

**NEW MEXICO MEDICAL BOARD
Interim Board Meeting
June 29, 2017
MINUTES**

Members Present: Steve Jenkusky, MD, Chair
Albert Bourbon, P.A., Vice Chair
Jennifer Anderson, Esq., Secretary Treasurer
Karen Carson, MD
Philip Styka, MD
Steve Komadina, MD (arrived at 4:10)
James Spence, MD
Peter Beaudette, MD

Other Staff Present: Sondra Frank, J.D., Executive Director
Angela Martinez, J.D., Administrative Prosecutor
Debbie Dieterich, Investigations Manager
Amanda Quintana, Compliance Manager / PIO
Samantha Breen, Administrative Assistant

1. CALL TO ORDER / ROLL CALL

Dr. Jenkusky called the Interim Board Meeting of the New Mexico Medical Board to order at 4:05 p.m. and a quorum was present.

2. APPROVAL OF AGENDA

MOTION was made by Dr. Jenkusky to approve the Agenda. **SECONDED** by Ms. Anderson. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Carson, Dr. Spence and Ms. Anderson. **ABSENT:** Dr. Komadina. **MOTION CARRIED.**

3. APPROVAL OF MINUTES

MOTION was made by Mr. Bourbon to accept and approve the minutes of the May 11-12, 2017 Board Meeting as presented. **SECONDED** by Dr. Styka. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Carson, Dr. Spence and Ms. Anderson. **ABSENT:** Dr. Komadina. **MOTION CARRIED.**

4. Chair Report
None

5. Executive Director Report

Ms. Frank introduced and welcomed Angela Martinez, J.D. to the Board as the new Administrative Prosecutor.

EXECUTIVE SESSION: Complaint Committee Reports / Licensing Requests and Actions

MOTION was made by Dr. Jenkusky to go into Executive Session pursuant to Section 10-15-1(H) (1) of the Open Meetings Act to discuss matters pertaining to the issuance, suspension, renewal or revocation of a license and disciplinary matters. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Carson, Dr. Spence and Ms. Anderson. **ABSENT:** Dr. Komadina. **MOTION CARRIED.**

OPEN SESSION

The Board returned to open session. Dr. Jenkusky stated for the record that the matters discussed in executive session were limited only to those specified in the motion for closure.

6. ACTIONS RELATED TO EXECUTIVE SESSION

Complaint Committee A

Case #2015-A-138 RECOMMENDATION was made by Dr. Carson to close this case with no action. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Spence and Ms. Anderson. **RECUSED:** Dr. Carson and Dr. Komadina. **MOTION CARRIED.**

Case #2017-A-021 RECOMMENDATION was made by Dr. Carson to close this case and issue an unrestricted license to physician applicant. An advisory letter will be issued to physician reminding her of the Board's adoption of AMA Code of Ethics, which includes the prohibition to prescribe to self and family members. **YES:** Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Spence and Ms. Anderson. **NO:** Dr. Jenkusky, **RECUSED:** Dr. Carson and Dr. Komadina. **MOTION CARRIED.**

Case #2017-A-025 RECOMMENDATION was made by Dr. Carson to offer physician a stipulated license requiring mandatory participation in the NM monitored treatment program. If physician does not accept, a notice of contemplated action will be issued based on, but not limited to, habitual and excessive use of substances. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Spence and Ms. Anderson. **RECUSED:** Dr. Carson and Dr. Komadina. **MOTION CARRIED.**

Complaint Committee B

Case #2015-B-137 RECOMMENDATION was made by Dr. Spence to close the case with no action. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette and Dr. Styka. **RECUSED:** Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

Case #2017-B-108 RECOMMENDATION was made by Ms. Anderson to amend the notice of contemplated action to include an allegation of failure to report an arrest. An advisory letter will also be issued by the Board notifying PHYSICIAN that if he enters his clinics in an attempt to work in an official capacity of any kind, the Board will view it as the unlicensed practice of medicine and will consider it as a further violation of the Medical Practice Act. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette and Dr. Styka. **RECUSED:** Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

Complaint Committee C

Case #2015-C-142, 2016-C-029, 2016-C-030, 2016-C-262 and 2016-C-298 RECOMMENDATION was made by Mr. Bourbon to issue a summary suspension based on physician's imminent danger to the public, along with a Notice of Contemplated Action based on, but not limited to, gross negligence, failure to maintain accurate, complete and timely medical records, conduct likely to harm, failure to provide medical records when requested. **YES:** Dr. Jenkusky, Dr. Beaudette, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **RECUSED:** Mr. Bourbon and Dr. Styka. **MOTION CARRIED.**

Case #2017-C-057 RECOMMENDATION was made by Dr. Styka to offer physician applicant a stipulated license requiring an in-depth ethics course to be completed within 6 months. Once completed, physician applicant may request to be released from the stipulation on his license. If he does not accept, then physician applicant may withdraw his application for licensure while under investigation or a notice of contemplated action will be issued to deny licensure based on, but not limited to, misrepresentation on an application and ethics violations. **YES:** Dr. Jenkusky, Dr. Beaudette, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **RECUSED:** Mr. Bourbon and Dr. Styka. **MOTION CARRIED.**

Complaint Committee D

Case # 2016-D-098 RECOMMENDATION was made by Dr. Jenkusky to offer physician a stipulation of licensure requiring mandatory participation in the NM Monitored Treatment Program. If physician does not accept, a notice of contemplated action will be issued based on, but not limited to, habitual and excessive use of substances. **YES:** Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **RECUSED:** Dr. Jenkusky. **MOTION CARRIED.**

7. **Executive Committee Report**
None

8. **LICENSING ISSUES, NEW APPLICANTS / REINSTATEMENTS**

Pamela Costello, MD – Case No. 2017-013 – Hearing on Respondent's Motion to Dismiss Notice of Contemplated Action.
Hearing transcript attached.

EXECUTIVE SESSION: Licensing Issues, New Applicants / Reinstatements

MOTION was made by Dr. Jenkusky to go into Executive Session pursuant to Section 10-15-1(H) (1) of the Open Meetings Act to discuss matters pertaining to the issuance, suspension, renewal or revocation of a license and disciplinary matters. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

OPEN SESSION

The Board returned to open session. Dr. Jenkusky stated for the record that the matters discussed in executive session were limited only to those specified in the motion for closure.

Pamela Costello, MD – Case No. 2017-013 – Consider Respondent's Motion to Dismiss NCA.

MOTION was made by Dr. Spence to **DENY** Respondent's Motion to dismiss the Notice of Contemplated Action based on the statute of limitations issue. **SECONDED** by Ms. Anderson. **YES:** Mr. Bourbon, Dr. Styka, Dr. Carson, Dr. Spence and Ms. Anderson. **NO:** Dr. Komadina. **RECUSED:** Dr. Jenkusky and Dr. Beaudette. **MOTION CARRIED.**

MOTION was made by Dr. Styka to dismiss Case No. 2017-013 with no further action by the Board. **SECONDED:** Mr. Bourbon. **YES:** Mr. Bourbon, Dr. Styka, Dr. Komadina, Dr. Carson and Ms. Anderson. **NO:** Dr. Spence. **RECUSED:** Dr. Jenkusky and Dr. Beaudette.

