or I guess you would call it
4 a proposed regulation at that point, does
5 it actually have to get voted on by the
6 State Legislature?
7 A. It must be voted on by
8 committees and subcommittees.
9 Q. So it's not the full
10 legislature that has to approve it but
11 the relevant committee; is that correct?
12 A. That's my understanding, yes.
13 Q. Is it a particular committee
14 or subcommittee that generally has to
15 approve your regulations?
16 A. I do know it's -- it's the
17 Rules Subcommittee and I'm sorry, I can't
18 remember the name of the actual committee
19 that it's the subcommittee of.
20 Q. You mentioned various Arkansas
21 professional medical or related
22 organizations that the Board will
23 sometimes look to for guidance in
24 developing regulations. Does the Board
25 ever look to national professional

1 AMY E. EMBRY
2 medical groups like the American Medical
3 Association?
4 A. Since I have been Director I
5 think it's more for information, data
6 collection, things of that nature.
7 Q. And the Board will look to
8 those national groups for information and
9 data collection; is that correct?
10 A. If needed, yes.
11 Q. Can you tell me in what
12 context?
13 A. An example may be that if they
14 need to know what the national average is
15 for a particular prescription of a drug,
16 the AMA, for example, may have that
17 information. They would go to the website
18 and see what information is there, so
19 just basically on an informational scale.
20 Q. Got it. And when the Board
21 passes a regulation, that's by a majority
22 vote; is that right?
23 A. Yes.
24 Q. So it's not a consensus
25 requirement?

1 AMY E. EMBRY
2 A. No, but it does require a
3 vote.
4 Q. Is there a public comment
5 period for regulations?
6 A. Yes.
7 Q. Is that before or after it
8 goes to the legislature?
9 A. Before.
10 Q. So do I understand right, the
11 Board will write the regulation, vote to
12 approve it, then put it out for public
13 comment or do I have that backwards?
14 A. You are correct.
15 Q. Okay. And then the Board
16 considers the comments that were made by
17 the public?
18 A. Absolutely.
19 Q. And potentially change the
20 regulation as a result?
21 A. Could be. Could be. That is an
22 option.
23 Q. And then they would have a
24 perhaps a revised version that they would
25 vote on again; is that right?

AMY E. EMBRY

A. That is correct.

Q. And at that point it would get sent to the legislature for approval?

A. At that point any changes that are made it has to go through the whole promulgation process again, so it would have the public comment period again and then begin the legislative process.

Q. Okay. Has the legislature ever rejected a proposed regulation?

A. Yes.

Q. Do you know what about?

A. It was the one we discussed earlier, the one about the cosmetic procedures. That's the only one that I know of.

Q. Oh, I misunderstood. So the Board actually did adopt a regulation but the legislature rejected it; is that right?

A. Correct.

Q. Do you know why?

A. During the committee meeting they thought the Medical Board did not

AMY E. EMBRY

have the authority to -- to regulate those procedures when they were not their licensees and it was also a scope of practice issue. So it was voted down in the legislature -- in the committee, in the committee.

Q. And what do you mean by "a scope of practice issue"?

A. Scope of practice basically means was it in the Board's scope to say this -- this person can or cannot do this procedure; was it in the law?

Q. And by "the law" you mean the law that gives the Board authority to regulate various healthcare providers?

A. Yes.

Q. The Arkansas Medical Practices Act?

A. Yes.

Q. Okay. You mention the public comment period. Do public comments ever get submitted on proposed regulations by professional medical groups?

A. Yes.

AMY E. EMBRY

Q. Would those be Arkansas professional medical groups or national groups or both?

A. Usually they are Arkansas.

Q. Would that include the same groups that you mentioned earlier, the Arkansas Medical Society and similar organizations for occupational therapists and physician assistants, I think you said?

A. Yes.

Q. Any others?

A. Not that I can think of but public comments can come from anyone, anywhere on the planet.

Q. Okay. And are those comments from the medical groups given weight by the Board in making a decision?

A. Sometimes.

Q. I want to talk a little bit about licensing.

I understand the Board licenses certain kind of medical providers, correct?

AMY E. EMBRY

A. Yes.

Q. And that includes medical doctors, right?

A. Yes.

Q. Where would I find the requirements for licensure of a medical doctor in Arkansas? Where are those contained?

A. They're contained in the Medical Practices Act but they're also on our applications on our website.

Q. Okay. But no other places besides that?

A. Not that I'm aware of.

Q. Okay.

MS. COOPER: Can we look at tab 4 and post that, please, and mark that as Exhibit 4?

(Exhibit 4, printout from the Medical Board re: Regulatory and Discipline was received and marked on this date for identification.)

MS. LAND: I have it.

MS. COOPER: Thank you.

1 AMY E. EMBRY
 2 Q. Do you recognize this page?
 3 A. Yes.
 4 Q. Do I understand correctly this
 5 is from the Arkansas State Medical
 6 Board's website?
 7 A. Yes.
 8 Q. And if you'll read with me the
 9 box that says Regulatory/Discipline, it
 10 says, "The Arkansas State Medical Board's
 11 mission is to protect the health, safety
 12 and welfare of the people of the State of
 13 Arkansas with the goal that all citizens
 14 are provided with the highest quality
 15 healthcare. The Medical Board receives
 16 and reviews complaints against each type
 17 of medical profession it licenses. All
 18 complaints received are reviewed by the
 19 Medical Board to determine if there have
 20 been any violations of the Medical
 21 Practices Act. If the Medical Board
 22 determines that violations have occurred
 23 disciplinary actions are taken." Did I
 24 read that correctly?
 25 A. Yes.

1 AMY E. EMBRY
 2 Q. Is this an accurate statement
 3 of the Board's mission concerning
 4 regulatory work?
 5 A. Yes.
 6 Q. Okay. I'd like to go back to
 7 what we marked as Exhibit 2, the Medical
 8 Practices Act and Regulations.
 9 Before I turn to a particular
 10 provision, I just have a more open
 11 general question.
 12 Can the Board, is it right,
 13 can investigate allegations of wrongdoing
 14 by doctors; is that correct?
 15 A. Yes.
 16 Q. And if you can turn to Section
 17 17-80-106. I understand this is the
 18 provision that says, "Investigations and
 19 inspections of alleged wrongdoing",
 20 correct?
 21 A. Yes.
 22 Q. If you look down to Section C
 23 it has some subsections there and if you
 24 would like to take the time to read (c),
 25 and then the (2), I have a question about

1 AMY E. EMBRY
 2 that. So why don't you take a moment.
 3 (Deponent reviews the
 4 document.)
 5 A. Okay.
 6 Q. So do I understand correctly
 7 from this provision or perhaps somewhere
 8 else that the Board can investigate to
 9 determine if doctors are practicing their
 10 profession in a way as to endanger the
 11 general health and welfare of the public?
 12 A. Yes.
 13 Q. So if somebody brings a
 14 complaint that there is a doctor engaging
 15 in some conduct that they say is harmful,
 16 you would investigate that? You, the
 17 Board, will investigate that complaint?
 18 A. Yes.
 19 Q. You mentioned you're a
 20 complaint-based -- it's a complaint-based
 21 process. If it comes to the attention of
 22 the Board that a doctor is practicing in
 23 a way that is endangering the public, but
 24 nobody has brought a formal complaint,
 25 can the Board investigate?

1 AMY E. EMBRY
 2 A. Yes.
 3 Q. Has that ever happened?
 4 A. Oh, yes.
 5 Q. Can you tell me about those
 6 times?
 7 A. Well, I don't -- I could not
 8 tell you specifically which ones without
 9 documents in front of me but other ways
 10 that we can be notified is if someone is
 11 arrested, if they make the news, if a
 12 Board member finds out about it, if it
 13 happens in front of a Board member.
 14 Q. And this is something that's
 15 happened -- when I say "this" let me
 16 rephrase that.
 17 Investigations that were done
 18 in the absence of a formal complaint, is
 19 that something that's happened since
 20 you've been with the Board?
 21 A. Yes.
 22 Q. Can you estimate how many
 23 times?
 24 A. If I had to guess, if I had to
 25 guess in the four years since I've been

1 AMY E. EMBRY
2 there, I would say a dozen, maybe a
3 little less. But that's my best guess
4 without documents in front of me.

5 Q. Understood. And you said you
6 gave some examples of potential ways an
7 issue could come to the Board's attention
8 and in one example you mention was if it
9 made the news.

10 Are there particular examples
11 you can think of where something was in
12 the news that prompted the Board to act?

13 A. Usually what happens is if we
14 hear on the news that a doctor or a
15 licensee, it doesn't have to be a doctor,
16 just one of our licensees is arrested, if
17 they are actually arrested that sends up
18 red flags. If they are just suspected but
19 no arrest has been made, that still sends
20 up red flags. But usually an arrest
21 means they have something, some sort of
22 proof that they could justify an arrest.
23 And then we would usually have what's
24 called a "called meeting", which means a
25 meeting outside of our regular scheduled

1 AMY E. EMBRY
2 board meetings, if that individual is an
3 immediate threat to the public, and we
4 could -- the Board could decide; does
5 this need to be an Emergency Order of
6 Suspension or what needs to be done?

7 Q. And just to understand this
8 type of circumstance better, I imagine a
9 doctor or other licensed provider could
10 be arrested for something that has
11 nothing to do with their practice of
12 medicine, say, you know, really bad
13 speeding violations, would that be
14 something that would prompt the Board's
15 attention and investigation?

16 A. Every situation is different.
17 They look at it; does it put the public
18 in danger? Speeding is one thing, two
19 DUIs is something else. So it just really
20 depends. That's just examples, it's just
21 an example. So every situation is
22 different and the Board must address that
23 situation and decide what needs to be
24 done.

25 Q. Have there been times when a

1 AMY E. EMBRY
2 licensee was arrested for something
3 related to how they were providing care?

4 A. Yes.

5 Q. Can you give me examples?

6 A. We had a physician who was
7 arrested on suspicion of rape with
8 patients and the Board took actions to
9 protect the public.

10 It was later, once it made it
11 to court, they could not have any
12 witnesses, no witnesses would testify, so
13 all the charges were dropped but the
14 Board had to take action to protect the
15 public.

16 Q. Any other examples of somebody
17 arrested in relation to the practice of
18 medicine?

19 A. Not that I can recall. And
20 again, if I had documents in front of me
21 I may have more information.

22 Q. Could it be a substance abuse
23 issue, arrest for that would be something
24 that could prompt the Board's attention?

25 A. Yes, absolutely.

1 AMY E. EMBRY
2 Q. What if, for example, somebody
3 was arrested for writing improper
4 prescriptions, you know, for friends to
5 get painkillers or something like that,
6 would that be something that could prompt
7 the Board's investigation?

8 A. Yes.

9 Q. And that would be whether or
10 not somebody brought a formal complaint
11 against the Board, is that right, against
12 the doctor?

13 A. Not necessarily. There does
14 not have to be a formal complaint if
15 there is an arrest or something that
16 shows substance abuse or that could
17 affect their ability to practice medicine
18 safely.

19 Q. Okay. Understood. I think I
20 asked the question awkwardly.

21 So there does not need to be a
22 complaint for the Board to investigate?

23 A. No.

24 Q. Understood. Have there been
25 any investigations of doctors or other

1 AMY E. EMBRY
 2 licensees for providing care that is
 3 considered harmful to patients?
 4 A. Yes.
 5 Q. Can you tell me about those
 6 examples?
 7 A. We've had complaints, for
 8 example, most recently we've had
 9 complaints that a doctor was prescribing
 10 a drug to county inmates that they felt
 11 was inappropriate. And that's the most
 12 recent one.
 13 Q. What drug was that?
 14 A. Ivermectin.
 15 Q. So that was a formal complaint
 16 made to the Board?
 17 A. Several formal complaints made
 18 to the Board and it also made the news.
 19 Q. That's something that the
 20 Board was going to address and did
 21 address?
 22 A. Yes. They are currently
 23 addressing it and I can't say much more
 24 on open investigations.
 25 Q. So the investigation is open

1 AMY E. EMBRY
 2 now?
 3 A. Yes.
 4 Q. How many complaints did the
 5 Board receive about that Ivermectin use
 6 in the jail?
 7 A. Written complaints, if I had
 8 to give a ballpark number, around ten.
 9 Q. And what about unwritten?
 10 A. Well, that would be from
 11 media, social media and I could not tell
 12 you how many there were. There were quite
 13 a few but I could not give you an exact
 14 number.
 15 Q. Has the Board received any
 16 complaints or otherwise chosen to
 17 investigate doctors that provided care
 18 that departed from accepted standards in
 19 the field?
 20 A. Yes.
 21 Q. Can you tell me some of those?
 22 A. I couldn't tell you exactly
 23 but it is very common to receive a
 24 complaint that the Board reviews in
 25 which, for example we'll use surgery,

1 AMY E. EMBRY
 2 somebody writes a complaint that the
 3 surgery did not go well, that they're not
 4 healing well or they're suffering from
 5 that and it is very common when the Board
 6 reviews that complaint they may ask the
 7 surgeons on the Board; is this common?
 8 They will say; yes, this is a common
 9 occurrence in surgery; or no, it is not a
 10 common occurrence, and we need to do an
 11 investigation.
 12 Q. In the surgery example you
 13 gave, that's a real life example that has
 14 happened at least once that someone
 15 complained about a surgery that they felt
 16 went wrong; is that correct?
 17 A. Yes.
 18 Q. And then so the surgeons on
 19 the Board would be consulted about
 20 whether what was described is a common
 21 occurrence or not?
 22 A. That's just my example, but
 23 usually during the board meeting all the
 24 Board members review that complaint, but
 25 some of them may have, you know, may say;

1 AMY E. EMBRY
 2 surgeons, what do you think about this,
 3 and get their expertise.
 4 Q. And then if there's concern
 5 that it may be inappropriate treatment,
 6 then it would be investigated?
 7 A. Usually, yes.
 8 Q. And when you say they may ask
 9 the surgeons about what do you think, is
 10 the question; is this conduct by the
 11 surgeon at issue consistent with accepted
 12 medical practice or something else? I
 13 just want to make sure I understand.
 14 A. Yes, it is usually accepted
 15 medical practice.
 16 Q. So failure to follow accepted
 17 medical practice could be a reason for
 18 investigation?
 19 A. Could be.
 20 Q. And to determine the accepted
 21 medical practice, does that involve
 22 looking to some of these medical
 23 professional groups that you talked
 24 about?
 25 A. That would be a question for a

1 AMY E. EMBRY
 2 physician. I can't answer that as an
 3 unphysician, as far as use.
 4 Q. But for the Board to determine
 5 whether this is something that should be
 6 investigated for failing to comply with
 7 accepted medical practices, how do they
 8 determine that?
 9 A. There are 14 Board members, so
 10 each one determines that individually. I
 11 think what I was trying to get to is that
 12 if they ask the surgeons their expertise
 13 and the surgeon says; this never should
 14 have happened, they would have been
 15 taught in medical school, or something
 16 like that. So it could be from medical
 17 education, it could be from continuing
 18 education, it could be from
 19 certifications.
 20 Q. When you say "it could be from
 21 medical education" and these other
 22 things, what is the "it" you mean?
 23 A. Their decision.
 24 Q. Oh, what they might base it
 25 on?

1 AMY E. EMBRY
 2 A. A-hum.
 3 Q. I see. But would it be a
 4 violation of the Arkansas State Medical
 5 Practices Act for doctors to provide care
 6 that departs from accepted standards in
 7 the field?
 8 MS. LAND: Objection to form.
 9 A. Could you repeat the question?
 10 Q. Sure. Would it be a violation
 11 of the Arkansas Medical Practices Act for
 12 doctors to provide care in a way that
 13 departs from accepted standards in the
 14 field?
 15 A. Not necessarily. I think it
 16 would just depend on the situation.
 17 Q. But the accepted standards in
 18 the field are relevant to assessing
 19 whether there was a violation; is that
 20 right?
 21 A. If I had to answer on how the
 22 Board makes their decision, I would say
 23 yes, that is part of their consideration.
 24 MS. COOPER: Okay. I'm mindful
 25 of the time, we've been going for

1 AMY E. EMBRY
 2 close to an hour and a half. Are
 3 folks, including the court
 4 reporter, okay going a few more
 5 minutes until a break to wrap up a
 6 line of questions?
 7 (Discussion is held off the
 8 record.)
 9 Q. Just to explore a little bit
 10 more this process the Board goes through
 11 when it's considering whether to
 12 investigate a complaint, and I should
 13 back up and ask, am I even describing
 14 that right, that there is a process that
 15 happens before a decision is made whether
 16 to investigate; is that correct?
 17 A. Yes. Yes.
 18 Q. So in the case of a complaint,
 19 a complaint is filed with the Board and I
 20 understand you spoke earlier about
 21 potentially hiring or not hiring, I guess
 22 working with investigators to collect
 23 subpoenaed information from the licensee
 24 and then issuing the report, but before
 25 you get to that stage does something

1 AMY E. EMBRY
 2 happen at the Board before investigators
 3 are called to assist?
 4 A. Yes. And again, every
 5 situation is different, but we do have a
 6 process within the office that is
 7 followed before it's presented to the
 8 Board.
 9 Q. And what is that process
 10 before the investigation would be
 11 launched?
 12 A. Okay. So when a complaint
 13 comes in the complaint is processed, a
 14 letter is sent to the complainant saying
 15 we have received your complaint; a copy
 16 of that complaint is also sent to the
 17 licensee and that licensee needs to
 18 respond to that complaint.
 19 At that point when we receive
 20 that response both the complaint and the
 21 response from the licensee is presented
 22 to the Board and they determine if there
 23 has been a violation of the Medical
 24 Practices Act and then from there that is
 25 -- they determine; are we going to do an

1 AMY E. EMBRY
 2 investigation; does the licensee need to
 3 come and talk to us more before we decide
 4 what we need to do? There could be a
 5 variety of situations of how this could
 6 work out.

7 It could also be that the
 8 Board reads it, reads the response and
 9 they take it as information only, meaning
 10 that we understand we've received the
 11 complaint, we've reviewed the complaint,
 12 there has been no violation of the
 13 Medical Practices Act and that's the end.
 14 And then once it is concluded a letter is
 15 sent to the complainant and also the
 16 physician to let them know the outcome.

17 Q. Thank you. Very helpful.

18 So in the event that they
 19 determine there is a violation, that's
 20 when they would then investigate? Or do
 21 they need the investigation to determine
 22 if there is a violation?