Louis Sidoti, MD – Case No. 2017-007 – Decision and Order

MOTION was made by Dr. Jenkusky to accept the Hearing Officers Report as presented. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

Louis Sidoti, MD – Case No. 2017-007 – Decision and Order

MOTION was made by Dr. Jenkusky to **DENY** the issuance of a New Mexico medical license to Dr. Sidoti. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

Louis Sidoti, MD – Case No. 2017-007 – Motion for Costs
Tabled

David Williams, MD – Case No. 2017-008 – Consider Joint Motion for Approval of Proposed Stipulation and Reprimand.

MOTION was made by Dr. Jenkusky to approve the Joint Motion for Approval of Proposed Stipulation and Reprimand as presented. **SECONDED** by Ms. Anderson. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

Kamran Khan, MD – Approve PGT License Application based on FCSA Evaluation of Medical School.

MOTION was made by Dr. Jenkusky to **GRANT** a PGT license to Dr. Khan. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

9. Compliance


Michael Bellas, PA – Consider request for release from stipulation.

MOTION was made by Mr. Bourbon to approve Mr. Bellas' request for release from stipulation. **SECONDED** by Dr. Jenkusky. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

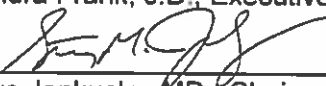
Paul Walsky, MD – Consider request for release from stipulation.

MOTION was made by Dr. Jenkusky to approve Dr. Walsky's request for release from stipulation. **SECONDED** by Mr. Bourbon. **YES:** Dr. Jenkusky, Mr. Bourbon, Dr. Beaudette, Dr. Styka, Dr. Komadina, Dr. Carson, Dr. Spence and Ms. Anderson. **MOTION CARRIED.**

10. ADJOURN - There being no further business before the Board, Dr. Jenkusky adjourned the meeting at 7:00 p.m.

SUBMITTED BY: 
Sondra Frank, J.D., Executive Director

DATE: Aug. 10, 2017

APPROVED BY: 
Steve Jenkusky, MD, Chair

DATE: Aug 10, 2017

APPROVED BY: 
Albert Bourbon, MD, Vice Chair

DATE: Aug 10, 2017

BEFORE THE NEW MEXICO MEDICAL BOARD

IN THE MATTER OF

Pamela Costello, MD
MD2009-0520

No. 2017-013

Respondent.

TRANSCRIPT OF PROCEEDINGS

HEARING ON RESPONDENT'S MOTION TO DISMISS NOTICE OF
CONTEMPLATED ACTION

June 29, 2017

4:51 p.m.

In the Conference Room of:
REGULATION AND LICENSING DEPARTMENT
5500 San Antonio, NE
Albuquerque, New Mexico

BEFORE THE NEW MEXICO MEDICAL BOARD:

STEVEN M. JENKUSKY, MD, CHAIR
JENNIFER ANDERSON, ESQ., BOARD MEMBER
PHILLIP STYKA, MD, BOARD MEMBER
PETER T. BEAUDETTE, MD, BOARD MEMBER
ALBERT BOURBON, PA-C, BOARD MEMBER
JAMES J. SPENCE, MD, BOARD MEMBER
KAREN CARSON, MD, BOARD MEMBER
STEVEN A. KOMADINA, MD, BOARD MEMBER

1 REPORTED BY: DEBRA ANN FRIETZE, CCR #251
 PAUL BACA COURT REPORTERS
 2 500 4th Street, NW, Suite 105
 Albuquerque, New Mexico 87102
 3
 4

A P P E A R A N C E S

5
 6 Administrative Prosecutor for the Medical Board:

7 ANGELA MARTINEZ, ESQ.
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10 For the Respondent:

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 13 rickjaffeesquire@gmail.com
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 BY: LORRI KREHBIEL
 17
 18

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1 THE CHAIR: I'm Dr. Jenkusky. I'm the
2 Chair, but I'm going to turn the proceedings over to
3 Dr. Anderson --

4 MS. ANDERSON: Just Anderson, Jennifer
5 Anderson.

6 THE CHAIR: -- she is a Doctor of Law.

7 Because I was on the Complaint Committee,
8 I'm recused from voting.

9 MS. ANDERSON: So we are here today to hear
10 the motion -- I know that you have -- at least it
11 appears to me from the record that you have two motions
12 that have been filed.

13 MR. JAFFE: Correct.

14 MS. ANDERSON: What we are here on today is
15 the Motion To Dismiss the Notice of Contemplated Action.
16 This is what I've referred to as the jurisdictional
17 motion, or the jurisdictional challenge. So I want to
18 give you an opportunity to -- I want you to know that
19 we've all read all of the briefing. I've read it very
20 carefully.

21 I certainly want to give you the
22 opportunity to make whatever argument you want to make,
23 but I also have some questions for you.

24 We did send out a letter to notify you all
25 that it's possible that people will be going under oath

1 in order to answer some questions. And so to the extent
2 that we do that, we're going to make sure that we
3 have -- we'll swear in witnesses. We had do have a
4 court reporter here today.

5 I recognize that the setup in the room is a
6 little unusual for that kind of hearing, but we're going
7 to figure out how to make that work.

8 MR. JAFFE: May I just ask: Is there some
9 reason we're not considering both motions, the other
10 motion in the interest of justice?

11 MS. ANDERSON: We can certainly hear that
12 motion. I guess what I'm telling you is what I'm going
13 to do is I want to hear this motion first, the
14 jurisdictional challenge. Understood?

15 MR. JAFFE: Okay.

16 MS. ANDERSON: So with respect to that
17 motion, I'm going to give you an opportunity to argue
18 first, and then I'm going to turn it over to the
19 prosecutor to make whatever comments she wants to make.

20 You'll have an opportunity at that point to
21 respond to her comments. And then if necessary, we'll
22 swear in the witnesses and do what needs to be done.

23 MR. JAFFE: Okay. I just hope -- like I
24 said, I would hope I could address the other motion
25 because I think, in a way, that's a more important

1 motion for this board.

2 What I appreciate is the opportunity to
3 actually speak to you all about, I think, a very
4 important issue, supplements. It's an issue which is
5 vitally important to the entire integrative medical
6 community in New Mexico. It includes all kinds of
7 people, and that's what I really primarily wanted to
8 talk to you about and give you my insight.

9 MS. ANDERSON: I understand, and let me
10 tell you why I'm doing this the way I'm doing this.
11 You've filed a motion where you've raised a
12 jurisdictional challenge to the Board's ability to hear
13 this case --

14 MR. JAFFE: I understand.

15 MS. ANDERSON: -- and so until we clear
16 that issue, I'm not inclined to hear anything else.
17 Okay?

18 MR. JAFFE: You are correct. I understand
19 completely. That is the absolute right thing to do. I
20 hadn't really thought of that. Thank you.

21 MS. ANDERSON: Okay.

22 MR. JAFFE: I tried to be simple and clear
23 in the motion. New Mexico has a statute of limitations
24 for filing a notice of contemplated action. It is two
25 years. There's no case law that says that it's not a

1 statute of limitations. I think everyone I know agrees
2 with that. It is a statute. It wasn't adhered to in
3 this case.

4 The only real issue is whether or not --
5 really, two: Whether the email settlement negotiations
6 constitute a waiver, or if not, whether an estoppel-type
7 argument can apply, which doesn't so much focus on what
8 we did, but what the former board prosecutor did.
9 That's really the only issue.

10 I hope everyone understands -- you're a
11 lawyer, and you're a healthcare lawyer, so I don't think
12 I have to go through all the cases.