23 A. Again, it all depends on the
 24 complaint. There are some complaints that
 25 we receive that are so severe that we may

1 AMY E. EMBRY
 2 call the Chairman of the Board saying; do
 3 you want us to start an investigation now
 4 to at least gather some medical records,
 5 description records, whatever they did?
 6 Or it could be that it's a standard
 7 complaint, it's presented to the Board
 8 and the Board says; yes, we need to open
 9 an investigation and we would like to see
 10 these medical records for these patients.
 11 And this is just an example, just to give
 12 you an idea, that they could say we want
 13 the medical records, we also want the
 14 PDMP report, which is the Prescription
 15 Drug Monitoring Program in Arkansas, for
 16 opioids and so forth and they can
 17 determine from there. So, again, it
 18 really depends on the complaint.

19 Q. So there are some complaints
 20 where -- tell me if this is correct --
 21 that when the complaint and the response
 22 are presented to the Board, on the face
 23 of it the Board can determine that a
 24 violation has or has not occurred; is
 25 that correct?

1 AMY E. EMBRY

2 A. Yes.

3 Q. Do they ever review, the Board
 4 ever review the complaint and response
 5 and determine they need an investigation
 6 to determine if a violation has occurred?

7 A. Yes.

8 Q. And then in terms of where
 9 they look to determine what constitutes a
 10 violation, would that be the provisions
 11 that we looked at -- actually, let me ask
 12 you generally because I don't want to
 13 limit your answer if there is more.

14 Where does the Board look to
 15 determine what standards they're applying
 16 to determine what constitutes a violation
 17 of the Medical Practices Act by a doctor
 18 or other licensee?

19 A. They look at the Medical
 20 Practices Act and the rules that are a
 21 part of it.

22 MS. COOPER: Okay. I think
 23 this would be a good time to take a
 24 break. How is ten minutes.

25 VIDEOGRAPHER: We are off the

1 AMY E. EMBRY

2 record at 11:36 a.m.

3 (Recess is taken.)

4 VIDEOGRAPHER: We are back on
 5 the record at 11:48 a.m.

6 Q. Thank you. When we were
 7 speaking before we were talking about the
 8 process the Board follows when there is a
 9 complaint against a licensee and I just
 10 have a couple of additional questions
 11 about that.

12 Is there ever a hearing
 13 involving a complaint against a licensee?

14 A. A hearing occurs whenever
 15 there is any action against a licensee,
 16 against their license. Usually that's an
 17 Emergency Order of Suspension.

18 Q. So if the Board decides to
 19 suspend a license there would be a
 20 hearing first?

21 A. Yes -- no. Let me -- you can
 22 do an Emergency Order of Suspension if
 23 you feel there is an immediate threat to
 24 the public and then there will be a
 25 hearing at the next scheduled board

AMY E. EMBRY

meeting.

Q. If the Board does not believe there is an immediate threat would there be a meeting before the suspended license?

A. Yes.

Q. So if there is an emergency suspension of the license it's followed up by a hearing to allow the person to contest it; is that correct?

A. Correct.

Q. So a licensee could have their license suspended without any hearing?

A. Yes. If there is -- if there is a perceived threat to the public.

Q. I'm sorry. Let me -- let me try to ask it differently.

If there is a complaint about some wrongdoing by a licensee, and the Board determines that a violation has occurred, it would make that determination before there would be any hearing for the licensee?

A. That is correct. Action can be

AMY E. EMBRY

taken on a license without a licensee being present, but they must be given a hearing and that is actually part of the administrative rules in Arkansas.

Q. So they get a hearing if action is taken to rescind or suspend their license?

A. Correct. Any action on a license, if they feel that it needs to be a revocation, which is very rare, and EOS, Emergency Order of Suspension is usually the most common done by our Board.

Q. In that case there would be an emergency order of suspension but it would be followed up by a hearing?

A. Correct.

Q. But if it's not an emergency order of suspension, but the Board would like to suspend, would there be a hearing and then a decision whether to suspend?

A. No, they can suspend at a meeting. For example, if a complaint comes in, they review that complaint,

AMY E. EMBRY

they vote that there has been a violation of the Medical Practices Act, they can suspend the license then.

Q. And then there is no hearing?

A. And then there is a hearing, the licensee is given notice that their hearing will be at the next board meeting.

Q. And they give -- are given an opportunity to convince the Board to change their mind, is that the idea?

A. Correct.

Q. And when there is a hearing -- so there's always a hearing when action is taken to suspend or revoke a license; is that correct?

A. Yes.

Q. Does the Board make a case at the hearing for why it is suspending the license?

A. Yes. That falls on the attorneys.

Q. The attorneys for the Board would do that?

AMY E. EMBRY

A. Correct.

Q. Would the attorneys for the Board present experts?

A. Yes, they could.

Q. And those would be experts in the relevant field at issue?

A. Usually, yes.

Q. Okay. And how does the Board find those experts?

A. There really is no official way that we find them. We could use recommendations of somebody in a particular field.

For example, if a complaint was against an ENT doctor, we may ask our Board member who is an ENT; do you know of anybody that would be a good expert to review this.

Q. So we've kind of been talking about this but I haven't asked this question; can the Board discipline a doctor who is licensed by the Board?

A. Oh, absolutely, yes.

Q. And under what circumstances

AMY E. EMBRY

can a Board discipline a doctor?

A. It could be that they're -- I will give an example, that a complaint comes in and it's more about boundaries, that they feel they overstep their bounds, they've become too close to patients, they could have a relationship with the patient. It could be numerous things.

So part of the discipline can be you need to take a boundaries course and you need to take that documentation to the Board and report back to the Board to let us know what's going on. Discipline, if there is substance abuse involved they could say; you need to meet with the Foundation, which is the organization that handles licensees in distress. So they can administer discipline that way. Very rarely do we issue a reprimand, but reprimands can be issued.

Q. If we can go back to Exhibit 2, the Medical Practices Act, and turn to

AMY E. EMBRY

Section 17-95-409, page 28.

A. 28?

Q. Got that? If you'll read with me (a)(1) says, "The Arkansas State Medical Board may revoke an existing license, impose penalties as listed in 17-95-410 or refuse to issue a license in the event the holder or -- in the event that holder or complainant, as the case may be, has committed any of the acts or defenses defined in this section to be unprofessional conduct."

My first question is, is this the provision that defines the scope of when the Board can discipline or the circumstances under which the Board can discipline a licensee?

A. Well, this is when it may revoke. This says when it may revoke.

Q. Well, it says -- I'm sorry. Go ahead.

A. This section specifically relates to revocation and refusal to issue a license.

AMY E. EMBRY

Q. And they impose penalties as listed in Section 95-410, that's also limited to, I see denial, suspension or revocation. Okay.

So these are -- Section 17-95-409 are the circumstances under which a license may be revoked or not issued; is that correct?

A. Correct.

Q. And other types of discipline for other -- excuse me. Sorry. Strike that.

You talked about other kinds of discipline, like requiring a doctor to take a particular kind of course about boundaries. Where in the act, if anywhere, are those kinds of discipline options enumerated?

A. That's going to be in the code. I don't know exactly where in the code. I would have to do some research to find it.

Q. Okay. Then let me ask a different way.

AMY E. EMBRY

So the Board has the ability to deny, suspend or revoke a license based on the grounds listed in Section 17-95-409, correct?

A. Yes.

Q. And is it correct that the Board has the authority to take other action, like suspension of a license?

A. Within this section, is that what you're asking?

Q. Well, let me ask it differently.

You've talked about suspension and emergency suspension. Is that something -- I'm sorry. Strike that. I read it wrong.

Apart from denial, suspension and revocation, are there other types of discipline a Board can impose?

A. Just off the top of my head, the ones I've already mentioned. Usually it is, you know, we want you to report back, check in, you need to take these courses just as a refresher. That's, off

1 AMY E. EMBRY
2 the top of my head, without having other
3 things in front of me, that's what I can
4 think of.

5 Q. Thank you. And focusing then
6 on suspension and revocation, it is
7 correct then that 17-95-409 are all of
8 the grounds for suspension or revocation
9 or denial of license?

10 A. In the code, yes. I'm going to
11 have to read through each one of these
12 individually. There may be other issues
13 but I need to see if it's included in
14 there.

15 Q. Well, let's look at subsection
16 (2) of 17-95-409. It says -- and
17 actually, before we look at that, just
18 because we've skipped around a little
19 bit, going back to section (a)(1), it
20 says, "The Arkansas State Medical Board
21 may revoke an existing license, impose
22 penalties as listed in Section 17-95-410
23 or refuse to issue a license in the event
24 that the holder or applicant, as the case
25 may be, has committed any of the actions

1 AMY E. EMBRY
2 or offenses defined in this section to be
3 unprofessional conduct." And if we look
4 at subsection Unprofessional Conduct, as
5 used in the Arkansas Medical Practices
6 Act, what the citations mean, and it
7 lists sections (A) through (S), correct?

8 A. Yes.

9 Q. So those are all practices or
10 conduct deemed to be unprofessional
11 conduct under the Act; is that correct?

12 A. Correct.

13 Q. And are there other places
14 where conduct may be deemed
15 unprofessional conduct, besides what's in
16 this statute?

17 A. To my knowledge, yes,
18 everything is listed here.

19 Q. Okay. I have a few questions
20 about just a couple of these provisions.

21 If you could look at
22 subsection (G), "grossly negligent or
23 ignorant malpractice", does the Board
24 have a standard for determining grossly
25 negligent or ignorant malpractice?

1 AMY E. EMBRY
2 A. They do have a definition of
3 grossly negligent that they have as part
4 of their Board packet when considering
5 this. I do not have it in front of me,
6 though.

7 Q. When you say "part of their
8 Board packet when considering this", what
9 do you mean by that?

10 A. We give them a list of
11 definitions so they'll understand what
12 suspension means; grossly negligent
13 they'll understand that; if we say
14 revoke, what does revoke mean. It's just
15 a reference sheet, the reference sheets
16 of commonly used words.

17 Q. And does "grossly negligent"
18 include departing from accepting
19 standards of medical care?

20 A. I would have to look at the
21 definition that they use. Again, I don't
22 have that with me.

23 Q. Okay. Is it based on
24 community standards of care?

25 A. I do not know.

1 AMY E. EMBRY
2 Q. Okay. Can you give examples of
3 some -- well, let me ask it differently.

4 Since you've been with the
5 Board has anyone faced discipline based
6 on gross and ignorant -- grossly
7 negligent or ignorant malpractice?

8 A. Not that I can recall.

9 Q. Could you look down to
10 subsection (S), the last one, it says,
11 "committing an ethical violation as
12 determined by the Board by rule." Did I
13 read that right?

14 A. Yes.

15 Q. Okay. So I understand from
16 this the Board has authority under this
17 provision to determine ethical violations
18 or to enact rules to identify what are
19 ethical violations; is that correct?

20 A. Yes.

21 Q. Has the Board done that?

22 A. Yes.

23 Q. Can you tell me where they've
24 done that?

25 A. It is Rule -- I don't want to

1 AMY E. EMBRY
 2 say it wrong, I'm thinking it is 17 but I
 3 need to make sure.
 4 Q. Okay.
 5 A. No. It is Rule 32, Rule 32.
 6 Q. Do I understand from previous
 7 testimony that this was a rule that was
 8 enacted prior to you joining or becoming
 9 employed by the Board?
 10 A. That is correct.
 11 Q. Okay. Is this the only rule
 12 the Board has identifying ethical
 13 violations?
 14 A. To my knowledge, yes.
 15 Q. By the way, I see sometimes
 16 the terminology in these -- in the
 17 regulations calls it a regulation and
 18 sometimes it calls it a rule. Is there
 19 any difference?
 20 A. It was in 2019 the legislature
 21 said we had to change everything that
 22 says "regulation" to "rule", that was
 23 statewide, all agencies. So we are in the
 24 process of updating everything. So
 25 anything that says "regulation" would be

1 AMY E. EMBRY
 2 changed to "rule". That is the only
 3 difference.
 4 Q. Okay. But the content won't be
 5 changed, just the name --
 6 A. Just the name.
 7 Q. -- that they would be all
 8 rules. Okay.
 9 Let's look at Regulation 32
 10 that I suppose will soon be referred to
 11 as Rule 32; is that correct?
 12 A. Yes.
 13 Q. It says, "Pursuant to Act 1178
 14 of the 87th General Assembly the Arkansas
 15 State Medical Board determines that the
 16 following conduct is an ethical
 17 violation." And in that regulation it
 18 lists subsections (a) through (e),
 19 correct?
 20 A. Yes.
 21 Q. So these are enumerated
 22 examples of -- strike that.
 23 The conduct listed in
 24 subsections (a) through (e) are the only
 25 things that are deemed unethical or

1 AMY E. EMBRY
 2 ethical violations by the Board; is that
 3 correct?
 4 A. That is correct for this rule,
 5 yes.
 6 Q. Are there other rules that
 7 address ethical violations that the Board
 8 has promulgated?
 9 A. Not to my knowledge.
 10 Q. So to your knowledge, this is
 11 the universe of ethical violations for
 12 physicians?
 13 A. Yes.
 14 Q. Okay. If we can just fairly
 15 briefly go through them, subsection (a)
 16 is about improper sexual contact or
 17 relationship with patients; is that
 18 correct?
 19 A. Yes.
 20 Q. Section (b) is about physician
 21 disclosing confidential information about
 22 a patient, correct?
 23 A. Yes.
 24 Q. Section (c) is about failing
 25 to notify a patient that they have an

1 AMY E. EMBRY
 2 ownership in a facility or service?
 3 A. Yes.
 4 Q. And (d) is sexual harassment
 5 by the physician; is that correct?
 6 A. Yes.
 7 Q. And (e) is a licensed
 8 physician grossly overutilizing or
 9 ordering or performing tests or
 10 procedures on a patient when that may
 11 result in harm to the patient; is that
 12 correct?
 13 A. Yes.
 14 Q. So that's the universe of
 15 ethical violations for physicians; is
 16 that correct?
 17 A. Yes.
 18 MS. COOPER: I'd like to mark
 19 as Exhibit -- sorry -- 5 what is
 20 tab 5.
 21 (Exhibit 5, Arkansas State
 22 House Bill 1718 was received and
 23 marked on this date for
 24 identification.)
 25 MS. LAND: It has pulled up on

AMY E. EMBRY

my screen.

MS. COOPER: Thank you.

Q. Just for the record, I'm going to say this is Section 20-6-201 of Arkansas Statutes.

Are you familiar with this statute?

A. I am. It's been a while since I've read it.

Q. I would like to call your attention to a particular part of this statute but if you need to read more we can take time to do that.

I'm going to, instead of taking your time, why don't I look for the relevant provision. Let's put that to the side and we'll come back to that.

So we talked earlier about the provision in the Medical Practices Act about unprofessional conduct. And that one of the examples of unprofessional conduct was an ethical violation as determined by the Board by rule, correct?

A. Could you repeat that?

AMY E. EMBRY

Q. Right. That one of the -- we talked earlier about the definition of unprofessional conduct with subsections (A) through (S) in the Arkansas Medical Practices Act; do you remember that?

A. Yes.

Q. And then one of those provisions for unprofessional conduct was defined as unethical conduct or violations as determined by the Board by rule; is that correct?

A. Yes.

Q. So what I'm trying to understand is if there were a complaint about a doctor engaging in conduct that was considered harmful by the complainant but it didn't fall under any of the categories in the unprofessional conduct statute (A) through (S), and wasn't considered an ethical violation under Regulation 32, is that something the Board could investigate and potentially address?

MS. LAND: Objection to form.

AMY E. EMBRY

A. Yes. Yes, they could.

Q. So anything that involves a complaint by someone in the public alleging that a doctor is engaging in harmful conduct could be investigated by the Board?

A. Yes. It could be, yes.

Q. And would the Board need to determine that the doctor violated any of those provisions that were defined as unprofessional conduct subsections (A) through (S) or an ethical violation under Regulation 32 to take action against a licensee?

A. They would need to determine if there had been any violation in any part of the Medical Practices Act, whether it's in code or in the rule.

Q. And to revoke -- let me ask it differently.

To revoke or suspend a license would it have to be "unprofessional conduct" under the statute we discussed?

A. I don't know if it's limited

AMY E. EMBRY

just to that, a revocation. I would have to do some research on that one.

Q. Okay.

A. But if -- I can't -- I can't answer truthfully to that.

Q. I'm just trying to think of -- for example, somebody says; I went to a surgeon and the surgeon did this treatment that left me disfigured, would that potentially be a basis to suspend a license?

A. They would have to research, they would have to do an investigation, unless there was an immediate threat to the public.

Q. If we can look at the Medical Practices Act, Exhibit 2, Section 17-95-410. Can we look at subsection (e)(1), and when you have that let me know, it's on page 29.

A. What subsection?

Q. (e)(1).

A. Okay.

Q. So it says here, "At the

1 AMY E. EMBRY
 2 conclusion of the hearing the Board shall
 3 first decide whether the accused is
 4 guilty of the charges against him or her
 5 and then decide on the appropriate
 6 disciplinary action; subsection (2), If
 7 the accused is not guilty the Board shall
 8 dismiss the charges; subsection (3), If
 9 the accused is found guilty the Board may
 10 do one or more of the following; (a)
 11 revoke his or her license; (b) suspend
 12 his or her license not to exceed one
 13 year; (c) issue a reprimand; (d) issue a
 14 probation allowing the licensee to
 15 continue practicing under terms and
 16 conditions found to be in the best
 17 interests of the accused and the general
 18 public; or (e) levy a fine up to \$1,000
 19 under the Arkansas Medical Practices Act
 20 and collect out-of-pocket costs of
 21 investigation incurred by the Board to
 22 conduct the disciplinary hearing."

23 Those are all forms of
 24 discipline that the Board can impose if a
 25 doctor is found to be in violation of the

1 AMY E. EMBRY
 2 Medical Practices Act?
 3 A. Yes.
 4 Q. Are there other discipline
 5 options besides those?
 6 A. As we discussed earlier, you
 7 know, if there's no action taken against
 8 the license they can say prescribing
 9 courses, they need you to meet with
 10 so-and-so or whatever. But if this is --
 11 if there is an actual -- an actual -- I'm
 12 sorry -- an actual action against the
 13 license.

14 Q. Okay. And focusing in on
 15 subsection (3)(d) that we looked at it
 16 says, "The Board can impose a probation
 17 allowing the licensee to continue
 18 practicing under terms and conditions
 19 found to be in the best interests of the
 20 accused and the general public". Is what
 21 you just described an example of that,
 22 you know, a course on anything that you
 23 thought the doctor needed?