13 You guys absolutely have a limitation of
14 action. It is two years from the date of the -- the
15 Board is aware of the complaint. And that's the new
16 date under one of these recent cases, and that would be
17 January 6th, 2015. And it expired January 6th or 5th,
18 2017. It expired. There's no question about that.

19 So on the issue of waiver, you know, the
20 only thing I can go by is case law. I'm a stranger
21 here. I'm a stranger in most cases that I appear on.
22 So you look at the case law, you look at the practice.
23 And in my mind, I get the concept of some of the cases
24 which have been brought forth by the former
25 administrative prosecutor, which is that if you go into

1 open court and put on the record a position on behalf of
2 a client settling a case, like in the Navajo Tribe case,
3 I get the concept that the client is bound by it, based
4 on apparent authority. That is black-letter law in
5 New Mexico and all other states. That's on the record
6 for the purpose of waiving a right.

7 I also understand the concept, and I
8 followed that principle in connection with our express
9 waiver of the hearing time. Because you also have the
10 limitations on when the hearing has to take place, and
11 that -- I think it's 60 days. And in order for the
12 Board to even contemplate our motion, which was going to
13 have to be heard after the expiration of the 60-day
14 period, we had to waive.

15 Legal norms are that that kind of motion
16 for -- when you make a motion to dismiss, the legal
17 norms are you contain and you include the waiver in a
18 pleading to be filed in court to be reviewed by the
19 presiding officer.

20 In this case, I think what happened is you
21 have a hearing officer who adjourned the hearing, and
22 there is actually a case about that. The hearing
23 officer has the absolute right to adjourn a hearing with
24 or without the consent of the licensee. And that was
25 the case cited by the former board prosecutor, so I mean

1 that's black-letter law. They have that power, and the
2 way that's done is through a formal proceeding.

3 Three is no case support, so far as I could
4 tell, or so far as cited -- nothing was cited by the
5 former prosecutor. I haven't found a single case where
6 you can take an informal settlement discussion, whether
7 it's in writing or oral -- and by the way, you probably
8 know you certainly know this. All the lawyers know
9 this: Settlement discussions aren't even admissible
10 usually in court. You have to put in writing. I mean
11 you can't say, "Well, somebody offered to settle," so
12 that's inadmissible. So you have informal
13 communications. It says what it says.

14 I mean what we suggested that we would do,
15 we entertained it. We wanted something in return. We
16 wanted the opportunity to address you all to provide
17 information that you hadn't had for one reason or
18 another before, which is that 964 may not apply.
19 There's another one that could apply, right?

20 We didn't feel you had the information. We
21 wanted the information presented to the Board --
22 re-presented to the Board. And as an arguably quid pro
23 quo, we were hoping we could induce the former
24 prosecutor to say look, don't worry about the statute.
25 You know, let's present this -- re-present our point

1 that what she's doing is prescribing a therapy.

2 So what we expected to happen in the normal
3 course of things was we expected, you know, after we
4 wrote the letter on the 29th, we expected to have
5 essentially a copy of the language from the stipulation
6 of settlement, which we quoted in the order, saying we
7 stipulated. We hoped it would have contained, "We're
8 going to re-present to the Board."

9 But you know, we told the guy in the email,
10 you know what? It's holidays and this, but that's what
11 we expected to get. Again, we never got it. We don't
12 know why we didn't get it. And indeed, the day after,
13 we get a call. "Where's the stipulation?" And I had
14 nothing to tell the client, so we kept on waiting and
15 waiting and waiting and waiting. And a month turns by,
16 and then we get this revised stipulation and -- or it
17 wasn't so revised, but it was a stipulation that still
18 had the waiver language. But by that time, the statute
19 had already passed.

20 What I have to tell you guys is the issue
21 of your job is to protect the public, and that sets up
22 how it circumvents the statute of limitations. That
23 ship has passed, respectfully. I mean the case law is
24 clear. People have rights, too. It just is what it is.

25 I think the bottom line is: I just don't

1 see any case law support for this concept of, you know,
2 shoot off an email, and then you do nothing for a month.
3 So it's unfortunate. And then when we get back the
4 revised settlement agreement -- I mean I still don't
5 know whether it was ever presented to the Board. I mean
6 we had hoped it was, but there was no indication of
7 that. So we felt that was the appropriate time to file
8 the motion. And I think that's really the short of it.

9 The point is, I think the cases are pretty
10 clear that you do have a statute. You know, there has
11 to be an intentional known waiver. You know, you can
12 take testimony if you want, but I can tell you right now
13 Dr. Costello didn't think she was waiving her rights
14 with the email, and I don't think any reasonable person
15 would.

16 MS. ANDERSON: Okay. Let me --

17 MR. JAFFE: Questions. Yes, ma'am?

18 MS. ANDERSON: I want to ask you a few
19 questions. First of all, you talk about the legal
20 authority or the legal support for the response, right,
21 with respect to whether or not this was a valid waiver?

22 What I see you relying pretty heavily on is
23 this notion that this is an informal email and that
24 there was no formally executed waiver, right, that would
25 suffice in your mind to operate as a tolling of this

1 limitations period, as you put it, right?

2 Am I summing that up correctly?

3 MR. JAFFE: Well, the basis of the waiver
4 is the email, so we're saying it's not a basis of the
5 waiver.

6 MS. ANDERSON: Do you agree with me that a
7 limitations period such as this one can be waived? If
8 parties agree that it should be waived, that parties are
9 capable of reaching an agreement that effectively waives
10 that limitation?

11 MR. JAFFE: Oh, it's in the stipulation.
12 Had she signed the stipulation, that would have
13 constituted the waiver. So the written stipulation
14 actually contains that language.

15 MS. ANDERSON: Can you point to anything in
16 the regulations or in case law or in the statutes to
17 support your contention that there has to be something
18 more than a communication --

19 [Interruption at the door.]

20 MS. ANDERSON: Do you have any authority on
21 which you rely for this distinction that you are drawing
22 between an email and a formally executed waiver as
23 you've described it in your motion?

24 MR. JAFFE: Well, stipulations, in general,
25 are only valid on signed writing. I mean that's in your

1 regulations regarding stipulations. I mean that's in
2 your regs.

3 MS. ANDERSON: So it's your view that our
4 regulations themselves require something signed by
5 Dr. Costello in order to extend that limitation period?

6 MR. JAFFE: If it's a stipulation, if it's
7 any kind of stipulation. You know, it's in your
8 administrative regs.

9 MS. ANDERSON: Understood. I want to make
10 sure that I understand your argument, and I think I do.
11 I think what you're telling me is in order for there to
12 be a tolling or an extension, whatever you want to call
13 it, of the limitations period, Dr. Costello herself had
14 to sign something agreeing to that extension.

15 Is that your -- I want to make sure -- I
16 don't want to put words in your mouth, but that's really
17 what this appears to boil down to.

18 MR. JAFFE: I don't know how to say that.
19 Let's put it this way: I can imagine other
20 circumstances. For example, if she would have gone
21 under oath here, right, be sworn, right, I believe that
22 her statement under oath would be binding, an oral
23 statement. So I think there are circumstances under
24 which a writing might not be required.

25 Another circumstance would be if there

1 were -- well, unlike this Navajo case, where the
2 attorneys settled the case in open court, in my
3 opinion -- you can disagree. In my opinion, that
4 wouldn't wash in New Mexico or any state because the
5 client has to sign, and indeed the notary has to be
6 signed.

7 So I think there are circumstances in which
8 a lawyer can bind clients that do not comport with your
9 particular -- at least practice norms, if not -- well,
10 like I say, the Administrative Code sets forth that
11 stipulations have to be signed by the client.

12 MS. ANDERSON: So let me ask you this: In
13 the emails, and I have them -- and I note, by the way,
14 it's signed, "Counsel for Dr. Costello" --

15 MR. JAFFE: Right.

16 MS. ANDERSON: Are you --

17 And I know Ms. Krehbiel. We have dealt
18 with each other in the past. She's a fine lawyer, and
19 I'm not intending to suggest that she was doing anything
20 wrong here, but I want to make sure I understand. Are
21 you suggesting that she was acting without
22 Dr. Costello's authority when this email was drafted?

23 MR. JAFFE: Absolutely not, no. I'll state
24 for the record that there were consultations.
25 Dr. Costello reviewed the email, and she agreed that we

1 would send it, but nobody understood it was going be a
2 waiver of her rights because it wasn't a stipulation.

3 So there's no question about the fact --
4 we're not taking the position -- just so you understand,
5 we're making a legal distinction here. We're not taking
6 the position that the sending of the email was not
7 authorized or not known by Dr. Costello. That's not our
8 position.

9 Our position is, as a matter of law -- it
10 doesn't matter what the facts are. As a matter of law,
11 this document is not -- it doesn't meet the standards of
12 an enforceable, knowing, intelligent waiver.

13 MS. ANDERSON: So this email that is
14 dated --

15 MR. JAFFE: December 29th?

16 THE COURT: -- December 29th says, in
17 part -- it's a very lengthy email.

18 I find that -- I reject the
19 characterization of it being an informal email, by the
20 way. It is a very lengthy email, which is detailed and
21 signed, "Counsel for Dr. Costello," as I've already
22 said.

23 But it says in part, "And further, consider
24 this offer to waive the limitation period for any or no
25 reason. It's the end of the year, and we responded at

1 the end of your deadline, close to the expiration of the
2 limitation period. Our delay was not for tactical
3 reasons to put pressure on you or your office. This is
4 a serious case, and we think it is in both parties'
5 interest to take the time need for full and complete
6 preparation at each stage of the proceeding. Therefore,
7 if for any reason you want to brief waiver of the
8 limitation period, similar to what is proposed in the
9 stipulation of settlement, we are agreeable."

10 MR. JAFFE: Okay.

11 MS. ANDERSON: And your view is that -- I
12 think from your briefing, that that required the
13 preparation of a separate stipulation to be signed by
14 Dr. Costello before the parties really had an agreement
15 to extend that period?

16 MR. JAFFE: Yes, that was an offer. It was
17 never accepted. We never heard anything back.

18 MS. ANDERSON: Well, that's not -- wait a
19 minute. That's not quite true, because there's further
20 email correspondence that the parties have submitted --

21 MR. JAFFE: February 9th.

22 MS. ANDERSON: And in that email
23 correspondence, doesn't Ms. Krehbiel say, "You need to
24 go ahead and file your NCA, and we'll present our
25 defenses"?

1 MR. JAFFE: And we are. We said, "We're
2 not going to sign it. Do what you have to do."

3 So you're trying to interpret that as
4 permission that -- a waiver? So that's a waiver of the
5 limitations by virtue of the fact we're telling you to
6 do what you have to do?

7 MS. ANDERSON: No. What I'm telling you,
8 though, is that it does give me some insight as to what
9 the parties were thinking at the time that these
10 communications were going back and forth. And I will
11 tell you that it appears to me that the parties were
12 engaged -- do you agree that during that period of time,
13 the parties were engaged in settlement discussions?

14 MR. JAFFE: Yes.

15 MS. ANDERSON: And do you agree that
16 Dr. Costello got a benefit from an NCA not being filed
17 while those settlement discussions were ongoing?

18 MR. JAFFE: No.

19 MS. ANDERSON: Okay. If an NCA had been
20 filed, it would have been reportable, right?

21 MR. JAFFE: Reportable?

22 MS. ANDERSON: It would be public.

23 MR. JAFFE: Well, complaints or NCAs are a
24 matter of public record, so I don't see any benefit.

25 The answer is it's put tremendous pressure

1 on her whole life. She's trying to leave the state, you
2 know, which this action is holding up. So no, I don't
3 find the delay of two months was any benefit to her.

4 MS. ANDERSON: Or the delay of putting out
5 the NCA while you were hoping to reach some sort of
6 settlement? No, no benefit to her at all?

7 MR. JAFFE: He didn't come back with
8 anything different. We still don't -- basically, it was
9 the same thing, "Don't sell supplements." It was the
10 same settlement offer. So I mean no, I don't see any
11 benefit.

12 MS. ANDERSON: But I'm looking at the
13 December 29th correspondence, right, where you say,
14 "We're agreeable to waiving this deadline"?

15 MR. JAFFE: Right, we would have been. And
16 I'll even go farther. Had he done the one thing he had
17 to do, which is prepare a proper stipulation -- I don't
18 understand this. What happened is we would sit down
19 with the client. We would tell the client we think it's
20 in your interest for X, Y and Z reasons, right? We
21 would have a discussion and go back and forth.

22 We never really had that discussion
23 because, you know, we sent an email, which was a lengthy
24 email. It contained our substantive position and what
25 we hoped -- the only reason we put it in writing was

1 because we wanted him to know what our position was to
2 re-present to the Board to show that there's another
3 provision that could apply. That was the only reason.
4 Otherwise, she would have just said no, and you know,
5 prepared something. You know, that was the only reason.
6 It was doing it to record what our position was so it
7 could be re-presented to the Board.

8 Look, ultimately, you're a lawyer. We're
9 all lawyers. We can disagree about an opinion. But you
10 know, there is just no case law in support of it. This
11 is not an extension to file an answer. This is a waiver
12 of a right which the Supreme Court of New Mexico
13 considers very valuable.

14 And in the property rights and the
15 notion -- the notion that you could take an arguably
16 inadmissible letter, which is lengthy, which contains
17 settlement discussions, and turn that into a waiver,
18 when your own practice -- your own practice is to have a
19 written stipulation for waivers twice, once before the
20 expiration of the statute of limitations and once after,
21 right, which would have corrected the problem had there
22 been -- had she signed it.

23 The notion that you can construe that --
24 that the Board can construe that as equivalent to what
25 the Board itself requires in order to waive rights is

1 surprising, and it's not supported by case law in
2 New Mexico. I mean it just -- there's nothing there.
3 The cases that you cite don't have anything to do with
4 it.

5 MS. ANDERSON: Okay. I'll give you an
6 opportunity to -- I'm going to give them the opportunity
7 to decide --

8 MR. JAFFE: Sure, sure. I apologize.

9 MS. ANDERSON: Let me ask one other
10 question. It strikes me that in the motion that was
11 filed, you know, I will tell you that I was troubled by
12 this, that there was no mention of the fact that there
13 had been this back-and-forth communication about an
14 extension. Why was that omitted from the motion?

15 MR. JAFFE: Because that was going to be an
16 issue. These are the facts. He was going to put it in
17 a response, and were going to do deal with a reply.

18 MS. ANDERSON: So I want to tell you kind
19 of where I'm coming from. I view that as a candor
20 issue, right, that you have an obligation to be candid
21 with us about how this dispute and controversy arose.
22 So I was trying to get some sense for why you felt like
23 that was not something that really you had an obligation
24 to inform us of in connection with the motion.