24 A. Imposing a probation, I'm
 25 wondering if this can refer to what we

1 AMY E. EMBRY
 2 call consent orders, meaning you're
 3 allowed to practice as long as you do A,
 4 B and C.

5 Q. That's called a consent order?

6 A. Yes. That's a legal document.

7 As far as impose a probation, I'm
 8 thinking that's what that is.

9 Q. And can you tell me examples
 10 of some of those? You called it a
 11 consent order?

12 A. Yes.

13 Q. What kinds of conditions are
 14 required? You can continue practicing if
 15 you do A, B or C, what kinds of
 16 conditions?

17 A. Just some off the top of my
 18 head, if it is a substance abuse issue,
 19 they're allowed to practice as long as
 20 they're in compliance with their contract
 21 with the Arkansas Medical Foundation who
 22 monitors distressed physicians licensed
 23 by our Board. It could also be that they
 24 have to complete these courses in a
 25 certain timeframe and present it to the

1 AMY E. EMBRY
 2 Board member, the Board as a whole, and
 3 -- I mean, that gives you some ideas,
 4 that there are certain stipulations that
 5 they must adhere to in order to continue
 6 practicing.

7 Q. Is there something called a
 8 restricted license?

9 A. No. We do not have a
 10 restricted license.

11 Q. You just have the consent
 12 order that says you need to do X, Y or Z
 13 to continue practicing?

14 A. Right.

15 Q. But even with, say, issues
 16 concerning, you know, prescription of
 17 drugs improperly there couldn't be a
 18 consent order that says you can continue
 19 practicing but you can't prescribe drugs?
 20 Could that be something?

21 A. Sure. It could be in the
 22 consent order, yes.

23 Q. Has the Board ever done that?

24 A. I can't recall. We've had a
 25 lot of consent orders, so I would have to

AMY E. EMBRY

look at that.

Q. So one example you gave was involving substance abuse. Have there ever been consent orders that do relate to prescription practices?

A. Yes.

Q. What kinds of consent orders?

A. It could be, for example, if the complaint was the physician or whomever was overprescribing, that part of the consent orders, if the Board chose to do so, they could say, you know, continue practicing but you must surrender your DEA license.

Q. And what is a DEA license?

A. Drug enforcement, so you can prescribe controlled substances.

Q. So the doctor could continue practicing but couldn't prescribe controlled substances?

A. Correct.

Q. Is there ever monitoring as part of the consent order, monitoring by the Board?

AMY E. EMBRY

A. There is monitoring, but we would gather that information from other sections. For example, as I discussed earlier, the PDMP is the Prescription Drug Monitoring Program, we can request a report from that program to show what physician or licensee prescribed to whomever whenever. So we could use that as -- to give you an example.

Q. And when the decision is made to impose discipline, whether suspension or revocation or something else, is that a majority vote by the Board?

A. Yes.

Q. If the Board learned that a doctor were using a treatment that is unsafe, could the Board issue a rule prohibiting the use of that treatment?

A. They could. They could draft a rule and put it through the promulgation process.

Q. Has it ever done that?

A. Yes.

Q. Tell me about that.

AMY E. EMBRY

A. It was discussed earlier, it was the rule about the cosmetic procedures and that's the one that I have since I have been at the Board that I know about.

Q. And that was a rule to ban certain procedures across the board or prohibit them from being provided at all?

A. It was to say who could provide those services, not prohibit.

Q. So let me ask it differently.

Has the Board ever promulgated a rule that prohibits anyone from performing a particular service or medical treatment?

A. Not to my knowledge, no.

Q. But it could if that came to its attention that there was a harmful treatment going around?

A. Yes.

Q. Has the Board ever considered prohibiting a treatment across the board?

A. Not to my knowledge, no.

Q. I want to switch gears away

AMY E. EMBRY

from the process, the Board's process.

When the legislature passes laws concerning the regulation of medicine, is the Board consulted about legislation of that nature?

A. Sometimes.

Q. Can you tell me examples of when it has been consulted?

A. Most recently they were considering licensing another healthcare provider and they consulted with the Board. They had a bill that was introduced and they said if we went forward with this bill what would need to be done. We went with them and went through that process.

Q. I'm sorry. I may not have understood. You said "they" meaning the legislature were considering licensing a healthcare provider?

A. Correct.

Q. I didn't realize the legislature licenses healthcare providers. What do you mean by that?

1 AMY E. EMBRY
2 A. They put forward a bill to
3 license naturopathic physicians.
4 Q. I see. Not a particular
5 provider but a category of providers?
6 A. Correct. Correct.
7 Q. So there was a bill to license
8 -- I'm sorry, what did you call the
9 category?
10 A. Naturopathic.
11 Q. Naturopathic physicians. And
12 the legislature consulted with the Board
13 about what sorts of issues the --
14 A. They would say if we decided
15 to license, how would your office handle
16 this if we put it underneath your Board?
17 And we told them when you're drafting the
18 bill this is how our licensure process is
19 set up now, so if you do move forward
20 with this bill we would ask you to
21 consider X, Y or Z.
22 Q. Was the Board asked its view
23 on whether that was a good idea to
24 license naturopathic physicians?
25 A. In that instance, no.

1 AMY E. EMBRY
2 Q. Are there any other examples
3 where you think that the legislature
4 consulted with the Board about a bill?
5 A. There may have been. The one
6 that I gave earlier, that's the one that
7 actually required a sit-down meeting but
8 it's very common for the legislature to
9 ask for statistics or information before
10 they draft a bill.
11 It is -- to my knowledge, it
12 is not required for the legislature to do
13 that and it has not done on any -- any
14 and all bills that would affect our
15 licensees.
16 Q. Since you've been with the
17 Board or since you've been Executive
18 Director, are there other examples
19 besides the naturopathic physician
20 licensing measure that the legislature
21 consulted with the Board about?
22 A. Let me think on that for a
23 minute. There may have been. I just
24 can't think of any off the top of my
25 head. I just remember that one about the

1 AMY E. EMBRY
2 naturopaths, that stuck out in my mind.
3 Q. And since you've been the
4 Executive Director have there been any
5 bills that actually were passed
6 concerning the regulation of medicine?
7 A. Yes.
8 Q. Which ones?
9 A. Well, I don't have the
10 documents in front of me, but 2021 was a
11 very active session and I do know that
12 the Act 626 that we're here about today,
13 that was passed, that would affect the
14 Medical Practices Act. There was also,
15 that affected the Board directly, is that
16 they changed that physicians could renew
17 for two years rather than one year, they
18 put that into law.
19 I don't have my list in front
20 of me. That's a couple of them.
21 Q. Did the legislature consult
22 with the Board about the rule or bill
23 about physicians renewing for two years?
24 A. No.
25 Q. And when you said before that,

1 AMY E. EMBRY
2 referring to the naturopathic physician
3 bill, that the legislature consulted with
4 the Board, who in the legislature did
5 that?
6 A. I don't have my notes in front
7 of me but it was one representative and I
8 believe one senator and I believe they
9 were the sponsor and co-sponsors of the
10 bill so they met -- it was during the
11 pandemic, so it was via Zoom.
12 Q. So is that something that has
13 happened in other situations that the
14 sponsors of a bill would consult with the
15 Board about a bill?
16 A. It could happen, yes, that
17 could happen.
18 Q. Have there been any
19 significant bills concerning the
20 regulation of medicine where the
21 legislature did not consult with the
22 Board?
23 MS. LAND: Object to form.
24 A. I would have to say yes. I
25 don't know what they are, but at some

AMY E. EMBRY

point, yes.

Q. That there are times that the legislature does not consult with the Board?

A. Correct.

Q. Is it typical that they do consult with the Board when it's a matter of medical regulation?

A. In my opinion, I wouldn't say typical.

Q. Sometimes yes, sometimes no?

A. Correct.

Q. And when they consult with the Board, who on the Board do they consult with?

A. It would come through the office. So they could speak to me, they could speak to a member of my staff. They could also reach out because we're under the Department of Health, it may come through the Department of Health. It would be direct contact or it could be indirect contact.

Q. So in the example you gave

AMY E. EMBRY

about the naturopathic physicians, did that come through you?

A. Yes, it did, yes.

Q. And you said it was the sponsors of the bill that reached out?

A. From what I can recollect, without anything in front of me, yes.

Q. And then do you then connect the legislators with members of the Board or do you just talk to them yourself?

A. No. We do not do that at the Board. We do not connect them unless it's specifically requested by the legislator or Department of Health or anything like that, no.

Q. So when the Board gave input to the legislature -- legislators, I should say, in what format did that come?

A. For?

Q. Let me ask it differently.

I understood you to be saying that these legislators asked for the view of the Board with respect to some questions related to the bill. Were you

AMY E. EMBRY

the one who answered those questions to provide the information they were seeking?

A. Yes. Because in that instance for the naturopathic it was specifically licensing questions and that would come from the Board staff.

Q. So the Board staff would typically provide the information that the legislators are seeking regarding a bill?

A. Yes.

Q. It would not go to the Board members?

A. Only if it is something that the Board needs to consider before returning that. For example, as I used in that example, the licensing practices, the Board would -- the licensing practices are what they are, the staff could answer that. But if they are asking; we want your input from a physician point of view, or something like that, we would either ask them to

AMY E. EMBRY

draft something that we would present to the Board or they could come and address the Board at the next board meeting.

Q. And have legislators ever come to address the Board on questions about which they wanted input?

A. I'm trying to recall. Since I've been Director, no.

Q. But do you know if that's been done in the past?

A. I'm not sure. I'm not sure.

Q. And you said they could put, the legislators could put questions in writing for the Board; is that correct?

A. Yes.

Q. Has that ever been done?

A. Not since I've been Director.

Q. Before that?

A. I don't know.

Q. Okay. But I understand you to be saying that if it were a question about wanting input from the Board on a matter of practice of medicine, that you would take that to the Board, not answer

AMY E. EMBRY

it by staff alone?

A. Correct.

Q. Okay.

A. The staff handles what the staff can handle. The rest goes to the Board.

Q. Okay. We talked earlier about prescription of opioids and I'd like to look at Section 17-95-701 of the Medical Practices Act. And this is titled -- subchapter (7) is titled Chronic Intractable -- Chronic Intractable Pain Treatment Act, correct?

A. Yes.

Q. And is this the provision of the Medical Practices Act that governs prescriptions for painkillers?

A. Yes.

Q. And I think you touched on it in the past. Has overprescription of opioids been a problem in Arkansas?

A. Yes.

Q. Has it caused harm to the public?

AMY E. EMBRY

A. Yes.

Q. What kind of harms?

A. Addiction.

Q. And there have been complaints to the Board about doctors overprescribing opioids; is that correct?

A. Yes.

Q. Did the Board enact regulations to address overprescription of opioids?

A. Yes, 2.8.

Q. Okay. And that one is which one, I think we talked about it, but --

A. It's Rule 2.8.

Q. Thank you. You said 2.8?

A. No. I'm wrong about that. I'm sorry.

Q. I'm not finding it there.

A. It is -- it's in Regulation 2, Regulation 2 has quite a bit to it, and if you look at 6 (a) and (b).

Q. You said subsection 6 of Regulation 2?

A. Correct.

AMY E. EMBRY

Q. "The treatment of pain with dangerous drugs and controlled substances is a legitimate medical practice when done in the usual course of medical practice", that provision? I'm reading just a portion of it just to make sure we're on the same page; is that correct?

A. Yes.

Q. And this regulation, was this all dictated by statute or did the Board develop any of this?

A. This was before my time, but from what I understand, this was at the request of the legislature.

Q. Not by a statute but legislators requesting it?

A. Correct. That is my understanding.

Q. If we can go back to subchapter 7 of the Medical Practices Act that's on page 34, and if we look at subsection (c) (1) it says, "In lieu of a finding of gross and ignorant malpractice the Board after a hearing may

AMY E. EMBRY

incrementally impose sanctions as follows: (a) monitor prescribing habits of the physician not to exceed six months; (b) require that the decision to voluntarily surrender his or her United States Drug Enforcement Agency license to the Board for a specified period of time not to exceed three months; (c) suspend the physician's license, stay the suspension and require monitoring of prescribing habits; (d) revoke the physician's license, stay revocation and require monitoring of the physician's prescribing habits for a specified time; and (e) revoke the physician's license for serious violations of statutes and regulations."

Are these all steps the Board can take if a doctor is found to violate the provisions regarding prescription of pain medication?

A. Yes.

Q. And the Board has a Pain Management Review Committee to review

1 AMY E. EMBRY
 2 complaints of overprescription of main
 3 medications; is that right?
 4 A. Yes.
 5 Q. And have doctors faced
 6 discipline due to improper prescription
 7 of opioids?
 8 A. Yes.
 9 Q. Can you say approximately how
 10 many, since you've been ED?
 11 A. Not truthfully. I honestly
 12 could not give an honest number on that.
 13 It has occurred.
 14 Q. Do you know if it's more than
 15 20?
 16 A. Since I've been Director, no,
 17 it's not more than 20.
 18 Q. Okay. But it's happened?
 19 A. Yes.
 20 Q. Did any of them have
 21 monitoring or surrender of DEA license as
 22 a discipline that was imposed?
 23 A. Describe "monitoring"?
 24 Q. Well, I'm just reading what it
 25 says there; "monitoring prescribing

1 AMY E. EMBRY
 2 habits up to six months."
 3 A. Yes. They can be referred to
 4 the Pain Management Review Committee and
 5 it could be that we want an MP run every
 6 month for the next six months.
 7 Q. And some doctors have had
 8 their DEA license revoked or they've had
 9 to surrender it, I should say?
 10 A. We cannot revoke a DEA
 11 license.
 12 Q. But you can require them to
 13 surrender it as a condition to continuing
 14 to practice?
 15 A. Yes, if that's what the Board
 16 decides.
 17 Q. And has that happened?
 18 A. Yes.
 19 Q. Did these actions serve to
 20 protect the public from harmful conduct
 21 by these doctors?
 22 A. Yes.
 23 Q. Did the Board consider just
 24 prohibiting the use of opioids
 25 altogether, given the harm they were

1 AMY E. EMBRY
 2 causing to the public?
 3 A. I do not know.
 4 Q. You do not know. Okay.
 5 That's never been proposed as
 6 a regulation by the Board?
 7 A. Not since I've been Director,
 8 no.
 9 Q. Do you know why they did not
 10 do that?
 11 A. I have no knowledge about
 12 that. This was before I was there.
 13 Q. Okay. Can we look at
 14 Regulation 27? This is the provision,
 15 "Informed consent for gastric bypass
 16 surgery." Okay?
 17 A. A-hum.
 18 Q. Do I understand correctly from
 19 this that the Board has established
 20 requirements for the informed consent
 21 process before a doctor can perform
 22 gastric bypass surgery?
 23 A. Yes.
 24 Q. And is this a regulation that
 25 was mandated by statute?

1 AMY E. EMBRY
 2 A. Yes. Actually, by Act 1356.
 3 Q. Okay. And did the Board
 4 develop any part of the regulation or was
 5 it all specified by statute?
 6 A. I do not know. I would have to
 7 look at the document.
 8 Q. And in looking at this I see
 9 it says here, "Pursuant to Act 1356 of
 10 the 84th General Assembly of 2003 all
 11 physicians of the State prior to
 12 performing gastric bypass surgery, also
 13 known as open or laparoscopic Roux-en-Y,
 14 will have the patient signs an informed
 15 patient consent form acknowledging they
 16 have been told information about the
 17 various complications that can result
 18 from the surgery. The complications and
 19 information the patient must be informed
 20 of are as follows:" Did I read that
 21 correctly?
 22 A. Yes.
 23 Q. And then it lists (a) through
 24 (i) as complications that patients must
 25 be informed of, correct?

AMY E. EMBRY

A. It's actually A through M.

Q. Oh, sorry. It is A through M.

And then some of those provisions have subsections, correct?

A. Yes.

Q. Okay. So, for example, subsection I says, "The following surgical complications may arise", and it lists 33 potential complications, correct?

A. Yes.

Q. And then there are a series of nutritional complications, four of those, correct, under J?

A. Yes.

Q. And psychiatric complications under K include 4, psychiatric complication, correct?

A. Yes.

Q. And then L lists items 1 through 22 as additional complications, correct?

A. Yes.

Q. And then M identifies

AMY E. EMBRY

pregnancy complications, correct?

A. Yes.

Q. And then going back to Section E says, "There is no guarantee of weight loss or long-term weight management as a result of getting surgery." Did I read that right?

A. Yes.

Q. Okay. And then F, a lifetime of followup medical care is required; is that correct?

A. Yes.

Q. So these are all provisions that doctors have to inform patients about, complications and risks that the doctors have to inform patients about before performing gastric bypass surgery, correct?

A. Yes.

Q. Now, how did the Board identify all of these complications?

A. I do not know. I was not at the Board when this was created and promulgated. So I would have to look at

AMY E. EMBRY

that documentation.

Q. Okay.

A. But it is possible it came directly from the Act.

Q. Okay. And do these provisions that lay out requirements for informed consent for gastric bypass protect the public from harm?

A. My belief is yes.

Q. And how is that?

A. Well, it's information to the patient, they need to be made aware of these complications.

Q. Did the Board ever discuss prohibiting gastric bypass surgery?

A. I do not know.

Q. Okay. Does the Board prohibit any -- I think I asked a version of this question before but I want to make sure I understand. Does the Board prohibit any medical treatment across the Board?

A. No.

Q. And has the Board ever considered, to your knowledge, a proposal

AMY E. EMBRY

to prohibit a particular medical treatment across the Board?

A. Not to my knowledge, no.

Q. Has any member of the Board proposed a regulation that would prohibit a particular medical treatment across the Board?

A. Not since I've been the Director, no.

Q. Okay. Are you aware of, as the Director of the Board, of any State statutes that prohibit a particular medical treatment?