25 MR. JAFFE: I understand what you're

1 saying, but let me say this: My job is to represent my
2 client. My job is not to present the Board prosecutor's
3 argument. So he is perfectly capable to present his own
4 argument. That's his defense. I am not -- no lawyer --
5 and again, I apologize. I'm not in New Mexico.

6 Lawyers don't present the other sides of
7 arguments and -- or some don't, in anticipation of it.
8 I stated what the facts are. That facts are that the
9 statute expired. He has possible defenses, right? He
10 raised those defense. I addressed them. You know, I
11 don't think --

12 MS. ANDERSON: I want --

13 MR. JAFFE: To be honest, I sort of reject
14 this notion of a candor issue, when really it's just --
15 I mean might I have gone into a lengthy explanation and
16 all that? But why should I do the guy's job when he's
17 going to do a better job than I can do?

18 You know, I think it's a judgment call. I
19 had thought about doing just that thing. I decided just
20 to offer simplicity. Here are the facts. Let the guy
21 say what he's going to say, and I'll put in a response.

22 I think that was the most straightforward
23 thing to do. And I think it's a judgment call whether
24 or not someone might have done it another way: But you
25 know, I don't normally argue -- as a matter of course, I

1 don't normally assert the other party's arguments.

2 MS. ANDERSON: Then you don't reject the
3 notion that you have a duty of candor as a lawyer,
4 right?

5 MR. JAFFE: Sure. I mean that's an ethical
6 obligation. Had he not -- let's put it this way. Had
7 he -- well, let's say he didn't mention -- let's take
8 the hypothetical. What if he didn't mention that, all
9 right? For what reason? I can think of five reasons --
10 or I can think of one reason why he wouldn't mention it,
11 right?

12 Say he doesn't mention it. Suppose he just
13 argues estoppel or just, you know, excusable neglect.
14 Lawyers, sometimes when they mess up, they will offer
15 failure of excusable neglect. Suppose he had done that,
16 all right? Would I have an obligation to make that
17 argument? I don't think so. This is also a sensitive
18 thing.

19 You know, one of the reasons I wanted -- I
20 filed the Interest of Justice motion, I wanted to do
21 that first. You know, who likes to do stuff like this?
22 Do you know what I mean? This is uncomfortable for me
23 as a litigator, but I have a duty to my client.

24 So go have this guy explain -- maybe he
25 wasn't going to explain why, in effect, in my view, he

1 didn't do the one thing he should have done. You know,
2 I mean I'm not saying he's, you know, completely
3 negligent. But certainly, you know, we wouldn't be here
4 on this issue if he had done -- taken the language and
5 done the stipulation.

6 And again, I just don't see -- it's my
7 view -- I understand your point. But in this kind of
8 case, it's exactly why I wanted to do the other motion
9 first.

10 MS. ANDERSON: Yeah, but we're not doing --

11 MR. JAFFE: And you were right about that.

12 MS. ANDERSON: Okay. All right. So I'm
13 going to let the prosecutor respond.

14 MS. MARTINEZ: Mr. Banner is here, and I
15 would like him to address any questions that you have,
16 but I'll be very brief. I think the question here is a
17 question of good faith, and I think the timeline and I
18 think the language are critical.

19 The timeline in this case indicates that
20 the parties were having conversations. And they were
21 active conversations that went back and forth, it
22 appears from the file, between December 13 all the way
23 through December 29th. And again, the NCA was due
24 January 6th of 2017. So all these back and forth --
25 there were voicemail communications which Mr. Bannon can

1 address, there were email communications. So there were
2 good-faith discussions about trying to resolve this
3 matter amicably.

4 Mr. Bannon received the email, and I won't
5 repeat it, but he received the email that basically
6 said, in three different places, that they would be
7 willing to waive the limitation period. The question
8 really is: Was it reasonable for him to have relied on
9 that language? And I'm not going to read that language
10 again, but I submit to the Board that it was reasonable.

11 In December -- on December 13th, Mr. Bannon
12 wrote to Ms. Krehbiel and said, "I received your
13 voicemail message. I started drafting the NCA, but I
14 would put that on hold and will instead email you a
15 draft of a proposed stipulation for you to review with
16 your client. I'll try to do that by the end of the
17 day," and he in fact did that.

18 And the response that we got back that you
19 read on 12/29 was -- and this is a response from the
20 doctor to the proposed stipulation. And it says, in the
21 last paragraph, what you already said. "If for any
22 reason you want a brief waiver of the limitation period,
23 we are agreeable." And on that basis, Mr. Bannon
24 continued, and the rest played out as it did. And I
25 would invite Mr. Bannon, subject to --

1 MS. ANDERSON: Banner.

2 MS. MARTINEZ: Banner, I'm sorry.

3 -- the Board, to have him address, or if
4 you would like me to question him, however you would
5 like to proceed.

6 Sorry about your name.

7 MS. ANDERSON: I think to the extent that
8 you want to get information from him, it makes sense to
9 put him under oath and also give the respondent an
10 opportunity to ask questions of him.

11 I think before we move to that, unless you
12 have anything else to say, I'm going to let the
13 respondent respond to what you just said.

14 MS. MARTINEZ: Sure.

15 MS. ANDERSON: And then I'll also ask you
16 to figure out whether -- I was very concerned about this
17 issue of acting outside the scope of authority. And so
18 I will tell you that I would have insisted that
19 Dr. Costello and Ms. Krehbiel go under oath if you had
20 said gosh, there may be a question about whether or
21 not --

22 MR. JAFFE: We're not raising that issue.

23 MS. ANDERSON: -- whether or not there was
24 an issue of authority.

25 I'm going to give the prosecutor an

1 opportunity to put Mr. Bannon under -- now I'm doing
2 it -- Mr. Banner oath so that she can ask questions.

3 You'll have the opportunity to question him
4 as well. If you have anybody you want to swear in, we
5 will do that and take testimony from them, too.

6 Before we get to that, do you have any
7 other argument that you want to present in response?

8 MR. JAFFE: I think administrative agencies
9 have to follow the law. I don't think it's a question
10 of good faith. I mean the case law doesn't talk about
11 good faith. The issue is whether or not it constitutes
12 a waiver.

13 The case law cited by the former Board
14 prosecutor does not -- it does not support a waiver.
15 There's nothing about -- good faith arguably comes in in
16 an estoppel. You either have an intelligent and
17 voluntary waiver or you don't.

18 Your Board practice is to have a written
19 stipulation. That's what your Board practice is.

20 MS. ANDERSON: So I want to address that,
21 though. Are you saying that Dr. Costello didn't
22 knowingly waive anything?

23 MR. JAFFE: She didn't knowingly waive --
24 she didn't waive the statute of limitations because the
25 email didn't waive the statute of limitations under

1 Board law and on the case law and your practice. So
2 yes, she did waive the statute of limitations. I mean
3 that's --

4 MS. ANDERSON: Well, I'll reserve on our
5 practice on what we accept as a waiver --

6 MR. JAFFE: Well, case law. I understand.

7 MS. ANDERSON: -- but she knew -- you have
8 said she reviewed the email?

9 MR. JAFFE: She reviewed the email. And I
10 think the fact -- if we talk about -- let's separate the
11 functions of fact and legal conclusion, which you have
12 to do, and to -- what I'm trying to do is present the
13 issue clearly to you so there's no confusion.

14 Dr. Costello, we will stipulate on the
15 record, which is a valid stipulation because it's on the
16 record, she will stipulate that she reviewed the email
17 and had input to the email before it was sent. She was
18 aware of the contents and input and was aware of it. We
19 will stipulate to that.