A. The only one that I am aware of is the one that we're here today to discuss, Act 626.

Q. You're not aware of any others?

A. No, I am not.

Q. Now, is off-label use of drugs permitted in Arkansas?

A. Yes.

Q. Is it common?

A. Yes. I would say so, yes.

1 AMY E. EMBRY
 2 Q. And I understand that the
 3 State allows off-label use of
 4 hydroxychloroquine to treat COVID; is
 5 that correct?
 6 MS. LAND: Objection to
 7 relevance. You can answer.
 8 A. It does not prohibit it.
 9 MS. COOPER: Can we mark as
 10 Exhibit 6, tab 8?
 11 (Exhibit 6, Guidance For the
 12 Use of Hydroxychloroquine and
 13 Chloroquine For the Treatment of
 14 COVID 19 was received and marked on
 15 this date for identification.)
 16 MS. COOPER: Amanda, do you
 17 have it up?
 18 MS. LAND: Leslie, it is not
 19 loading for me.
 20 MR. RICHARDSON: One moment.
 21 That should be available to you
 22 now.
 23 MS. LAND: Yes, I have it.
 24 MS. COOPER: Great.
 25 Q. For the record, I'll just

1 AMY E. EMBRY
 2 state that the document is called
 3 Guidance For the Use of
 4 Hydroxychloroquine and Chloroquine For
 5 the Treatment of COVID 19, dated July 29,
 6 2020 from the Arkansas Department of
 7 Health.
 8 Have you ever seen this
 9 before, Ms. Embry?
 10 A. Yes.
 11 Q. When did you see it?
 12 A. When it was released back in
 13 2020.
 14 Q. And why was this -- why did
 15 you see it? How did you come to see it?
 16 A. It was sent out by the
 17 Department of Health to all of its
 18 sub-agencies and sections. It was also on
 19 their website.
 20 Q. Did the Board have any role in
 21 the creation of this guidance?
 22 A. No.
 23 Q. That was done by the
 24 Department of Health?
 25 A. To my knowledge, yes.

1 AMY E. EMBRY
 2 Q. And just stepping back, I
 3 understand that you're -- well, let me
 4 ask you differently.
 5 What is the relationship
 6 between the Arkansas State Medical Board
 7 and the Department of Health?
 8 A. We are within the Department
 9 of Health. The State Medical Board is an
 10 agency or subsection or whatever you want
 11 to call it of the Department of Health.
 12 Q. Okay. Thank you.
 13 And if we can just read along
 14 together, since it's pretty short, it
 15 says, "On June 15, 2020 the Food and Drug
 16 Administration, FDA, revoked the
 17 emergency use authorization, EUA, for the
 18 use of chloroquine, CQ, and
 19 hydroxychloroquine, HCQ, to treat COVID
 20 19 after concluding it was 'no longer
 21 reasonable to believe that oral
 22 formulations of HCQ and CQ may be
 23 effective in treating COVID 19, nor is it
 24 reasonable to believe that the known and
 25 potential benefits of these products

1 AMY E. EMBRY
 2 outweigh their known and potential
 3 risks.' The latter included serious
 4 adverse events. Based on this
 5 information, the Arkansas Department of
 6 Health, ADH, updated its guidance related
 7 to HCQ and CQ indicating that their use
 8 for treatment of COVID 19 should be
 9 avoided in both outpatient and
 10 hospitalized settings, but could be
 11 administered prescribed and dispensed for
 12 FDA medical supervision of a patient's
 13 healthcare provider. Unapproved use,
 14 i.e., off-label use, of these medications
 15 is left to the discretion of individual
 16 clinicians and their patients. However,
 17 the ADH wants clinicians to be aware that
 18 coadministration of HCQ or CQ with
 19 remdesivir and MEUA, approved medication
 20 for treatment of COVID 19, is not
 21 recommended based on data showing an
 22 antagonistic effect of these medications
 23 on the antiviral activity of remdesivir."
 24 Did I read that reasonably
 25 okay?

1 AMY E. EMBRY
 2 A. Yes.
 3 Q. Despite some of the big words.
 4 So you said you were familiar
 5 with this guidance, correct?
 6 A. Yes.
 7 Q. Was the Board consulted in any
 8 way about this guidance?
 9 A. This was nearly two years ago
 10 but my recollection right now is no, they
 11 were not consulted.
 12 Q. Okay. Did the Board have any
 13 conversations about this guidance?
 14 A. Not that I can recall. I would
 15 need to go back and look at meetings.
 16 It's been years.
 17 Q. Did you have any conversation
 18 with Board members or Board have about
 19 this guidance?
 20 A. No.
 21 Q. Did you hear any conversations
 22 from Board staff or Board members about
 23 it?
 24 A. No.
 25 Q. So I understand here that the

1 AMY E. EMBRY
 2 Department of Health is allowing
 3 off-label use of hydroxychloroquine to
 4 treatment COVID despite the State's
 5 awareness of the lack of evidence of
 6 effectiveness plus serious risks of use,
 7 correct?
 8 A. Repeat that question.
 9 Q. Yes. I understand from here
 10 the State is -- the Department of Health
 11 is allowing the off-label use of
 12 hydroxychloroquine to treat COVID despite
 13 the State's awareness of the lack of
 14 evidence of effectiveness for this
 15 purpose and the serious risks of using
 16 it; is that correct?
 17 A. According to this document, it
 18 says it's allowing the decision to be
 19 left to the individual clinicians and
 20 their patients.
 21 Q. Okay. And this is not
 22 something the Board considered weighing
 23 in on?
 24 A. Not that I can recall.
 25 VIDEOGRAPHER: Is there a

1 AMY E. EMBRY
 2 chance we can take a break? I've
 3 got to change a card and I'm
 4 getting pretty close.
 5 MS. COOPER: Sure. We can take
 6 a break now. How much time do you
 7 need?
 8 VIDEOGRAPHER: We are off the
 9 record at 12:56 p.m.
 10 (Recess is taken.)
 11 VIDEOGRAPHER: We are back on
 12 the record at 1:50 p.m.
 13 Q. Thank you. Welcome back.
 14 You mentioned earlier an issue
 15 with some doctors or a doctor at a jail
 16 prescribing Ivermectin for COVID. Did I
 17 say that right?
 18 A. Yes.
 19 Q. Okay. And I think you
 20 mentioned there were a number of
 21 complaints about that use of Ivermectin;
 22 is that right?
 23 A. Yes.
 24 Q. And was it all against the
 25 same doctor or multiple doctors?

1 AMY E. EMBRY
 2 A. In that instance it was the
 3 same doctor.
 4 Q. And so I understand that there
 5 were multiple complaints against this
 6 doctor and am I right that there was a
 7 determination that no action was taken at
 8 some point by the Board with respect to
 9 the complaint against this doctor for
 10 prescribing Ivermectin for COVID?
 11 A. This one is still open, so I
 12 cannot say that nothing has been done.
 13 Q. Okay. So when you say "this
 14 one is still open" and maybe I may be
 15 misspeaking here, but if there is
 16 multiple complaints about one doctor,
 17 then they get joined together as one
 18 investigation or are they separate
 19 investigations?
 20 A. It could. It depends on the
 21 nature of the complaint as well.
 22 Q. And in this case with the
 23 doctor prescribing Ivermectin, is there
 24 one process only or have there been more
 25 than one process in investigating these

1 AMY E. EMBRY
 2 complaints?
 3 A. I think we did group this one
 4 into one investigation.
 5 Q. So the Board never reached any
 6 conclusion with respect to this -- any
 7 complaint against this doctor?
 8 A. It is still ongoing.
 9 Q. And it never took a complaint
 10 for "information only" at any stage?
 11 A. They may have taken some for
 12 "information only".
 13 Q. When you say "some", some
 14 complaints against this doctor?
 15 A. Yes. So, for example, let's
 16 say ten complaints were received. All ten
 17 complaints would be presented to the
 18 Board individually as separate
 19 complaints. Some complaints may say we
 20 need to look into this one further, we
 21 need to do an investigation, whatever
 22 they decide. There may be another
 23 complaint to say, no, there was no
 24 violation, from what we have found there
 25 is no violation of the Medical Practices

1 AMY E. EMBRY
 2 Act and this one is closed.
 3 Q. So with these Ivermectin
 4 complaints, some of them have been
 5 closed?
 6 A. Yes.
 7 Q. And was that based on a
 8 determination in those complaints there
 9 wasn't a violation of the Medical
 10 Practices Act?
 11 A. Yes.
 12 Q. And does that mean in those
 13 situations the Board determined that
 14 Ivermectin had not been prescribed to
 15 treat COVID in those cases?
 16 A. It would depend on what that
 17 particular complaint was. If it was a
 18 complaint about Ivermectin and they took
 19 it as no violation, then that's it but I
 20 would have to go back and review every
 21 single one of those to see if it was
 22 specifically Ivermectin.
 23 Q. Was there ever a complaint --
 24 and I know I could go review all the
 25 board meetings and look at this myself,

1 AMY E. EMBRY
 2 but maybe you can help me cut to the
 3 chase here.
 4 Was there ever one where the
 5 Board heard the complaint, had a hearing
 6 and determined that even though the
 7 doctor was found to have prescribed
 8 Ivermectin to treat COVID, that it was
 9 not a violation of the Medical Practices
 10 Act?
 11 A. No. There has not been
 12 anything like that.
 13 Q. Okay. Has the Board considered
 14 passing any regulation prohibiting the
 15 use of Ivermectin for COVID?
 16 A. No.
 17 Q. It's not been proposed by
 18 anybody?
 19 A. I'm sorry. Could you repeat
 20 that?
 21 Q. It hasn't been proposed by
 22 anybody?
 23 A. Not to my knowledge.
 24 Q. Okay. Is informed consent a
 25 requirement for medical treatments

1 AMY E. EMBRY
 2 generally in Arkansas?
 3 A. Could you repeat that?
 4 Q. Let me repeat that. Are you
 5 having trouble hearing me?
 6 A. I think you were just breaking
 7 up on that question.
 8 Q. Okay. I'll repeat it.
 9 Is informed consent a
 10 requirement for medical treatment in
 11 Arkansas?
 12 A. I would have to check the code
 13 but I do know we have some regulations
 14 for informed consent, abortion, gastric
 15 bypass and I do know on certain instances
 16 you do have to have a consent form to
 17 treat certain patients. For all of them,
 18 I'm not sure about.
 19 Q. Is the Board aware of the
 20 Gender Spectrum Clinic at Arkansas
 21 Children's Hospital?
 22 A. I can't answer for all the
 23 Board members, so I don't know if they're
 24 aware of it or not.
 25 Q. But the Board, itself, has the

1 AMY E. EMBRY
 2 Board had any information provided to the
 3 Board that made it aware of the Arkansas
 4 Children's Hospital Gender Spectrum
 5 Clinic?
 6 A. Not to my knowledge, no.
 7 Q. Did the Board ever have any
 8 discussions about the Gender Spectrum
 9 Clinic at Arkansas Children's Hospital?
 10 A. Not to my knowledge no.
 11 Q. Did any members of the Board
 12 have any discussion about the Gender
 13 Spectrum Clinic at Arkansas Children's
 14 Hospital?
 15 A. Not to my knowledge.
 16 Q. What about Board staff?
 17 A. No. Not to my knowledge, no.
 18 Q. So you've not been part of any
 19 conversations about the Gender Spectrum
 20 Clinic?
 21 A. No.
 22 Q. Do you know what I refer to
 23 when I refer to Gender Spectrum Clinic?
 24 A. No. I just figure it's a
 25 section of that hospital.

1 AMY E. EMBRY
 2 Q. Has the Board ever received
 3 any complaints concerning
 4 gender-affirming medical care for minors?
 5 A. No.
 6 Q. And by the way, do you know
 7 what I mean by "gender-affirming medical
 8 care" or do you have an understanding of
 9 that term?
 10 A. Yes. It was the definition
 11 provided in the document to me.
 12 Q. Okay. And just to be clear, in
 13 case there is any confusion, by
 14 "gender-affirming medical care", I'm
 15 referring to medical interventions for
 16 adolescents with gender dysphoria,
 17 including hormone therapy or puberty
 18 blocker or surgery to treat their gender
 19 dysphoria. Are we having a common
 20 understanding there?
 21 A. Yes.
 22 Q. So I will use the term
 23 gender-affirming medical care as
 24 shorthand rather than say that every
 25 time, okay?

1 AMY E. EMBRY
 2 A. Okay.
 3 Q. So going back to my question,
 4 has the Board ever received any
 5 complaints regarding doctors providing
 6 gender-affirming medical care?
 7 A. No.
 8 Q. Never? And that's including
 9 before the introduction of what became
 10 Act 626 and since?
 11 A. To my knowledge, it has never
 12 received a complaint regarding
 13 gender-affirming medical care.
 14 Q. And is that for minors or
 15 adults?
 16 A. Correct.
 17 Q. Has the Board ever had any
 18 discussions about gender-affirming
 19 medical care?
 20 A. Not to my knowledge, no.
 21 Q. Well, so does that -- you are
 22 testifying on behalf of the Board, and
 23 you have been designated by the Defendant
 24 Board to testify on this topic.
 25 So have you been prepared --

1 AMY E. EMBRY
 2 can you answer on behalf of the Board
 3 that the Board has not had discussions
 4 about this topic, let's say, since you've
 5 been Executive Director?
 6 A. There has not been discussion
 7 at any of the board meetings. I cannot
 8 speak for every single Board member to
 9 see if they ever discussed it.
 10 Q. Are you aware of any
 11 conversations with any -- with or between
 12 any Board members concerning
 13 gender-affirming medical care?
 14 A. No.
 15 Q. And are you aware of any
 16 conversations that included any Board
 17 staff about gender-affirming medical
 18 care?
 19 A. No.
 20 Q. Okay. So when the bill that
 21 became Act 626 was being debated and
 22 ultimately passed, nobody at the Board
 23 staff or at board meetings discussed it
 24 at all?
 25 A. No.

1 AMY E. EMBRY
 2 Q. Has the Board ever considered
 3 are passing a regulation concerning
 4 gender-affirming medical care?
 5 A. No. Not as I've been
 6 Director, no.
 7 Q. Did the Board ever see a need
 8 for a regulation concerning
 9 gender-affirming medical care?
 10 A. It was not communicated to me
 11 if they did.
 12 Q. And so I asked you about
 13 whether there were complaints about
 14 gender-affirming medical care and you
 15 said there weren't, but I understand from
 16 your testimony earlier sometimes things
 17 come to the Board's attention apart from
 18 complaints.
 19 Did any problems related to
 20 gender-affirming medical care for minors
 21 ever come to the Board's attention
 22 outside of complaints?
 23 MS. LAND: Object to form.
 24 A. No.
 25 Q. Okay.

1 AMY E. EMBRY
 2 MS. COOPER: Beth, if you can
 3 take tab 9 and we'll have that
 4 marked as Exhibit 7? Thank you.
 5 (Exhibit 7, May 5, 2021 email
 6 re: Public Health Grand Rounds was
 7 received and marked on this date
 8 for identification.)
 9 MR. RICHARDSON: Exhibit 7 has
 10 been introduced.
 11 MS. LAND: I have it.
 12 MS. COOPER: Thank you.
 13 Q. Ms. Embry, you have Exhibit 7
 14 in front of you?
 15 A. Yes.
 16 Q. Have you seen this document
 17 before?
 18 A. I cannot recall seeing this
 19 specific one.
 20 Q. Have you seen any documents
 21 representing grand rounds regarding
 22 gender-affirming medical care?
 23 A. I have to grand rounds. I
 24 can't say that I have seen it for
 25 gender-affirming but I have seen grand

1 AMY E. EMBRY
 2 rounds.
 3 Q. And just to be clear the
 4 document marked as Exhibit 7 is an email
 5 including a document that has in large
 6 text Public Health Grand Rounds,
 7 Announcing a Session on Gender-Affirming
 8 Care Services in Arkansas. I'm just
 9 stating that for the record, not as part
 10 of the question.
 11 So you were not aware of a
 12 grand rounds --public health grand rounds
 13 on gender-affirming care services in
 14 Arkansas?
 15 A. Well, I may have received this
 16 email but we receive these normally
 17 weekly, so I do not recall this one in
 18 particular.
 19 Q. And so sitting here now is the
 20 first time that you think you have been
 21 aware of this grand round?
 22 A. Correct.
 23 Q. Just so I understand the email
 24 at the top, it says from Matt Gilmore
 25 ADH, is that the Arkansas Department of

1 AMY E. EMBRY
 2 Health?
 3 A. Yes.
 4 Q. And it's sent to Heather Owen
 5 cc: Sarah Morris. Who is Heather Owen?
 6 A. Heather Owen is an employee of
 7 the Board.
 8 Q. What is her position on the
 9 Board?
 10 A. She is one of the licensing
 11 managers.
 12 Q. Okay. And Sarah Morris?
 13 A. I have no idea who Sarah
 14 Morris is.
 15 Q. Okay. Below that there is a --
 16 it looks like it was forwarding an
 17 earlier email from Sarah Morris to ADH
 18 All. Is ADH All, do I take it, an email
 19 list of all ADH employees?
 20 A. Correct.
 21 Q. Okay. So you would have
 22 received this but you don't recall that
 23 particular grand rounds?
 24 A. Correct.
 25 Q. Okay. Did anyone at the Board

1 AMY E. EMBRY
 2 discuss the fact that there was going to
 3 be a grand rounds on gender-affirming
 4 care in Arkansas?
 5 A. Not to my knowledge.
 6 Q. And just for the record, I'm
 7 noting that it's dated, the event was
 8 dated to occur May 6th, 2021.
 9 Does that help refresh your
 10 recollection about whether there was any
 11 conversation about this?
 12 A. There was no conversation with
 13 me about this.
 14 Q. And you're not aware of others
 15 discussing it?
 16 A. No.
 17 Q. Okay. When Act 626 was first
 18 introduced in the legislature as HB 1570,
 19 during that period when it was being
 20 considered, did anyone at the Board
 21 discuss the bill?
 22 A. No, not to my knowledge.
 23 Q. Okay so no official board
 24 meeting discussion of the bill?
 25 A. No.

1 AMY E. EMBRY
 2 Q. And you're not aware of any
 3 conversations among the Board members
 4 about the bill?
 5 A. No.
 6 Q. And you're not aware -- well,
 7 let me ask you a different question.
 8 Are you aware of any
 9 conversation involving any Board staff or
 10 employees about the bill?
 11 A. No.
 12 Q. Sorry if I'm -- I'm finding it
 13 surprising that a bill that obviously had
 14 a lot of public attention involving
 15 medical regulation, nobody at the Board
 16 talked about it at all?
 17 MS. LAND: Object to form.
 18 Q. Is that right? Really, nobody
 19 discussed it?
 20 A. I found out about the bill it
 21 was either on social media or the news.
 22 Q. Back at the time it was being
 23 considered?
 24 A. Correct.
 25 Q. So just to be clear, you are

1 AMY E. EMBRY
 2 not aware of any conversations had among
 3 any Board members or involving any Board
 4 members or any staff about this bill that
 5 became Act 626?
 6 A. No.
 7 Q. Now, we talked earlier about
 8 other areas of regulations by the Board
 9 that were -- where the regulations after
 10 statutes were passed on the particular
 11 topic like gastric bypass procedures.
 12 Is the Board expected to pass
 13 regulations relating to Act 626?
 14 A. I do not have the act in front
 15 of me, but I do not recall that act
 16 requiring any Licensing Board to
 17 promulgate a rule. If it is specifically
 18 in there that they will promulgate a rule
 19 then it will be promulgated.
 20 Q. But at this point so far has
 21 there been any discussion about a
 22 possibility of promulgating a rule?
 23 A. No.
 24 Q. Has any government official in
 25 the executive branch or the legislature

1 AMY E. EMBRY
 2 communicated with the Board about Act
 3 626?
 4 A. No, not to my knowledge, no.
 5 Q. Okay. And when the bill was
 6 introduced and being considered did
 7 anyone from the legislature consult with
 8 the Board regarding this bill?
 9 A. No.
 10 Q. And just to be clear, "this
 11 bill" I'm referring to the bill that
 12 became Act 626.
 13 A. No. No one contacted, no.
 14 Q. So the Board's input was not
 15 sought by any member of the legislature?
 16 A. No.
 17 Q. Okay. And since the law Act
 18 626 was enacted has any government
 19 official communicated with the Board
 20 about enacting regulations regarding the
 21 Act?
 22 A. No.
 23 Q. So your understanding is that
 24 the Act 626 does not require any
 25 regulations or rules to be promulgated by

AMY E. EMBRY

the Board?

A. Yes, from my recollection. I don't have it in front of me, I would have to read through it again, but I do not recall a requirement for rules in that Act.

Q. So there is no plan on the part of the Board to pass a regulation relating to Act 626?

A. No.

Q. Has the Board consulted with any experts on the topic of gender-affirming medical care?

A. No.

Q. So prior to the introduction of HB 1570, the bill that became Act 626, was the Board ever approached by any government official or their representatives about enacting regulations concerning gender transition procedures?

A. As long as I've been Director, no. Before that, I can't answer that.

Q. And was the Board or any Board

AMY E. EMBRY

member or Board staff contacted by anybody from the Governor's Office related to HB 1570 or Act 626, which it later became?

A. I was not, and I don't recall anybody else in the office, being contacted by the Governor's Office.

Q. Are you aware of any Board member being contacted by anyone from the Governor's Office?

A. I am not aware of anything.

Q. So the way I had asked the questions before about legislators, is whether any of the legislators contacted the Board. Do you know if anybody from the Board contacted any legislators concerning HB 1570?

A. Not to my knowledge, no.

Q. Do you know if anybody from the Board staff contacted any legislator regarding Act 626 or HB 1570?

A. Not to my knowledge.

Q. Okay. Did anyone from the

Board or the Board staff reach out to any

AMY E. EMBRY

government official, executive or legislative branches regarding HB 1570, which later became Act 626?

A. Did you say executive branches?

Q. Yes, from the executive or legislative branches.

A. No.

Q. Okay. Did the Board ever take a position on HB 1570?

A. No.

Q. Why not?

A. The Board does not lobby.

Q. Did the Board ever discuss the possibility of taking a position about the bill?

A. No.

Q. Was the Board ever asked its position by anyone?

A. Not to my knowledge.

Q. But it was asked by press reporters, right?

A. I don't recall being contacted by the press on this.

AMY E. EMBRY

MS. COOPER: Okay. Can we, Beth, take tab 10 and let's mark that as Exhibit 8.

(Exhibit 8, email dated May 25, 2021, re: CNN Inquiry was received and marked on this date for identification.)

MR. RICHARDSON: Exhibit 8 has been introduced.

MS. LAND: I've got it pulled up.

Q. I'll give you a moment to just take a look at that.

A moment ago I asked whether the Board was ever asked its position on HB 1570 or after it became law Act 626. I'll ask a slightly different question now.

Was the Board ever asked its view on the lawsuit challenging Act 626?

A. Yes.

Q. And so the exhibit marked Exhibit 8, which I have handed to you, is a -- I'll describe for the record, an

1 AMY E. EMBRY
2 email from Chance Pagan sent Tuesday, May
3 25th, 2021 to Juli Carlson, cc: Ann
4 Embry ASMB Regulatory/Disciplinary
5 Department, subject: Forward CNN
6 Inquiry. That's just for the record.
7 Do you recognize this email?
8 A. Yes, I do.
9 Q. You were copied on it? You saw
10 it at the time?
11 A. I was. This was a year ago.
12 Q. Okay. And is this -- I do read
13 right that CNN was asking for comment
14 from the Board on the ACLU lawsuit
15 against Act 626?
16 A. Yes.
17 Q. And so tell me if I'm getting
18 this right, it looks like the initial
19 email is from someone named Jamiel Lynch
20 from Warner Media at, according to their
21 email address, to ASMB Support
22 Department, copying Kodwyer,
23 K-o-d-w-y-e-r, @HDLlaw.com, subject: CNN
24 Interview.
25 What is ASMB Support

1 AMY E. EMBRY
2 Department, do you know?
3 A. That's just an email, email
4 that can go to Support Department, which
5 means more than one person has access to
6 that email. Anything that they need
7 assistance with they send it to that, and
8 so one of three or four people will be
9 able to help out.
10 Q. Okay. So then it looks like
11 someone named Chance Pagan listed as
12 Systems Administrator sent this,
13 forwarded this email to Juli Carlson and
14 you; is that correct?
15 A. Correct.
16 Q. And who is Chance Pagan?
17 A. He is in our IT department.
18 Q. It says here in the email, "I
19 believe this would be for you." I assume
20 he meant Juli Carlson; is that correct?
21 A. That's why he sent it to Juli
22 and this was sent to the Support
23 department, which goes to IT. He
24 forwarded it onto the Regulatory
25 department.

1 AMY E. EMBRY
2 Q. Thank you. Did you talk with
3 Juli Carlson about this request?
4 A. I'm sure I did but this was a
5 year ago, and I don't remember. We would
6 have responded but I'd have to go back
7 and look at my emails and notes on this.
8 Q. Did the Board take a position
9 on the ACLU lawsuit?
10 A. No. We would not have taken a
11 position.
12 Q. Did it make a statement?
13 A. I can't remember. I would have
14 to go back and look in my emails and look
15 at in my notes.
16 Q. Okay. Was the Board asked for
17 comment or statements about Act 626 or
18 the ACLU lawsuit challenging Act 626,
19 apart from this CNN inquiry?
20 A. It's possible. It is possible.
21 Q. And what responses would the
22 Board have made?
23 A. I would have to go back and
24 look at my notes but it would be a
25 generic response.

1 AMY E. EMBRY
2 Q. A generic response to the
3 effect of what?
4 A. We would not take a stance in
5 the lawsuit, it would be somewhere along
6 the lines -- and again, this is not what
7 the response would have said -- is that
8 we would have followed the process; we
9 have a lawsuit filed against us, we'll
10 follow the process.
11 Q. Are you aware that the
12 Governor vetoed HB 1570 before it
13 ultimately became law?
14 A. I think I do recall that, yes.
15 Q. And were you aware that --
16 well, let me ask a different question.
17 Have you seen the Governor's
18 veto statement or heard him speak about
19 his veto?
20 A. No.
21 Q. You never saw it?
22 A. Not that I can recall.
23 Q. Do you know why the Governor
24 vetoed the law?
25 A. No.

AMY E. EMBRY

Q. Does the Board have a view about the appropriate course of treatment for adolescents with gender dysphoria?

A. No.

Q. Does the Board recognize that gender-affirming hormones can be a help to some adolescents?

A. Not to my knowledge.

Q. "Not to my knowledge" that the Board knows, or the Board recognizes this, rather?

A. You're going to have 14 different Board members with 14 different opinions, so you can have 14 different answers.

Q. Do you know the views of any individual Board member?

A. No.

Q. Is the Board taking the position in this case that no adolescent can benefit from gender-affirming hormone therapy?

A. I don't feel I can answer that question. The Board has not discussed it,

AMY E. EMBRY

so I don't know the answer to that.

Q. So the Board doesn't -- the Board doesn't have a position on that?

A. No.

Q. And is it also true the Board does not have -- does not take the position that gender-affirming medical treatments can never be helpful to alleviate gender dysphoria in adolescents?

A. Can you repeat that?

Q. I'm realizing that was a terrible question with a double negative. I'm going to rephrase it.

Is it the Board's position that gender-affirming medical treatments can never alleviate gender dysphoria in adolescents?

A. It's never been discussed, so they do not have an opinion on this at the Board.

Q. Is it the Board's position that the risks of gender transition procedures always outweigh the benefits

AMY E. EMBRY

for every minor patient with gender dysphoria?

A. Again, they haven't discussed this, so there is no position that I'm aware of.

Q. Does the Board recognize that for adolescents who are currently receiving gender-affirming medical treatments that withdrawing that treatment from them could put them at risk of harm?

A. Again, they haven't discussed this, so I do not know the Board's position on this.

Q. So does the Board have a position on this?

A. No, they have never discussed it.

Q. So it's not just that you don't know the Board's position, is it your testimony that the Board doesn't have a position on this?

A. They have not discussed anything to have a position on this. This

AMY E. EMBRY

issue has not come up. The Board did not know about the bill or anything until it hit the media, same as us.

Q. So is it fair to assume that nobody from the Board lobbied legislators to support the bill?

A. No.

Q. Nobody lobbied -- nobody from the Board lobbied legislators one way or the other related to the bill?

A. The Board does not lobby.

Q. The Board doesn't lobby about any bills; is that right?

A. That is correct.

Q. So members of the Board, have they ever individually taken positions on any bill related to medical care?

A. Not at the Board meeting.

Q. But outside of the board meeting?

A. I wouldn't know that.

Q. Are you aware of any times that happened?

A. No. I don't know, no.

AMY E. EMBRY

Q. In Arkansas do parents have to consent to medical treatment for their children, for their minor children?

A. Usually yes. That's between the physician and the parent and the patient.

Q. And what do you mean by it's "between the physician and the parent and the patient"?

A. Well, any care on any patient, whether it's a minor or an adult, that is between the physician and the patient. If a minor is involved, then the parent is involved.

Q. When you say any care between the patient and the physician and if it's a minor the parent, do you mean the decision about whether to undergo care?

A. I would think it -- yes. Yes.

Q. But I think you testified that generally parents do have to consent for medical treatment for their children, if they want them to have that care? Excuse me. Let me do that again because that was

AMY E. EMBRY

my fault. I spoke over you. I just want to get a clear record.

Do you understand your testimony that in Arkansas generally before minors can have medical care their parents need to consent?

A. Yes.

Q. Okay. Are there exceptions where the minor could consent on their own without parents?

A. I don't know.

MS. COOPER: Beth, if we can take tab 12 and mark that as Exhibit 9.

(Exhibit 9, copy of House Bill 1570 was received and marked on this date for identification.)

MS. LAND: Okay. It's pulled up for me.

Q. For the record, I'm going to identify Exhibit 9 as House Bill 1570.

Have you seen this bill before?

A. Yes.

AMY E. EMBRY

Q. When did you see it for the first time?

A. For the first time it would be after it was put on the news or social media, however I heard of it, I pulled it up.

Q. Why did you -- sorry. Go ahead.

A. I pulled it up on the legislative website.

Q. Why did you do that?

A. Because I knew that it would probably affect the Board in some form or fashion, so I was just looking at it.

Q. Why did you think it would affect the Board in some form or fashion?

A. Because it involved physicians.

Q. And now that you've looked at it, does it involve the Board in some form or fashion?

A. One section.

Q. Which section is that?

A. It's going to be from page 9

AMY E. EMBRY

line 27, and the Code is 20-9-1504, it's the enforcement. And it says, "Any referral for or provision of gender transition procedures to an individual under 18 years of age is unprofessional conduct and is subject to discipline by the appropriate licensing entity or Disciplinary Review Board with competent jurisdiction in this State."

Q. And that's the one provision within HB 1570 that you understand to involve the Board --

A. Yes.

Q. -- is that right? Is that because the Board is the appropriate licensing entity at issue?

A. Well, it is the appropriate --

Q. Excuse me. I have to -- I asked my question terrible. I'll redo it.

Is it because the Board is the appropriate licensing entity or Disciplinary Review Board with jurisdiction in this State?

MS. LAND: I'll object to the

1 AMY E. EMBRY
 2 form. You can answer that.
 3 A. It is the licensing entity for
 4 some healthcare professionals in the
 5 State of Arkansas.
 6 Q. And is it also the
 7 Disciplinary Review Board for some
 8 healthcare professionals in Arkansas?
 9 A. We've always just been called
 10 a Licensing Board. I've never heard us
 11 called a Disciplinary Review Board.
 12 Q. Okay. So I have a few
 13 questions about this provision, which is
 14 20-9-1504, subsection (a).
 15 As you read it says, "Any
 16 referral for or provision of gender
 17 transition procedures to an individual
 18 under 18 years of age is unprofessional
 19 conduct."
 20 I'm trying to understand what
 21 that means for your enforcement as you,
 22 the Board, because there's a whole other
 23 provision in the Medical Practices Act
 24 laying out unprofessional conduct.
 25 Is it your understanding that

1 AMY E. EMBRY
 2 this is an additional type of conduct
 3 that now constitutes unprofessional
 4 conduct, in addition to what we discussed
 5 in the other statute defining that term?
 6 A. Yes.
 7 Q. Okay. So I believe that one
 8 had subpoints A through S defining
 9 unprofessional conduct, so this is just
 10 one more?
 11 A. Yes.
 12 Q. Okay. And you testified that
 13 the Board is the licensing entity for
 14 some medical providers.
 15 Is there any other entity that
 16 enforces or that is a licensing entity or
 17 Disciplinary Review Board that would be
 18 relevant with respect to enforcing Act
 19 626?
 20 A. It depends on what healthcare
 21 professionals would be providing these
 22 services.
 23 Q. Okay. So let's break that
 24 down. That's helpful.
 25 So for physicians who are

1 AMY E. EMBRY
 2 providing procedures that are prohibited
 3 by HB 1570, the Board would be the
 4 appropriate licensing entity; is that
 5 correct?
 6 A. Yes.
 7 Q. Okay. Is there any other
 8 entity in Arkansas that would be a
 9 licensing entity for physicians?
 10 A. No, not for physicians.
 11 Q. Is there any other entity in
 12 Arkansas that would be responsible for
 13 discipline of physicians in Arkansas?
 14 A. No.
 15 Q. Does the Board have discretion
 16 in deciding how to enforce Act 626,
 17 should it take effect?
 18 A. It would -- it would work, as
 19 the same as any other enforcement, if the
 20 complaint came, that they would read the
 21 law and see what needs to be done because
 22 that's just how it works on a complaint
 23 basis.
 24 Q. Well, I think you also said
 25 while it's on a complaint basis, things

1 AMY E. EMBRY
 2 can come to the Board's attention apart
 3 from complaints that the Board could then
 4 act on; is that right?
 5 A. Yes.
 6 Q. Like if it's in the news, for
 7 example, I think you said?
 8 A. Correct.
 9 Q. Okay. Has the Board been
 10 provided any direction from any
 11 government official or entity about how
 12 to enforce Act 626 if it takes effect?
 13 A. No.
 14 Q. Has the Board had any
 15 conversations or any Board members or
 16 Board staff about how the Board would
 17 enforce Act 626 should it take effect?
 18 A. No.
 19 Q. Are you aware that the law Act
 20 626 was preliminarily enjoined by Federal
 21 Court in Arkansas and is not currently in
 22 effect?
 23 A. Yes.
 24 Q. Okay. And prior to that,
 25 before the court ruled, I believe --

AMY E. EMBRY

well, let's find this. I'm going to just strike that and ask it differently.

If the law were to take effect would there be a process the Board would need to undergo to determine how to enforce Act 626?

A. No. It would go through the usual process of any complaint received, it would be addressed by the entire Board and they would determine if there has been a violation.

Q. So if tomorrow Act 626 went into effect the Board would be ready to field any complaints should they arise?

A. Yes.

Q. Okay. It doesn't have anything it needs to do to get ready for that?

A. No.

Q. Okay. So if Act 626 took effect and a complaint came to the Board saying that there is a doctor who is providing gender-affirming medical care to an adolescent, what would happen? What would the Board do?

AMY E. EMBRY

A. It would be the same as any other complaint. The physician would be provided a copy of the complaint and asked to respond and once that is received by the complaint and the response is presented to the Board and then they will move forward from there; if there needs to be an investigation; does action need to be brought against the license; it could be a variety of situations, but the whole thing will go before the full Board and it will be discussed.

Q. And so if they got a complaint, the Board got a complaint about this and the physician responded and admitted providing that care, would a violation be determined?

A. I can't answer that question. That would go before the Board, they would look at all situations, all circumstances surrounding it. So I can't answer how the Board would vote.

Q. So there could be

AMY E. EMBRY

circumstances under which it might not constitute a violation?

A. No. I can't think of anything off the top of my head.

Q. So the Board would not have any discretion not to find a violation if the person admitted to providing care prohibited by Act 626?

A. Could you repeat?

MS. LAND: Object to form.

Q. Sure. Would the Board have no discretion, it would have to find a violation if a doctor admitted providing care prohibited by Act 626?

A. That is possible, that is a possible outcome.

Q. Possible? Let me ask the question differently because I'm not sure I understand your answer.

Would the Board be required to make a finding of a violation of Act 626 -- let me ask that differently. I didn't ask that right.

Would the Board have to make a

AMY E. EMBRY

finding of unprofessional conduct as directed by Act 626 if a doctor admitted to providing prohibited care under the statute?

A. Yes.

Q. Okay. Would the doctor be subject to discipline by the Board?

A. Yes.

Q. And what would happen? What would be the discipline?

A. That is strictly up to the Board. You are looking at different scenarios every single time. Every single case is different. It could be that they find that they may have to suspend the license, it could be that they say; okay, you need to go back and take these courses and make sure you understand the law. It just depends. Every situation is different.

Q. Could the Board revoke the license of the doctor?

A. If their legal counsel says they do have enough and that's what the

AMY E. EMBRY

Board votes to do, yes, they can.

Q. When you say if their legal counsel says they do have enough, if the Board's legal counsel says they do have enough, is that what you mean?