20 I will also state that it was not her
21 intention and it not our advice that this email was an
22 operative -- it was a self-executing operative legal
23 document under New Mexico case law. And there's no case
24 that the Board prosecutor has cited, there's no case
25 that you've mentioned that establishes that that email

1 was a valid waiver of a known right. That is a legal
2 conclusion that you and -- look, this case is going to
3 go up to the New Mexico Supreme Court.

4 So the point is what you have to do -- what
5 you have to do is you have to make a determination based
6 on the facts and apply the law to the facts with
7 whatever legal input you have to do. But I think it's
8 important so you can think about -- you guys can think
9 about this as what is the fact -- and we're setting you
10 up on the facts, right?

11 I understand your legal conclusion, but
12 that's a legal conclusion, if that's where you're going.
13 But the facts we're just bringing up for you so you'll
14 understand clearly what it is so you can make whatever
15 legal conclusion you have based on whatever legal input
16 you have.

17 MS. ANDERSON: One more question: Unless
18 your client wants to testify about this, are you willing
19 to stipulate that she also reviewed and approved the
20 Tuesday, March 14, 2017, email? It's Exhibit 7 to the
21 Response.

22 MR. JAFFE: Well, I don't know the answer
23 to that.

24 MS. ANDERSON: Okay. Well, then we'll put
25 her under oath and ask her.

1 MR. JAFFE: Well, hold on a second. No,
2 we're not going to stipulate to that. I think what
3 she's going to testify to is that she's not aware of
4 that.

5 MS. ANDERSON: Okay. So we'll swear you in
6 after we have Mr. Banner sworn in.

7 Okay. Anything else before we --

8 MR. JAFFE: Oh, wait a second. For what
9 it's worth, let me just state -- again, to clarify the
10 record, I want to state that Dr. Costello is cc'd on
11 that email. And I think she certainly -- I think we
12 would concede that she's cc'd on the email and probably
13 got it after the fact. I don't think she saw it before
14 the fact. So in fact -- again, we need a clean record
15 here.

16 MS. ANDERSON: Thank you.

17 [Discussion held off the record.]

18 MS. ANDERSON: Mr. Banner, I'm going to ask
19 the court reporter to swear you in.
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1 THOMAS BANNER

2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 MS. ANDERSON: Ms. Martinez?

5 MS. MARTINEZ: Thank you.

6 THE WITNESS: May I make a brief statement
7 just to clarify something before we go any further?

8 MS. ANDERSON: Sure.

9 THE WITNESS: I am not here in the capacity
10 of an employee or contractor of this Board. I'm here in
11 my personal capacity. I'm not being compensated for my
12 testimony. I just want to make that clear. I've
13 recused myself from the prosecution of this matter.

14 Thank you.

15 MS. ANDERSON: Yes, I appreciate that. And
16 I will say for the record that Mr. Banner is here
17 because we notified the parties that this could turn
18 into an evidentiary proceeding. And given that he was
19 the recipient of these emails, we requested that he
20 bring himself here as a witness in this case, but not in
21 any other capacity.

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DIRECT EXAMINATION

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BY MS. MARTINEZ:

Q. Mr. Banner, you were the prosecutor in this case?

A. Yes, ma'am.

Q. You recused yourself?

A. Yes, ma'am.

Q. Why did you do that?

A. I believe I have an ethical duty to do so under the Rules of Professional Responsibility. A lawyer, in particular a prosecutor, may not ethically serve as a witness and an advocate in a matter before the same tribunal.

Q. And why did you believe you would be a witness in this case?

A. Well, it was brought to my attention that this Board had requested my presence, together with the presence of the opposing counsel. I assumed from that that they were going to ask questions about the facts, the timeline and circumstances related to the motion to dismiss.

Q. I'd like to go through that timeline very quickly. I don't know if you have filed materials or anything. But if there's something I can show you that would refresh your recollection, I'll be happy to do so.

1 A. I can tell you that I did bring with me today
2 copies of some of the emails I have. My inbox emails,
3 after I left, were moved. I don't have access to those
4 at the Board, but I was able to collect some sent emails
5 that were part of strings of communications between me,
6 Mr. Jaffe and Ms. Krehbiel related to this case. So if
7 at some point I think those may be helpful to me in
8 answering your questions, I'd ask leave to refer to
9 them.

10 **Q. I believe you would agree that the NCA was due**
11 **to be filed in this case on January 6th of 2017?**

12 A. That was my understanding of the statute of
13 limitations, yes.

14 **Q. And why was that not filed on January 6th,**
15 **2017?**

16 A. Well, this case was -- I believe the Board
17 resolved in November of 2016 that -- I could be wrong --
18 either a stipulation be offered to resolve the matter
19 and -- or in the alternative, that if that offer was
20 rejected, the NCA would be issued.

21 So from early December -- I believe
22 December 6th was one of the first attempts at emails I
23 might have sent. On December 29th, we were in the
24 process of negotiation. On December 29th, I got an
25 email from Ms. Krehbiel's email address. It was signed

1 by Dr. Costello's counsel. I took that to mean plural.

2 At the time, I had been in contact with
3 Mr. Jaffe. He contacted me previously and wanted me to
4 share confidential Board investigatory materials with
5 him. I advised him in writing I didn't think that was
6 appropriate because he hadn't yet been admitted to
7 practice law in the state, so I didn't share any
8 information until later.

9 But I got the email on the 29th. And I
10 thought well, this is coming from two attorneys. Two
11 attorneys representing a licensed physician are telling
12 me that they voluntarily want to waive the statute of
13 limitations. I hadn't asked for that.

14 It appeared to me that it was voluntary, I
15 think it was knowledgeable, and the respondent was doing
16 it with the assistance of two attorneys. One of them
17 was licensed to practice law here. So I did not jump on
18 the drafting of the NCA to have it issued by the 6th of
19 January because I believed that they had waived the
20 defense of violation of the statute of limitations.

21 And between that date and the date of
22 issuance of the NCA on March 13th, I acted in reliance
23 on that understanding. I attempted to engage
24 Ms. Krehbiel and Mr. Jaffe -- first Ms. Krehbiel,
25 because Mr. Jaffe hadn't been admitted. So he wasn't

1 admitted until April 10th, I think, of 2017.

2 I called Ms. Krehbiel's office. I spoke
3 with her partner a few times, Chance Barnett I think is
4 his name, and was told she was unavailable. So I
5 periodically checked back, and I did make efforts to
6 engage in further negotiations to reach a settlement, as
7 is evidenced by some of the emails in your record which
8 I don't have a copy of.

9 Q. Were you approached specifically by counsel on
10 behalf of Dr. Costello to not file the NCA?

11 A. Absolutely. I received a voicemail message
12 on -- whenever. It's been referenced. There's an email
13 that I wrote responding to a voicemail message wherein
14 Ms. Krehbiel asked that I not draft and issue the NCA
15 because they wanted to consider the terms that were
16 being offered by the Board to settle the case.

17 Q. So the email was dated December 13th, to Lorri
18 from you, saying, "I received your voicemail message. I
19 started drafting the NCA, but I will put that on hold,
20 and I will instead email you a draft of a proposed
21 stipulation for you to review with your client. I'll
22 try to do that by the end of day today."

23 And in fact, on Tuesday, December 13th, you
24 sent an email to Lorri saying, "A proposed stipulation
25 is attached"?