A. Correct. Yes.

Q. And have enough what?

A. Evidence to either suspend or revoke a license.

Q. Would admission or proof of providing gender-affirming medical care to a minor be enough to suspend or revoke a license?

A. That would actually be a question for the Board's legal counsel, not me. It is very common for the Board to ask the legal counsel in the room; do we have enough for a suspension or revocation before they make any decision.

Q. But it's a possible outcome?

A. Yes.

Q. When we talked earlier about the definition of unprofessional conduct in 17-95-409 of the Medical Practices Act

AMY E. EMBRY

and they had subsection A through S as conduct that's deemed unprofessional conduct, were those all determined by the legislature, those categories of unprofessional conduct or the Board?

A. Let me go back to that 17-95

--

Q. Actually, withdraw the question. I answered it myself. I withdraw it.

If there were a complaint against a doctor for violating Act 626 and the doctor responded by saying withdrawing treatment from a patient would cause severe harm to the patient, would that be a defense to the complaint for unprofessional conduct based on 626?

A. Yes, it could be a defense.

Q. It could be a defense. And there would be a hearing on that?

A. I hearing is usually held only if a license is going to be -- action is going to be taken against a license. A hearing is not held just because a

AMY E. EMBRY

complaint is received.

Q. So you're saying even before the need for a hearing, the Board could potentially deem a doctor's defense or I should say the doctor's statement that withdrawing the care a patient could cause harm to the patient as a defense to a complaint of unprofessional conduct based on Act 626?

MS. LAND: Object to form.

A. So I want to make sure I understand your question. The original question was, you can do all this without a hearing. So if a complaint comes in on a physician, they gather the complaint, the response from the physician, the Board reviews it, they can decide then there's been no violation and it's done. They can also decide we want to see this doctor at the next board meeting. They can also determine just from the response or from the complaint; has there been a violation that rises to the level of a suspension or a revocation? If they do

AMY E. EMBRY

that, then the hearing will be at the next meeting.

So I'm getting confused as far as what you're asking as far as a hearing and a defense because a hearing is only held if action is brought against a license. Asking a doctor to appear is not an action against a license. Asking a doctor to respond is not an action against a license. So I'm confused as to what you're asking.

Q. Thank you. That's helpful. I'll break it down into smaller bits and try to focus better.

If there is a complaint against a doctor on the basis that the doctor is providing gender-affirming medical care and the doctor's response is to say withdrawing treatment for this particular patient would cause severe harm to the patient, so I could not do that, is it possible that the Board could determine that the doctor's conduct was not a violation?

AMY E. EMBRY

A. It's possible. They could choose to do that.

Q. So the Board would not be required to discipline a doctor for providing gender-affirming medical care in all cases?

A. Again, it depends on the situation. They would have to look at all the evidence before them.

If I had to speculate, if a complaint came in of this nature they would want to speak with the physician. So more than likely the physician would be likely to appear to discuss this.

Q. And then if the Board were convinced that the doctor's concern about harm to patient in the event of withdrawing treatment was valid, the Board would not have to find a violation and discipline the doctor?

A. That is possible.

Q. Okay. One of the topics on our 30(b)(6) deposition notice had to do with two doctor plaintiffs in this case and

AMY E. EMBRY

their -- let me pull up the notice. The medical license of Dr. Michelle Hutchison and the medical license of Dr. Katherine Stambough.

Do those doctors have any pending complaints against them?

A. No.

Q. Have there been any complaints against either doctor?

A. No.

Q. Okay. Another topic on our notice was what the Board did to search for documents in response to our subpoena. I believe that was the last item on the list.

Can you tell me what was done to search for documents?

MS. LAND: I'm going to object to that question to the extent it elicits any attorney-client privilege information. So to the extent she can answer that without revealing any of that, I'll assert that objection.

AMY E. EMBRY

Q. Right. So without revealing any attorney-client communications, what was searched or how did the search happen?

A. We received the request and then we gave it to our IT department and I don't have the original request in front of me but I think it was along the lines any information we had on HB 1570 or 626. So we researched our entire email system for those terms.

And then the second request came in and we did it again and because the Board hadn't any involvement with this legislation there was not anything in there.

When the third request came it came with two or three pages of search terms or search items and that is when they put that through the system and all these documents came out, whether they were relevant to this act or not.

Q. And when you say "through the system" does that mean all employees of

AMY E. EMBRY

the Board?

A. Yes, the entire email system.

Q. For Board employees, though; is that right?

A. Yes.

Q. Or is it beyond Board employee?

A. No. It is only Board employee employees.

Q. And what about Board members?

A. No, we do not have email addresses for Board members.

Q. So you didn't search files of any Board members?

A. We don't have files on Board members as far as communications. They don't use any of our systems to communicate.

Q. Okay. So the Board members don't have an official email that they use in their business as Board members?

A. No.

Q. They just use their personal email?

1 AMY E. EMBRY
 2 A. Correct.
 3 Q. So when the Board members are
 4 conducting Board business is it ever done
 5 through email?
 6 A. No. Well, that is if we have
 7 to send out some attachments that were
 8 not part of the, you know, original Board
 9 package, things of that nature, or if we
 10 have to say; here is the Zoom link for
 11 the board meeting or something like that.
 12 Q. And in those cases you'll
 13 email to their personal email?
 14 A. Correct.
 15 Q. Or might it be their workplace
 16 email?
 17 A. It might it depends on what
 18 email address they choose to use.
 19 Q. For these Board members this
 20 is just a part-time activity for them, is
 21 that right, it's not their full-time?
 22 A. No. No. The majority of them
 23 are full-time physicians.
 24 Q. Okay. And when you talked
 25 about giving a packet to members of the

1 AMY E. EMBRY
 2 Board, I assume that relates to different
 3 complaints against medical providers; is
 4 that right?
 5 A. Yes. It is what is provided
 6 that they review at every single board
 7 meeting. They are sent out on disks and
 8 they are loaded into their computer and
 9 into the Board system and that is
 10 everything that they will discuss or that
 11 any appearances for that board meeting.
 12 Q. So it's based on what's on the
 13 agenda at the next board meeting, they
 14 will get a packet of materials; is that
 15 right?
 16 A. Correct.
 17 Q. And that could be related to a
 18 complaint against a physician; is that
 19 right?
 20 A. Yes.
 21 Q. And that could include
 22 something related to a regulation being
 23 considered; is that right?
 24 A. A-hum.
 25 Q. And all of those kinds of

1 AMY E. EMBRY
 2 materials are sent on a disk in the U.S.
 3 mail or how do they get them?
 4 A. No. They are sent FedEx with
 5 signature required.
 6 Q. Wow. Okay.
 7 MS. COOPER: Why don't we take
 8 a break, maybe about ten minutes.
 9 Okay?
 10 VIDEOGRAPHER: We are off the
 11 record at 2:53 p.m.
 12 (Recess is taken.)
 13 VIDEOGRAPHER: We are back on
 14 the record at 3:06 p.m.
 15 MS. COOPER: Thank you. I just
 16 want to put on the record that Beth
 17 Echols, who is on the Plaintiff's
 18 counsel team joined the deposition
 19 some time ago but we have not
 20 mentioned that until now.
 21 Beth, can you grab tab 5?
 22 Actually, I'm sorry, did we already
 23 mark tab 5? We did, didn't we?
 24 MR. RICHARDSON: We marked it
 25 as Exhibit 5.

1 AMY E. EMBRY
 2 Q. So let's turn to Exhibit 5.
 3 A. I'm afraid, Leslie, that the
 4 ones before 6 were not marked, so if you
 5 could identify them?
 6 Q. I'm sorry, yes. We'll do that
 7 after but it is the document that says on
 8 the top A Bill and it's House Bill 1718.
 9 Do you see that?
 10 A. Yes.
 11 Q. Okay. Ms. Embry, are you
 12 familiar with this law?
 13 A. I know of it. I've read it.
 14 Q. Well, I want to call your
 15 attention to a particular part of it and
 16 if you want to read more, that will be
 17 fine but I specifically want to point to
 18 the beginning where it says, it's called
 19 Subsector 2, Patient Right-to-Know Act
 20 and it says 20-6-201 is the title and if
 21 you look right below that 20-6-202
 22 Legislative Findings and Purpose. You
 23 got that?
 24 A. Yes.
 25 Q. And it says, "(a) the General

1 AMY E. EMBRY
 2 assembly finds that; (1) is patients are
 3 entitled to continuity of care with their
 4 healthcare providers; (2) healthcare
 5 providers are prohibited legally and
 6 ethically from abandoning a patient
 7 before treatment has concluded." We can
 8 stop reading there.

9 Does that refresh your
 10 recollection about this statute?

11 A. Yes. This was done before I
 12 was Director.

13 Q. Okay.

14 A. So I would not have been as
 15 involved with this.

16 Q. Okay. And so I wanted to ask
 17 you, focusing in on subsection (a)(2) it
 18 says, "Healthcare providers are
 19 prohibited legally and ethically from
 20 abandoning a patient before treatment has
 21 concluded."

22 So is this another source of
 23 ethical obligations of doctors in
 24 Arkansas?

25 A. Ethical I don't know, but it

1 AMY E. EMBRY
 2 is an obligation that the Board would
 3 look at.

4 Q. Okay. Well, I ask because it
 5 says, "The healthcare providers are
 6 prohibited legally and ethically from
 7 abandoning a patient."

8 So is that your
 9 understanding, that it would be an
 10 ethical violation to abandon a patient
 11 before treatment has concluded?

12 A. Yes.

13 Q. Okay. And so under this
 14 provision if a doctor is treating a
 15 patient and has to stop care for any
 16 reason before treatment is concluded,
 17 they have -- is it an ethical obligation
 18 to help them find care from another
 19 doctor?

20 A. Yes.

21 Q. Is that right? I'm sorry?

22 A. Yes.

23 Q. Yes, okay. And can complaints
 24 be filed with the Board for doctors
 25 abandoning patients in violation of this

1 AMY E. EMBRY

2 section?

3 A. Yes.

4 Q. Has that ever happened?

5 A. Yes.

6 Q. Under your watch?

7 A. Yes.

8 Q. Can you tell me about those
 9 kinds of circumstances?

10 A. It would be a letter of
 11 complaint saying that either they were
 12 fired or they were abandoned by the
 13 physician without providing another
 14 physician or a referral to another
 15 physician and it would go through the
 16 complaint process.

17 Q. Have any doctors been
 18 disciplined for abandoning patients?

19 A. I can't recall if they were
 20 disciplined. I know some were called
 21 before the Board to explain what
 22 happened, but without looking at
 23 documents, I can't recall if they were
 24 disciplined.

25 Q. But under the Board's

1 AMY E. EMBRY
 2 authority that could be something that
 3 would happen?

4 A. Yes.

5 Q. And just to be clear, the
 6 Board could discipline a doctor for
 7 abandoning a patient in violation of
 8 20-6-202?

9 A. Yes, they could.

10 Q. We talked about the ethical
 11 obligations for doctors contained in
 12 Regulation 32. And now we've talked about
 13 an ethical requirement in Section
 14 20-6-202.

15 Are there other sources of
 16 ethical obligations for doctors in
 17 Arkansas besides those?

18 A. Not that I'm aware of. You
 19 know, anything in the code that is law we
 20 adhere to that as well. Just because it's
 21 in the law doesn't necessarily mean there
 22 is a rule.

23 Q. I'm sorry. I didn't hear you.

24 A. So if there could be a law
 25 that we're not required to have a rule on

AMY E. EMBRY

that we must adhere to that law as well.

Q. So if there were other statutes that identified ethical duties of doctors, that would be an ethical obligation of doctors even if there is no corresponding rule; is that what you're saying?

A. Correct.

Q. Are you aware of any besides this ethical obligation contained in Section 20-6-202?

A. Without looking at all my documents, no, I can't answer that truthfully. I can't say that with all, through the Arkansas -- all Arkansas statutes there aren't any others. I can't say that honestly.

Q. Okay. We talked a few minutes before the break about parents being required generally, I think you said, to provide informed consent for treatment of their minor children. Do you recall that?

A. Yes.

MS. LAND: I objected to the

AMY E. EMBRY

form of that previous question.

MS. COOPER: Okay.

Q. Is that correct, that as a general matter, minors cannot undergo medical treatment without their parents providing informed consent?

A. As far as I know.

Q. Well, okay. That's fine.

Are there any other medical treatments, besides gender-affirming medical care for minors with gender dysphoria, that parents cannot provide informed consent for their children to undergo?

A. I don't -- I don't think so. This is the only one that I saw that meets those parameters, but no.

Q. Under what circumstances could the Board step in and ban a particular medical treatment?

A. I don't know of any because they have not banned any medical treatment, so that would be new ground, new territory.

AMY E. EMBRY

Q. So because it's not something they've ever done you can't say under what circumstances they would do something like that; is that right?

A. No.

Q. Okay. And as the Board being the entity responsible for regulating the areas of medicine that you cover, when would banning a particular treatment be an appropriate regulation of the field of medicine?

A. I don't know.

Q. The Board doesn't have a view on that?

A. No.

Q. And when is it appropriate for the State entity that regulates medicine, the Board, to override patients and their doctors' decisions about medical care?

MS. LAND: Objection, form.

A. I do not know the answer to that question.

Q. Does the Board have a view about when it's appropriate to override

AMY E. EMBRY

patients and their doctors' decisions about medical care?

A. Not to my knowledge.

MS. LAND: Objection to form.

Q. Does the Board have any view about the type of -- excuse me. Let me rephrase that.

Does the Board have a view about the level of evidence of effectiveness that is required before doctors should be permitted to provide a medical treatment?

A. No. That has not been addressed since I've been the Director.

Q. So am I right that the Board would not prohibit or restrict a particular medical treatment based on the level of scientific evidence that supports that treatment?

A. They have not, I can say that. They have not prohibited any procedure. I can't say what would be done in the future.

Q. Has it ever come up before the

AMY E. EMBRY

Board that a particular treatment is harmful because it's not supported by adequate scientific research demonstrating its effectiveness?

A. Not to my knowledge.

Q. So as the representative of the Board here, the Board is not aware of that ever coming up, that has not come up?

A. Not to my knowledge.

Q. Has there ever been any issue raised with the Board whether in the context of a complaint against a doctor or otherwise an investigation against a doctor or a proposed regulation about the appropriate amount of evidence that's required before medical treatment should be allowed?

A. No.

Q. Is it the Board's understanding that only -- sorry.

Is it the Board's understanding that all medical treatment that is provided in Arkansas and allowed

AMY E. EMBRY

to be provided is supported by randomized control clinical trials?

A. No.

Q. Are there medical treatments that are permitted to be provided in Arkansas that are not supported by randomized controlled clinical trials?

A. I do not know the answer to that.

Q. We talked earlier about the complaints about Ivermectin being used for COVID and I think -- I don't think I asked this question, has anyone proposed, within the Board, to prohibit doctors from prescribing Ivermectin to treat COVID?

A. No.

MS. LAND: Objection to relevance.

Q. Why not?

A. You are asking me? Is that question toward me?

Q. That's for you, Ms. Embry.

So you said there have not

AMY E. EMBRY

been any proposals to prohibit the use of Ivermectin to treat COVID and I asked why not?

A. Because it is off-label drug and what is prescribed between a patient and the physician is between the physician and the patient, as with any prescription.

Q. So even if there are known risks for using Ivermectin for COVID and no evidence of its effectiveness, the Board leaves that decision to patients and their physicians?

A. It is left between physicians and patients, yes.

Q. And the Board is in agreement with that position, that that should be between the patients and their physicians?

A. Yes.

Q. Am I right that doctors can't provide treatment to patients in Arkansas without informing the patients of potential risks? I'm not talking about

AMY E. EMBRY

Ivermectin specifically, but in general.

A. Do you mean as far as prescription or treatment in general?

Q. We can break that down. Let's start with treatment in general. Is it correct that doctors can't provide medical treatments to patients without informing them of any potential risks?

A. I believe so. I can't answer completely on that point.

Q. Okay. What about with respect to use of prescriptions, that doctors -- is it your understanding that doctors are required to inform patients of risks before prescribing drugs?

A. I'm not -- I don't know of a requirement. I know it is usually done. I don't know of a requirement.

Q. Is it the Board's position that there are some treatments patients should not be permitted to consent to after being fully informed of the risks?

A. Could you repeat that?

Q. Is it the Board's position

1 AMY E. EMBRY
2 that there are some medical treatments
3 patients should not be permitted to
4 consent to after being fully informed by
5 their doctors of the risks of the
6 treatment?

7 A. I don't know. That would be a
8 -- the Board members would have to decide
9 that.

10 Q. Okay. Imagine Act 626 didn't
11 exist, no one ever thought about it and
12 it was just -- imagine times before that
13 law.

14 If there was a doctor that was
15 providing gender-affirming medical care
16 to minors and was not following the
17 accepted standards in that field, could
18 that issue be addressed by the Board?

19 A. If the complaint is filed,
20 yes.

21 Q. And would that also be true if
22 it otherwise came to the Board's
23 attention that that was happening?

24 A. Yes.

25 Q. If the Board had a broader

1 AMY E. EMBRY
2 concern about doctors overprescribing
3 hormone therapy for adolescents with
4 gender dysphoria, is that something the
5 Board could step in and regulate?

6 A. Regulate means to form a
7 regulation?

8 Q. Yes.

9 A. They can create a rule if they
10 choose to do so. It would go through the
11 promulgation process. It does not mean
12 that it would pass.

13 Q. I'm just thinking about, we
14 talked about the very detailed
15 regulations about pain medications and
16 regulation in place to govern how
17 prescriptions can be provided, is that a
18 fair description?

19 A. Could you repeat that?

20 Q. Yeah. I'll ask it clearer.

21 We talked earlier about the
22 regulations for pain medications. You
23 remember that?

24 A. Yes.

25 Q. If there were an issue with,

1 AMY E. EMBRY
2 say, some doctors in the State providing
3 gender-affirming medical care to minors
4 and specifically overprescribing hormone
5 therapy, similar to the way opioids have
6 been overprescribed, would it be possible
7 for the Board to enact a regulation to
8 address that problem?

9 A. Yes. If they found it
10 necessary, yes.

11 Q. And similarly, if the Board
12 were to learn that some doctors in
13 Arkansas who provide gender-affirming
14 medical care to minors were not providing
15 sufficient information in the informed
16 consent process about the risks and
17 benefits of these treatments, could the
18 Board enact regulations to impose
19 informed consent requirements?

20 A. The Board can create a
21 regulation on any subject they choose.
22 Whether or not it passes the promulgation
23 process is what determines if it goes
24 into effect.

25 Q. But I'm just thinking about,

1 AMY E. EMBRY
2 for example, the gastric bypass
3 regulation that we talked about earlier
4 that had, I don't know, dozens, dozens of
5 risks that doctors are required to tell
6 patients about before they can obtain
7 informed consent for the procedure. If
8 there was a concern about inadequate
9 informed consent with gender-affirming
10 medical care for minors, could the Board
11 pass a regulation to spell out informed
12 consent requirements in a similar way?

13 A. Again, if they feel a need to,
14 for which they have a concern, they can
15 do that.

16 MS. LAND: I'll object to the
17 form of that previous question as
18 well.

19 Q. Okay. So that would include
20 enacting a regulation like the gastric
21 bypass informed consent regulation that
22 would impose requirements for informed
23 consent before obtaining -- before
24 providing hormone therapy for minors?

25 A. Yes. And I believe on that

1 AMY E. EMBRY
 2 one, though, that that was through an Act
 3 that was required.
 4 Q. Thank you. But that is
 5 something the Board could do if it saw a
 6 need; is that right?
 7 A. Yes. It could -- it could
 8 attempt. Let me say that, it could
 9 attempt to promulgate a rule.
 10 Q. And I want to make sure I
 11 understand what you mean by that.
 12 Do you mean they could come up
 13 with a rule but there is no guarantee the
 14 legislature would approve it; is that
 15 what you mean?
 16 A. Correct. Right.
 17 Q. But assuming the legislature
 18 were onboard, they could pass a rule to
 19 establish informed consent requirements
 20 for hormone therapy for minors if they
 21 felt that that was something that was not
 22 being done properly by all doctors in
 23 Arkansas?
 24 A. If that's what the Board chose
 25 to create a rule on, yes, that's the

1 AMY E. EMBRY
 2 process.
 3 Q. There is nothing about that
 4 type of regulation that couldn't be done?
 5 A. Well, we can't make a
 6 regulation that is against law. Right,
 7 but we can --
 8 Q. Understood. Assuming Act 626
 9 never existed, you would be able to do
 10 that?
 11 A. If that's what the Board voted
 12 to do.
 13 Q. Okay. And I think we touched
 14 on this before but I want to be sure, if
 15 the Board felt that gender-affirming
 16 medical care for adolescents were
 17 inherently harmful, it could enact a
 18 regulation to prohibit that care; is that
 19 right?
 20 A. I mean, if that was a concern
 21 and that's what the Board felt was
 22 necessary it would start the process, go
 23 through the appropriate channels to
 24 create a rule.
 25 Q. Right. And it could enact a

1 AMY E. EMBRY
 2 rule and then it would just be a question
 3 of whether the legislature approved it;
 4 is that right?
 5 A. Yes. And I mean, there's
 6 various steps to this. I mean, it is a
 7 lengthy process. It takes at least months
 8 to get it done.
 9 Q. It takes how long?
 10 A. At least months. It could go
 11 into years.
 12 Q. Okay. But if they felt -- if
 13 the Board felt there was a problem and
 14 they needed -- let me rephrase that.
 15 If the Board felt that
 16 gender-affirming medical care for
 17 adolescents was inherently harmful it
 18 could -- if the Board agreed that was the
 19 case, they could pass a regulation
 20 banning that care that could take effect
 21 as long as the legislature approved it?
 22 MS. LAND: Object to form.
 23 THE WITNESS: Answer it?
 24 MS. LAND: Yes.
 25 A. Yes.

1 AMY E. EMBRY
 2 Q. That issue of gender-affirming
 3 medical care for minors has never been
 4 raised as an issue at the Board; is that
 5 right?
 6 A. That is correct.
 7 MS. COOPER: I'd like to take
 8 tab 11. We haven't done that one
 9 yet, right? I'm checking with my
 10 team. Can we mark that as the next
 11 exhibit, which is --
 12 MR. RICHARDSON: This will be
 13 -- apologies, uploading -- this
 14 will be Exhibit 10.
 15 MS. COOPER: Exhibit 10. Thank
 16 you.
 17 (Exhibit 10, Opinion article
 18 in Washington Post dated April 8,
 19 2021 was received and marked on
 20 this date for identification.)
 21 MR. RICHARDSON: Exhibit 10
 22 has been produced.
 23 MS. LAND: I've got it.
 24 Q. So we've now marked Exhibit
 25 10, and just for identification, it's a

1 AMY E. EMBRY
 2 document from the Washington Post opinion
 3 titled Why I Vetoed My Party's Bill
 4 Restricting Healthcare For Transgender
 5 Youth by Asa Hutchinson, dated April 8th,
 6 2021.

7 We talked a few minutes a
 8 while back about the Governor's veto of
 9 HB 1570 before it became law and I can't
 10 remember if you said you've seen his veto
 11 statement or his reasons for his veto.
 12 Have you seen this before?

13 A. No, I have not.

14 Q. Could you -- why don't you
 15 take a minute to read this and I'll have
 16 a couple of questions.

17 (Deponent reviews the
 18 document.)

19 Q. Have you had a chance to read
 20 it? Okay.

21 Just to make sure I'm covering
 22 all bases, did the Board have any
 23 discussions about the Governor's veto or
 24 his statement about the veto?

25 A. No.

1 AMY E. EMBRY
 2 Q. And the staff, the same?

3 A. No. There may have been
 4 conversations; hey, did you see he vetoed
 5 it? But nothing as far as Board
 6 business.

7 Q. So you were aware at the time
 8 that he vetoed HB 1570?

9 A. Yes.

10 Q. And that was something that
 11 was acknowledged among members of the
 12 Board staff?

13 A. Yes.

14 Q. Do you remember who?

15 A. It was me and Juli Carlson.

16 Q. That was back at the time?

17 A. Yes.

18 Q. Roughly around April 8th, '21?

19 A. Thereabouts. I don't know the
 20 date.

21 Q. Who brought it up; was it you
 22 or Juli Carlson?

23 A. I don't recall and I know we
 24 both got it on our phone that's how we
 25 found out about it.

1 AMY E. EMBRY
 2 Q. I didn't hear part of what you
 3 said.

4 A. We saw it on social media or
 5 from a news station, social media and
 6 that's how we found out about it. That's
 7 what started the conversation, that's it.

8 Q. And what did you say to one
 9 another about it?

10 A. Nothing. It was not a long
 11 drawn out conversation. It was just;
 12 hey, the Governor vetoed this bill.

13 Q. Okay. Did anybody -- did
 14 either you or Juli Carlson express
 15 agreement or disagreement with the
 16 Governor's decision?

17 A. No.

18 Q. Neither one?

19 A. Not that I recall. This was
 20 well over a year ago, so not that I
 21 recall.

22 Q. Okay. In part of the message
 23 the Governor talks about concerns about
 24 youth accessing treatment on the black
 25 market. Do you recall seeing that part?

1 AMY E. EMBRY

2 A. Yes.

3 Q. Well, do you agree in general
 4 that it is harmful for people to access
 5 medical treatment on the black market?

6 A. Are you asking as a personal
 7 opinion or as my opinion as Executive
 8 Director?

9 Q. Let's start with the Board, as
 10 the Executive Director of the Board.

11 A. Yes. It is dangerous to
 12 receive it on the black market.

13 Q. Do you have a different
 14 personal opinion about it?

15 MS. LAND: I'll object to any
 16 questions about her personal
 17 opinions, that would be outside the
 18 scope of the notice for her
 19 30(b)(6) witness.

20 MS. COOPER: Okay.

21 Q. Did you have a different
 22 personal opinion? You can answer, she
 23 objected.

24 A. No. I don't have a different
 25 personal opinion.

AMY E. EMBRY

Q. Does the Board recognize, as the Governor mentioned, that the procedures banned by the Law 626 are considered best practice medical care for youth with gender dysphoria?

A. I'm sorry. Repeat that question.

Q. Yeah. Does the Board recognize, as the Governor does, that the gender transition procedures banned by Act 626 are part of best practice medical care for youth with gender dysphoria?

A. The Board has never discussed that, so I don't know what their stand is on that.

MS. LAND: Object to the form of that previous question.

Q. And does the Board agree with the Governor that the decision about providing gender-affirming medical care to minors is best left to parents and doctors?

A. Again, the Board has never discussed this, so I do not know the

AMY E. EMBRY

Board's stance.

Q. Okay. And does that mean the Board doesn't have a stance, since you're testifying on behalf of the Board?

A. I don't know how to answer that. They've never discussed it. It's never been brought up to discuss. So I don't -- as of right now they don't have a stance because it's not been discussed. It has not been an issue.

Q. Understood. I want to go back to few more questions about the Board's enforcement of 626, if it should take effect and to understand a little bit more about that.

You mentioned a little while ago we talked about Arkansas Stat 20-6-202 which says, "Healthcare providers are legally and ethically prohibited from abandoning a patient before treatment has been concluded." Do you recall that?

A. Yes.

Q. So if doctors are currently

AMY E. EMBRY

treating adolescents with gender-affirming hormones, would the doctor be violating their ethical duty to discontinue treatment for a patient without referring them to an alternative provider?

A. According to this law, yes.

Q. And by "this law" you mean 20-6-202?

A. Yes.

Q. Okay. So that would be unprofessional conduct on the part of a doctor to discontinue gender-affirming hormones without providing a referral to another doctor to continue that care; is that correct?

A. Yes, that is my understanding.

Q. So what is the Board to do if that situation arises and a complaint is filed or the Board otherwise comes to learn about a doctor who is providing care to a patient, an adolescent patient, specifically gender-affirming medical care, and was providing that care before

AMY E. EMBRY

Act 626 took effect and then after 626 takes effect feels the doctor cannot discontinue that care because it would be abandoning their patient? So on the one hand, there's the issue of abandonment and on the other hand, Act 626 says the doctor can't provide that care; how are doctors supposed to navigate that conflict?

MS. LAND: Objection to form.

A. If that were to occur, then what would happen is the Board would let their legal counsel know there is a conflict of these two rules and we need to know how to proceed. That attorney may go further and it may require an AG opinion. When two laws conflict they have to ask for legal assistance.

Q. Has the Board raised the concern about Act 626 putting it in this bind?

A. No. The Board has not addressed Act 626 at all.

Q. Okay. Does the Board have any

1 AMY E. EMBRY
 2 concerns about the impact of enforcing
 3 Act 626 on adolescents who are receiving
 4 gender-affirming medical care?
 5 A. The Board has not addressed
 6 this. Nothing has been discussed at the
 7 Board level of Act 626, so nothing has
 8 been addressed.
 9 Q. So if the Board were put in
 10 that situation where Act 626 took effect,
 11 a complaint was brought to the Board
 12 because a doctor is continuing to provide
 13 care to a patient that they had been
 14 treating beforehand, I'm trying to
 15 understand, would the Board tell that
 16 doctor they have to stop providing that
 17 care?
 18 A. So are you asking if 626 was
 19 in effect and it conflicts with 20-6-202,
 20 the Board would ask for legal assistance
 21 on this; what do they need to do.
 22 Q. Does the Board view Act 626
 23 promoting the well being of minors?
 24 A. Again, the Board has not
 25 addressed Act 626 so this has not been

1 AMY E. EMBRY
 2 discussed.
 3 Q. So the Board has no position?
 4 A. No position.
 5 Q. So then just to make sure I
 6 understand, does the Board not have any
 7 knowledge of ways Act 626 to benefit
 8 minors?
 9 A. It has not been provided by
 10 the Board Office to the Board members
 11 anything about Act 626.
 12 Q. So the -- what I'm trying to
 13 learn is whether the Board, itself, has
 14 any evidence or knowledge that Act 626
 15 would benefit minors in some way?
 16 A. To my knowledge, no.
 17 Q. Okay. Is the Board aware of
 18 any minors in Arkansas who have been
 19 harmed by gender-affirming medical care?
 20 A. The Board has not received any
 21 complaints and that's how they would
 22 learn about that. So, no.
 23 Q. So again, I can be confident
 24 that the Board will not be presenting any
 25 evidence based on its own experiences of

1 AMY E. EMBRY
 2 any minors being harmed by
 3 gender-affirming medical care?
 4 A. We have not received any
 5 information or any complaints to that
 6 nature.
 7 MS. LAND: Objection to form
 8 on that previous question.
 9 Q. So I think you testified
 10 earlier that the Board is the State
 11 entity charged with regulating medicine
 12 in Arkansas with respect to the
 13 categories of medical professionals that
 14 you license; is that correct?
 15 A. Correct.
 16 Q. And that includes doctors; is
 17 that correct?
 18 A. I'm sorry? What was that?
 19 Q. And that includes doctors?
 20 A. Yes.
 21 Q. Is it the Board's view that
 22 Act -- sorry. Is it the Board's view
 23 that Act 626 is an appropriate regulation
 24 of medicine?
 25 A. The Board has not addressed

1 AMY E. EMBRY
 2 Act 626.
 3 Q. So it has no view?
 4 A. It has no view.
 5 Q. Okay.
 6 MS. COOPER: Can we mark tab
 7 13 as Exhibit 11?
 8 (Exhibit, 11, email dated
 9 March 22, 2021, from Sarah Vestal
 10 to ASMB was received and marked on
 11 this date for identification.)
 12 MR. RICHARDSON: Exhibit 11
 13 has been introduced.
 14 MS. LAND: I've got it.
 15 Q. Okay. Thank you. Ms. Embry,
 16 have you seen Exhibit 11?
 17 A. Yes, I have.
 18 Q. For the record, I'll identify
 19 it as an email marked "Confidential" from
 20 Sarah Vestal sent Monday, 22 March, 2021.
 21 I understand this to be
 22 referencing a complaint against a surgeon
 23 based on the complainant being
 24 transgender; do I read that right?
 25 A. That is correct.

AMY E. EMBRY

Q. Okay. Now, we didn't get the complaint that this was about. Was there ever a complaint filed?

A. I believe that I would have to go back and look at the files again. I do not have the files with me and we get an average of 400 complaints a year. So I would have to actually have documents to answer anything about this.

However, when this came in I think this was the complaint because this was asking, it was not filing a complaint against a physician, no physician is named. It asks if there was a statute of limitations for filing an ethics complaint.

Q. I see. So and this could satisfy your requirements for a complaint, they just have to notify the Board that they are making a complaint, there is no form they have to use?

A. No, but it must be in writing. It can be email, it can be handwritten, U.S. mail, whatever, but it must be in

AMY E. EMBRY

writing and must include the doctor's name or licensee's name.

Q. Okay. And what -- did this complaint get taken up by the Board?

A. I would have to see if an actual complaint came in after this. This cannot be considered a complaint because it does not mention a licensee's name. This was specifically a question as to the statute of limitations for filing an ethics complaint.

Q. So you don't know whether Sarah Vestal subsequently filed a complaint?

A. She may have because I do remember this name but, again, it could be that I'm remembering her name from this document.

Q. So sitting here now, you have no recollection of the outcome of that. Okay.

Now, assuming what she alleged here is correct, understanding that we don't know, but would the refusal to

AMY E. EMBRY

treat a patient because they're transgender be something that would be an appropriate issue for the Board to address?

A. Again, that depends on the situation. If it's a new patient, the doctor can refuse new patients. So I mean, you would have to get into more detail to determine if there had been a violation.

Q. So if it was discrimination by a doctor based on any of the protected characteristics, that would not be something the Board would be involved with?

A. If the investigation can be proven, then that is something the Board would take up.

Q. Oh, sorry. Let me clarify my question.

Assuming she were able to prove discrimination by her doctor because she's transgender, is that something the Board would -- could find

AMY E. EMBRY

in violation?

A. Yes.

MS. COOPER: Can we take a short break? Let's take ten minutes and I think we're getting close.

VIDEOGRAPHER: We are off the record at 3:56 p.m.

(Recess is taken.)

VIDEOGRAPHER: We are back on the record at 4:15 p.m.

Q. Ms. Embry, is Act 626 an appropriate regulation of medicine?

A. I do not have an opinion on that.

Q. And does that mean the Board doesn't have an opinion about that?

A. The Board, that would be a question for the Board. Also, I'm not a physician.

Q. Okay. Now, this is one of our topics on the notice about regulation of medicine and so -- and you're testifying on behalf of the Board and you should have been prepared on these. So I'm

AMY E. EMBRY

1 looking at the, you know, much of the
2 notice is about regulating the medical
3 profession. So is this -- is Act 626 an
4 appropriate regulation of medicine?

5 MS. LAND: I'll object to the
6 form of that question and it is
7 also vague. You can answer.

8 A. I would need more detail, such
9 as who drafted the legislation, who did
10 they consult with, did they consult with
11 anybody in the medical field? I don't
12 have enough information as to how this
13 was drafted to say if this is a good form
14 of medicine.

15 Q. And I hear you and I think
16 that your answer is telling me maybe my
17 question could have been clearer because
18 I wasn't -- I wasn't asking about what
19 medical experts would say about
20 appropriate medical care for youth with
21 gender dysphoria, so let me ask the
22 question a little bit differently because
23 I see how it was heard by you.

24 Is prohibiting treatment that
25

AMY E. EMBRY

1 is -- well, let me just ask it this way;
2 you're aware that gender-affirming
3 medical care is recognized as best
4 practices in the medical field by many
5 professional medical professional
6 associations?

7 MS. LAND: Objection to form.

8 A. Could you repeat that question
9 again?

10 Q. Are you aware that
11 gender-affirming medical care is
12 recognized as best practice in the -- for
13 the treatment of gender dysphoria by many
14 medical associations, medical
15 professional associations?

16 A. No, I was not aware of that.

17 Q. Okay. Is prohibiting a
18 particular medical treatment, blanket
19 ban, typical of how medicine is -- the
20 field of medicine is normally regulated?

21 MS. LAND: Objection to form.

22 A. It is not typical as to how
23 Arkansas regulates medicine at the
24 moment.
25

AMY E. EMBRY

1 Q. And I think you said earlier
2 this is the only -- strike that.

3 I believe you said earlier Act
4 626 is the only ban on a particular
5 medical treatment in Arkansas that you're
6 aware of; is that correct?

7 A. That I am aware of.

8 Q. Okay. And that the Board is
9 aware of; is that correct?

10 A. Yes, it is.

11 Q. Okay. So do you have any
12 concerns about the government intruding
13 on the medical decisions families make
14 with their doctors?

15 MS. LAND: Objection to form.

16 A. I believe the Board would have
17 concern with some of the issues in 626.
18 If they were to address this issue they
19 may have concerns.