1 A. Yes, ma'am.

2 Q. So were there conversations between you and
3 counsel in the interim after you sent that proposed
4 stipulation?

5 A. There were. Unfortunately, I did not work or
6 bill by the hour at that time. I was a State employee,
7 so I didn't keep very good records of the dates, the
8 times or durations of my telephone calls or other
9 contacts with Ms. Krehbiel or her co-counsel, Mr. Jaffe.

10 But the answer to that question is yes.
11 From that day forward, until the issuance of the NCA, I
12 did engage in communications by telephone and by email
13 with Ms. Krehbiel and Mr. Jaffe, and I did not resolve
14 this.

15 Q. And in those conversations, was there ever any
16 express concern about the waiver of the statute of
17 limitations?

18 A. There was on one occasion, in an email sent by
19 Ms. Krehbiel, I believe. And I don't have it because my
20 inbox emails I couldn't get ahold of. It might be in
21 the record here.

22 There was a suggestion that the waiver was
23 ineffective. And I called her up immediately. I said,
24 "Hey, that's not my understanding of what was agreed
25 to."

1 And she -- I don't want to put words in her
2 mouth because she's here to testify, and she may testify
3 contrary to what I'm about to say. But she said, "Yeah,
4 I'm" -- she alluded to the fact she was working with
5 co-counsel and that co-counsel had some input in that
6 final closing paragraph of her email.

7 I got the impression, the distinct
8 impression from Ms. Krehbiel's oral communications with
9 me, that she personally viewed the waiver as valid, but
10 that her co-counsel may not have. So that was why I was
11 in this particular email. And I don't have it, but it
12 could be in one of these emails somewhere.

13 **Q. So you left that conversation how?**

14 A. Well, I said that I would be very surprised --
15 I think I told her I'd be very surprised if at that
16 point, after we had not issued the NCA and had engaged
17 in further settlement negotiations, she or her
18 co-counsel would turn around and try to file a motion to
19 dismiss based on a violation of the statute of
20 limitations, and that did not occur. In fact, that did
21 not occur at any time while Ms. Krehbiel or Mr. Jaffe
22 knew I was employed by this Board.

23 It was only after I sent an email on June
24 10th, advising that I would be leaving, that they filed
25 a Motion To Dismiss based on the alleged violation of

1 the statute of limitation. As to Mr. Jaffe's
2 testimony -- I'll follow testimony here today -- that he
3 did not make mention of that email in his initial motion
4 because he assumed I would bring it up, I have
5 difficulty believing that.

6 I don't believe he knew I would be here,
7 and I'm very bothered by that. He thought that there
8 would be some other ignorant or unknowing State employee
9 assigned to this case who would never know that there
10 was an email in my inbox describing a waiver. And the
11 fact that there is no mention of that in their motion, I
12 personally take great offense to it. I think it's an
13 assault on this tribunal, and I have to choose my words
14 carefully because I don't enjoy particular immunity from
15 the lawsuit, but I'm very bothered by it.

16 **Q. Is there any information that I have not asked**
17 **you that they may not be aware of that you are aware of**
18 **that you would like to share with the Board in terms of**
19 **this --**

20 **A.** All I can say is that I understood -- it was my
21 impression, that the waiver was valid, as it was
22 voluntarily given. It wasn't asked for. It was being
23 given by two attorneys with apparent authority to act on
24 behalf of their client. At least one attorney was
25 authorized to act on behalf of this respondent under

1 New Mexico law.

2 And yeah, I thought that it was a valid
3 waiver. And that's how I operated until June 16th, when
4 I learned that they had filed a motion to dismiss.

5 MS. MARTINEZ: I don't have any further
6 questions.

7 MS. ANDERSON: Mr. Jaffe?

8 CROSS-EXAMINATION

9 BY MR. JAFFE:

10 Q. Mr. Banner, you're no longer employed by the
11 Board, correct?

12 A. That is my testimony.

13 Q. Do you work in Albuquerque?

14 A. I work in Santa Fe and other places in the
15 state, yes.

16 Q. Are you available -- have you indicated to
17 anyone on the Board that you would not be willing to
18 share information or help with the assisting of any
19 files as a former prosecutor?

20 A. I think at this point the communications I have
21 had with my former employer might be privileged.

22 Q. I'm not asking the nature of the
23 communications. But you haven't told -- you haven't
24 indicated that you would not cooperate with any kind of
25 ongoing Board matter with which you were involved?

1 A. Well, I'll just say I'm here today because I
2 was asked to be here. I was asked to cooperate.

3 Q. Okay.

4 A. I'm here because I feel I have a civic duty to
5 be here.

6 Q. Right. And you would have talked to the new
7 Board prosecutor if she asked you information to prepare
8 for this hearing? There would be no reason why you
9 wouldn't have talked to her? Can you think of any
10 reason you might not have talked to her in connection
11 with the preparation for this hearing on this motion?

12 A. I'm not going to speculate. I can tell you I
13 didn't speak with any new Board prosecutor about this or
14 any other case.

15 Q. All right. Now, how long were you a Board
16 prosecutor, sir?

17 A. I don't know, 18 months.

18 Q. Eighteen months?

19 A. Yes.

20 Q. And did you draft up -- we don't have to put it
21 in evidence. There are two proposals. You drafted
22 these two stipulations of settlement, right?

23 A. I think I actually drafted three. I could be
24 wrong.

25 Q. I'm aware of two, but that's not really the

1 point.

2 This language on page 2 -- let me just read
3 it to you. "In order for the Board to have adequate
4 time to consider this proposed settlement" --

5 MS. ANDERSON: Mr. Jaffe, I'm going to stop
6 you. You need to go slower when you're reading in
7 particular.

8 MR. JAFFE: Thank you. I apologize.

9 Q. (By Mr. Jaffe) Paragraph 5, page 2,
10 Stipulation. This is the original. "In order for the
11 Board to have adequate time to consider this proposed
12 stipulation, respondent waives the right to have this
13 matter heard and decided within the timeframe set by the
14 ULA," and that means the Uniform Licensing Act, "and
15 also waives the time and location for the Board to bring
16 an action against respondent is set forth in ULA, NMSA
17 1978, Sections 6-1-3.1 and/or in the MPA at NMSA 1978,
18 Section 6-6-24."

19 That's basically -- did you make that up,
20 or did you take that from some other form, that
21 language?

22 A. Well, I don't know. I can tell you that when I
23 got to work at the New Mexico Medical Board, the prior
24 prosecutor/prosecutors did things differently.

25 I believe I did at one point start using

1 language like that in proposed stipulations in an effort
2 to protect the Board's jurisdiction to take action
3 against licensees who, like your client, had a case that
4 was coming up against the statute of limitations.

5 I can tell you I think I also saw that
6 language in one other stipulation, either Wessler or one
7 of the other licensees who's got pending cases against
8 them now, but where they had criminal prosecutions in
9 parallel with administrative prosecutions.

10 I was of the opinion that it would conserve
11 administrative resources if we allowed the criminal
12 proceedings to move forward and then see what happened
13 and then take action against them in the administrative
14 realm. Now sometimes criminal cases take more than two
15 years, so I put that language in so we can preserve our
16 case and see what happened.

17 Furthermore, I didn't want to call a
18 licensee at an administrative hearing and ask them
19 questions where they might incriminate themselves while
20 they had this pending criminal case.

21 There was no reason in some situations, and
22 this one included, I thought, to force the
23 administrative prosecution if there was a way to resolve
24 it or otherwise conserve state resources.