20 Q. And which concerns or what
21 concerns?

22 A. If I had to speculate to
23 answer for 14 individuals, it would be
24 about cutting off care to patients that
25

AMY E. EMBRY

1 are already undergoing treatment. It
2 would also be a conflict with another
3 law, as we've already discussed earlier.

4 Q. And what is your basis for
5 thinking that might be -- those may be
6 concerns? And let's start with the
7 cutting off care to patients already
8 receiving treatment.

9 A. That is strictly from
10 witnessing the Board at board meetings.
11 What is -- issues that may not be exactly
12 like this but similar to it and how they
13 have addressed those issues.

14 Q. So are you speaking of other
15 issues unrelated to gender-affirming
16 medical care where there were concerns
17 expressed by the Board about physicians
18 cutting off care for patients; is that
19 correct?

20 A. Yes. It's called patient
21 abandonment.

22 Q. And the Board, some of the
23 Board members have expressed concerns
24 about when that happens, when patients
25

1 AMY E. EMBRY
 2 are abandoned by doctors; is that right?
 3 A. Yes.
 4 Q. What concerns were raised by
 5 the Board members about that?
 6 A. Just, in general, just the
 7 fact that patient abandonment happened,
 8 that they abandoned a patient with
 9 nowhere else to go and a complaint was
 10 filed against the Board and they
 11 addressed it as would any other
 12 complaint.
 13 Q. Did the Board express concerns
 14 that that's harmful to patients when that
 15 happens?
 16 A. Yes. At times they have said
 17 it is harmful to the patient.
 18 Q. And why? Why did they say it
 19 was harmful?
 20 A. They did not give a reason
 21 why. When they spoke of that it was just
 22 a statement that it was harmful to
 23 patients when you abandon them.
 24 Q. Which Board member said that?
 25 A. Oh, there's been -- I don't

1 AMY E. EMBRY
 2 know. I don't know, but there have been
 3 issues of patient abandonment that have
 4 been brought before the Board.
 5 Q. I'm sorry. I can't recall if I
 6 asked you this question. Do you have
 7 concerns about the government intruding
 8 on the medical decisions families make
 9 with their doctors?
 10 MS. LAND: Objection to form
 11 and to the scope of that question.
 12 You can answer.
 13 A. I do believe upon any
 14 legislation that comes before the Board
 15 if they discuss, if they do have concerns
 16 they do discuss it and they would ask
 17 their legal counsel what would be the
 18 best way to proceed.
 19 Q. And are you speaking -- I
 20 asked the question a little bit generally
 21 but I didn't probably ask it as
 22 specifically as I should have and that
 23 may help clarify your answer.
 24 Do you have concerns about,
 25 with respect to Act 626, the government

1 AMY E. EMBRY
 2 intruding on the medical decisions
 3 families make with their doctors?
 4 MS. LAND: Objection to form
 5 and scope.
 6 A. There is a possibility, yes.
 7 It's all I can say on that is that there
 8 is a possibility. Until it is addressed
 9 by the Board, I can't give a definite
 10 answer.
 11 Q. And there is a possibility
 12 that you would have concerns or there is
 13 a possibility that if Act 626 takes
 14 effect that the government would be
 15 intruding on medical decisions families
 16 make with their doctors? I'm not sure I
 17 understood your answer.
 18 A. I would say yes to both.
 19 Q. So does that mean there is a
 20 possibility that the Board, if faced with
 21 complaints about doctors providing care
 22 that is prohibited by Act 626, that the
 23 Board may not enforce Act 626 and
 24 prohibit doctors from or discipline
 25 doctors for engaging in such care?

1 AMY E. EMBRY
 2 A. Again, every situation is
 3 different, but if Act 626 went into
 4 effect, as your question is based on, if
 5 it were to go into effect, it would be in
 6 conflict with another law and the Board
 7 would need to ask for legal assistance on
 8 what to do.
 9 MS. LAND: I'll object to the
 10 form of that previous question.
 11 Q. And that conflict would only
 12 be, if I understand correctly, in the
 13 case of individuals who are already
 14 receiving care from a doctor; is that
 15 right?
 16 MS. LAND: Object to form.
 17 A. Yes. According to 20-6-202
 18 it's legally and ethically prohibited
 19 from abandoning a patient before
 20 treatment has been concluded. So that
 21 means they are already within treatment.
 22 Q. Right. So understanding that
 23 the Board would need to ask for legal
 24 advice from counsel about what to do in
 25 the event of a complaint that raises this

1 AMY E. EMBRY
 2 conflict between two statutes, if you
 3 had, you know, putting aside patients who
 4 are already receiving care and just
 5 somebody who their doctor recommends or
 6 would recommend that they initiate care
 7 that would violate Act 626, do you have
 8 concerns about the government intruding
 9 into that decision made by families with
 10 their doctor?

11 MS. LAND: Objection to form.

12 A. I don't understand the
 13 question. I don't understand exactly --

14 Q. Let me ask it differently.

15 If Act 626 were in effect and
 16 a patient, minor patient and their parent
 17 saw a doctor and after assessment the
 18 doctor's recommendation would be
 19 gender-affirming medical treatment, and
 20 the parents and minor agree that that's
 21 in the best interests of that patient,
 22 but that Act 626 would not permit the
 23 child or minor to receive that care that
 24 the parent and doctor believe is in the
 25 child's best interests, do you have

1 AMY E. EMBRY
 2 concerns about the law intruding into
 3 this medical decision that families make
 4 with their doctors?

5 MS. LAND: Objection to form
 6 and scope.

7 A. I would say that the Board, it
 8 is possible that they would have
 9 concerns. But, again, if it were in
 10 effect and it's in conflict with another
 11 law, they would not do anything until
 12 they advised their legal counsel.

13 Q. And in your view it's possible
 14 the Board would have concerns even if
 15 there's an individual minor who is not
 16 currently receiving care but is --
 17 parents and doctors believe care would be
 18 in their best interest?

19 A. It is possible, it is a
 20 possibility that the Board would voice
 21 concerns.

22 Q. But you have not heard
 23 specific concerns voiced by anybody at
 24 this point?

25 A. No.

1 AMY E. EMBRY
 2 Q. Okay. Do you have concerns?

3 MS. LAND: I'll object to the
 4 form of that question to the extent
 5 it's asking for any personal views
 6 that would be outside the scope of
 7 this notice. So I will object to
 8 any question that's going to elicit
 9 personal views of this witness.

10 MS. COOPER: Okay.

11 MS. LAND: And if we're going
 12 to continue to ask her personal
 13 views, that might need to be a
 14 discussion we need to have further.

15 MS. COOPER: Yeah. I just have
 16 this question.

17 Q. Do you remember the question?

18 MS. LAND: You can answer.

19 A. Okay. So I have concerns that
 20 the law that was passed, Act 626, is in
 21 violation of other laws. That is my
 22 concern.

23 Q. And which other laws?

24 A. The 20-6-202.

25 Q. Any others?

1 AMY E. EMBRY
 2 A. Not that I'm aware of right
 3 now.

4 Q. Okay. So that's a concern
 5 about people who are currently receiving
 6 care not being able to have the doctor
 7 continue to provide or refer them for
 8 continuation of that care?

9 A. Correct.

10 Q. Okay. But not about the people
 11 who haven't started care yet, there are
 12 no concerns about that?

13 A. I don't know -- at this point,
 14 no. If the law were enacted, then more
 15 research would need to be done.

16 Q. And have you talked with any
 17 families who will be directly affected by
 18 Act 626 if it takes effect?

19 A. Have I spoken to anyone? No.

20 Q. Do you know any?

21 A. No, I do not.

22 Q. Okay. Do you know any
 23 transgender adolescents who are receiving
 24 gender-affirming medical care?

25 A. The only ones that I am aware

1 AMY E. EMBRY
 2 of are the ones that were listed in the
 3 lawsuit.
 4 Q. So you don't personally know
 5 or the Board doesn't have interaction
 6 with any minors who are receiving
 7 gender-affirming medical care?
 8 A. Not to my knowledge.
 9 MS. COOPER: Just a minute.
 10 That's all I've got.
 11 MS. LAND: I don't have any
 12 questions.
 13 VIDEOGRAPHER: We are off the
 14 record at 4:35 p.m.
 15 MS. LAND: We would like to
 16 read and sign.
 17 (The proceedings were
 18 adjourned at 4:35 p.m.)
 19
 20
 21
 22
 23
 24
 25

1 C E R T I F I C A T E
 2 I, MAUREEN M. RATTO, a
 3 Registered Professional Reporter, do
 4 hereby certify that prior to the
 5 commencement of the examination, AMY E.
 6 EMBRY was sworn by me to testify the
 7 truth, the whole truth and nothing but
 8 the truth.
 9 I DO FURTHER CERTIFY that the
 10 foregoing is a true and accurate
 11 transcript of the proceedings as taken
 12 stenographically by and before me at
 13 the time, place and on the date
 14 hereinbefore set forth.
 15 I DO FURTHER CERTIFY that I am
 16 neither a relative nor employee nor
 17 attorney nor counsel of any of the
 18 parties to this action, and that I am
 19 neither a relative nor employee of such
 20 attorney or counsel, and that I am not
 21 financially interested in this action.
 22
 23 
 24 -----
 25 MAUREEN M. RATTO, RPR
 License No. 817125

1 I N D E X
 2 WITNESS: AMY E. EMBRY 6
 3 DIRECT EXAMINATION BY MS. COOPER 6
 4
 5 E X H I B I T S
 6 Exhibit 1, 30(b)(6) notice for 15
 7 Defendant Arkansas State Medical
 8 Board
 9 Exhibit 2, Arkansas Medical 24
 10 Practices Act and Regulations,
 11 revised as of December 2, 2020
 12 Exhibit 3, printout of the 44
 13 homepage of the Arkansas State
 14 Medical Board website
 15 Exhibit 4, printout from the 69
 16 Medical Board re: Regulatory and
 17 Discipline
 18 Exhibit 5, Arkansas State House 105
 19 Bill 1718
 20 Exhibit 6, Guidance For the Use 138
 21 of Hydroxychloroquine and
 22 Chloroquine For the Treatment of
 23 COVID 19
 24 Exhibit 7, May 5, 2021 email re: 155
 25 Public Health Grand Rounds

1 Exhibit 8, email dated May 25, 165
 2 2021, re: CNN Inquiry
 3 Exhibit 9, copy of House Bill 175
 4 1570
 5 Exhibit 10, Opinion article in 217
 6 Washington Post dated April 8,
 7 2021
 8 Exhibit 11, email dated March 229
 9 22, 2021, from Sarah Vestal to
 10 ASMB
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1 AMANDA LAND, ESQ.
 2 aland@arkansasag.gov
 3 May 24, 2022
 4 RE: BRANDT, et al. vs. RUTLEDGE, et al.
 5 5/10/2022, Amy E. Embry (#5219516)
 6 The above-referenced transcript is available for
 7 review.
 8 Within the applicable timeframe, the witness should
 9 read the testimony to verify its accuracy. If there are
 10 any changes, the witness should note those with the
 11 reason, on the attached Errata Sheet.
 12 The witness should sign the Acknowledgment of
 13 Deponent and Errata and return to the deposing attorney.
 14 Copies should be sent to all counsel, and to Veritext at
 15 erratas-cs@veritext.com.
 16
 17 Return completed errata within 30 days from
 18 receipt of testimony.
 19 If the witness fails to do so within the time
 20 allotted, the transcript may be used as if signed.
 21
 22 Yours,
 23 Veritext Legal Solutions
 24
 25

1 BRANDT, et al. vs. RUTLEDGE, et al.
 2 5/10/2022 - Amy E. Embry (#5219516)
 3 E R R A T A S H E E T
 4 PAGE _____ LINE _____ CHANGE _____
 5 _____
 6 REASON _____
 7 PAGE _____ LINE _____ CHANGE _____
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 9 REASON _____
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 15 REASON _____
 16 PAGE _____ LINE _____ CHANGE _____
 17 _____
 18 REASON _____
 19 PAGE _____ LINE _____ CHANGE _____
 20 _____
 21 REASON _____
 22 _____
 23 _____
 24 Amy E. Embry Date
 25

1 BRANDT, et al. vs. RUTLEDGE, et al.
 2 5/10/2022 - Amy E. Embry (#5219516)
 3 ACKNOWLEDGEMENT OF DEPONENT
 4 I, Amy E. Embry, do hereby declare that I
 5 have read the foregoing transcript, I have made any
 6 corrections, additions, or changes I deemed necessary as
 7 noted above to be appended hereto, and that the same is
 8 a true, correct and complete transcript of the testimony
 9 given by me.
 10
 11 _____
 12 Amy E. Embry Date
 13 *If notary is required
 14 SUBSCRIBED AND SWORN TO BEFORE ME THIS
 15 _____ DAY OF _____, 20____.
 16
 17 _____
 18 NOTARY PUBLIC
 19
 20
 21
 22
 23
 24
 25

Federal Rules of Civil Procedure
 Rule 30

(e) Review By the Witness; Changes.
 (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
 (A) to review the transcript or recording; and
 (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.
 (2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f) (1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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Appendix A: Response to Objections

Page Start	Line Start	Page End	Line End	Objection	Response
42	7	44	9	No objection.	N/A
45	7	50	16	<p>Object to lines 45:7–50:16 as to relevance under Rules 401 and 402.</p> <p>Object to lines 46:1–47:4, 48:10–50:16 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>For 46:1–47:4, 48:10–50:16: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>
51	14	54	23	<p>Object to lines 51:14–54:23 as to relevance under Rules 401 and 402.</p> <p>Object to lines 51:24–52:24, 53:19–54:14 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>For lines 51:24–52:24, 53:19–54:14: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
58	19	66	9	<p>Object to lines 58:19–66:9 as to relevance under Rules 401 and 402.</p> <p>Object to lines 58:22–59:3, 61:4–62:3, 62:13–63:19, 64:24–66:9 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>For lines 58:22–59:3, 61:4–62:3, 62:13–63:19, 64:24–66:9: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>
71	6	83	23	<p>Object to lines 71:6–83:23 as to relevance under Rules 401 and 402.</p> <p>Object to lines 71:6–72:12, 77:9–23, 81:16–82:19, 83:3–83:23 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 71:6–72:12, 77:9–23, 81:16–82:19, 83:3–83:23: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
92	14	102	14	<p>Object to lines 92:14–102:14 as to relevance under Rules 401 and 402.</p> <p>Object to lines 92:14–102:14 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
107	2	116	24	<p>Object to lines 107:2–116:24 as to relevance under Rules 401 and 402.</p> <p>Object to lines 107:2–113:22, 115:16–22, 116:12–21 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p> <p>Object to lines 109:7–16, 113:15–22, 115:16–22, 116:12–21 due to calling for speculation under Rule 602.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 107:2–113:22, 115:16–22, 116:12–21: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p> <p>For lines 109:7–16, 113:15–22, 115:16–22, 116:12–21: Objection is waived as to all questions within the line designations for which an objection was not raised during the deposition. Testimony is within the scope of the Board’s corporate knowledge and is not speculative.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
119	2	122	24	Object to lines 119:2 – 122:24 as to relevance under Rules 401 and 402.	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p>
125	5	148	22	<p>Object to lines 125:5 – 148:22 as to relevance under Rules 401 and 402.</p> <p>Object to lines 126:8–127:4, 127:9–130:3, 131:12–22, 132:13–135:20, 136:6–14, 137:11–138:8, 142:25–143:20, 147:3–148:12 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 126:8–127:4, 127:9–130:3, 131:12–22, 132:13–135:20, 136:6–14, 137:11–138:8, 142:25–143:20, 147:3–148:12: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
149	9	154	25	<p>Object to lines 149:9–154:25 as to relevance under Rules 401 and 402.</p> <p>Object to lines 149:9–18, 151:6–152:16, 154:7–24 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 149:9–18, 151:6–152:16, 154:7–24: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
159	8	164	18	<p>Object to lines 159:8–164:18 as to relevance under Rules 401 and 402.</p> <p>Object to lines 160:7–19, 161:23–163:8 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 160:7–19, 161:23–163:8: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
170	2	191	11	<p>Object to lines 170:2–191:11 as to relevance under Rules 401 and 402.</p> <p>Object to lines 170:2–16, 170:20–173:15, 174:2–175:12, 176:16–181:8, 181:19–190:22 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 170:2–16, 170:20–173:15, 174:2–175:12, 176:16–181:8, 181:19–190:22: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

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197	6	217	6	<p>Object to lines 197:6–217:6 as to relevance under Rules 401 and 402.</p> <p>Object to lines 197:11–200:3, 200:25–217:6 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 197:11–200:3, 200:25–217:6: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>
221	3	221	12	Object to lines 221:3–12 as to relevance under Rules 401 and 402.	Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.

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223	12	228	8	<p>Object to lines 223:12–228:8 as to relevance under Rules 401 and 402.</p> <p>Object to lines 223:12–228:8 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

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229	8	233	3	<p>Object to lines 229:8–233:3 as to relevance under Rules 401 and 402.</p> <p>Object to lines 230:18–231:12, 231:20–233:3 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>For lines 230:18–231:12, 231:20–233:3: Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

Page Start	Line Start	Page End	Line End	Objection	Response
233	12	234	15	<p>Object to lines 233:12–234:15 as to relevance under Rules 401 and 402.</p> <p>Object to lines 233:12–234:15 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p>	<p>Testimony provides foundation for relevant testimony.</p> <p>Testimony is relevant because it calls into question the state’s asserted interest in protecting the health and safety of minors.</p> <p>Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p>

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235	18	245	15	<p>Object to lines 235:18–245:15 as to relevance under Rules 401 and 402.</p> <p>Object to lines 235:18–245:15 as to improper lay opinion and legal conclusion testimony under Rules 701 and 702.</p> <p>Object to lines 236:12–239:4 due to calling for speculation under Rule 602.</p>	<p>Testimony is relevant because it tends to make it more probable that Act 626 will cause harm.</p> <p>Testimony is relevant because it tends to make it less probable that Act 626 is narrowly tailored to a compelling government interest, substantially related to an important government interest, or rationally related to a legitimate government interest.</p> <p>Testimony is within the scope of the Board’s corporate knowledge and does not constitute improper lay opinion or legal conclusion testimony.</p> <p>For lines 236:12–239:4: Objection is waived as to all questions within the line designations for which an objection was not raised during the deposition. Testimony is within the scope of the Board’s corporate knowledge and is not speculative.</p>