25 Does that make sense? Am I rambling?

1 Q. I think I understand. I think the Board
2 understands what you're talking about.

3 Let me ask you this: Why didn't you
4 prepare a waiver, and why didn't you have terms to the
5 waiver? I mean why didn't you say how long you wanted
6 the waiver for? Let me withdraw that. Let me ask you
7 another question.

8 What did we waive? How long did we make
9 the waiver for? Was the waiver for five years, three
10 years, two years, one year or six months or three
11 months? If you had come back ten years from now, right,
12 and said, "Hey, here it is," I mean what timeframe was
13 in your mind, and how was that timeframe, in your mind,
14 communicated to us?

15 A. Well, I think that you read the language in
16 paragraph 5 that was in on each and every one of the
17 stipulations that I sent to you.

18 Q. Right.

19 A. And that waiver language does not contain any
20 end time for the wavier to expire, does it? It does
21 not.

22 Q. Right.

23 A. And under New Mexico law, as I understand it,
24 you either waive a right or you don't waive it. You
25 can't -- I'm going to waive my right to --

1 Q. Well, that's not quite true. It actually says,
2 "In order for the Board to have adequate time to
3 consider his proposed settlement." So the timeframe is
4 something having to do with the Board's consideration.

5 A. Sure.

6 Q. Now --

7 A. That's the consideration for the deal.

8 Q. Right.

9 A. That's the, "Here's what we give in exchange
10 for what you get."

11 Q. Let me ask something -- I'm going to put
12 Ms. Krehbiel on the stand afterwards. Just so the
13 record is clear, are you saying the email contained --
14 this March 14th email contained a notion that she
15 thought the waiver was valid? Was it the email or your
16 oral communication or both?

17 A. Is it the March 14th email I don't have.

18 Q. Yeah, whatever the March --

19 A. I'd love to look at it.

20 Q. Sure. You're saying this -- I'm trying to
21 ascertain whether -- just to clarify your testimony,
22 whether it was the email that created the impression in
23 your mind that she thought the waiver was valid, or was
24 it her oral communication?

25 A. That's March 14th. Did you say March 13th?

1 Q. 14, I said.

2 A. That's not the email. I mean I think there's
3 another email.

4 Q. Well, that's the one that we did -- I thought
5 that's the one we've been talking about.

6 THE WITNESS: May I look at my emails?
7 Would you object? Does the Board object? I thought
8 there was another email because when I read it, it was
9 like hey, that's not what we agreed to.

10 I picked up the phone, and I called
11 Ms. Krehbiel, who was, at that time, admitted to
12 practice law in this state.

13 Q. (By Mr. Jaffe) Let me ask you another question
14 as you look through the emails: How did you communicate
15 your agreement or acceptance of the deal, or however the
16 offer -- however you want to characterize it? I'm not
17 trying to pin you down as to how we characterize it.

18 How did you communicate, if at all, your
19 acceptance of this -- call it the March -- the December
20 29th communications?

21 A. I did not issue an NCA.

22 Q. Lack of action? In other words, lack of
23 action?

24 A. Well, that's what was suggested. And
25 thereafter, I made attempts to reach out to Ms. Krehbiel

1 to continue our negotiations. And Ms. Krehbiel and you
2 did engage in those negotiations. And it was my
3 understanding thereby that we were all on the same page.
4 We would waive the statute of limitations so we could
5 negotiate.

6 Q. So let me ask you something: Did you -- I
7 guess you were only there for 18 months. Have you ever
8 drafted a waiver, a written waiver of the statute of
9 limitations, apart from a stipulation of license and
10 order? You've never done that before, I guess?

11 A. I can't say that I remember doing it before,
12 but I did look at examples.

13 Q. Of prior waiver-of-rights stipulations?

14 A. Yeah. Polling agreements, for example. You
15 know, I thought the language, if it was sent to me in
16 the email, was a waiver slash --

17 Q. Tolling agreement?

18 A. Kind of, but it was a unilateral waiver. So a
19 tolling agreement would require the signature of all
20 parties.

21 Q. Right. That's exactly the point.

22 A. But a waiver does not. A waiver only requires
23 the person with the right -- the person holding the
24 right to do, to say, to act in a way that manifests an
25 intent to waive that right, and that's what I think

1 happened in this case.

2 Q. That's your opinion, or actually --

3 A. It is my opinion.

4 Q. Right. So to put it -- just for the Board, for
5 the record, that's how you acted in accordance with --

6 A. Yes, sir.

7 Q. I understand what you're saying. Again, I just
8 want to clarify whether you think there's an email that
9 led you to believe that Ms. Krehbiel thought that there
10 was a waiver, but -- or it was an oral communication?

11 A. As I said, there was an email sent. It was in
12 my inbox. I don't know. Maybe Ms. Krehbiel can recover
13 the email. It would have been from the time around
14 February 9th she sent it to me, wherein I think it was
15 signed by the two of you. There is a suggestion that
16 you're going to assert some sort of a defense?

17 Q. Right.

18 A. And I said, "Hey, I called the Board. And
19 everyone said, "Where does this come from?"

20 And I said, you know, "If you're going to
21 file a motion to dismiss or if you're going to file
22 something to say we can't file an NCA, you can be
23 assured that I will fight that."

24 Q. Okay. So it was an oral communication?

25 A. It was an oral communication.

1 Q. You've actually answered my question. Thank
2 you.

3 It wasn't an email?

4 A. No, sir.

5 MR. JAFFE: I want to make the record
6 clear. It wasn't an email. It was an oral
7 communication. That's what we need to know.

8 We're kind of spinning our wheels. I
9 appreciate this fact. I'm going to -- I think we've
10 done enough of this.

11 I appreciate your time and all that, so I
12 have no further questions of you. We appreciate your
13 coming here.

14 Thank you, Mr. Banner.

15 MS. ANDERSON: Ms. Martinez?

16 MS. MARTINEZ: I don't think I have
17 anything.

18 MS. ANDERSON: I guess I have one question,
19 and we'll see if anybody else has any questions.

20 We've heard a little bit here today about
21 the practice of the Board with respect to waivers and/or
22 tolling agreements. Have there been other instances
23 where there have been agreements to waive the limitation
24 period, as it's been described here today, documented by
25 email, not in this instance, but in other cases?

1 THE WITNESS: I can only speak for the time
2 I was there.

3 MS. ANDERSON: And that's what I intend to
4 ask, and thank you. In the time that you were there for
5 the 18 months in which you were serving in that
6 capacity.

7 THE WITNESS: I can say without any
8 hesitation there was no other instance where opposing
9 counsel wrote me up out of the blue an email that said,
10 "We're going to waive this right for any or no reason at
11 all." No attorney I have ever run into has ever done
12 that before.

13 There have been agreements, essentially, to
14 toll statutes of limitation that are executed by both
15 parties, and those were in the form of stipulations when
16 I was there. But no, never before had any party come to
17 me and said, "We're going to waive this right, and take
18 all the time you want."

19 MS. ANDERSON: Okay.

20 MR. JAFFE: Well, actually, then I have one
21 further question.

22 Q. (By Mr. Jaffe) The language is -- look, what
23 the language says is we would be willing to waive the
24 limitation period in a similar way set forth in a post
25 situation. I mean the language was we would be willing

1 to waive it.

2 The bottom line is: You took that as a
3 self-executing legal fact, right? That's really the
4 bottom line. Let's get to it.

5 A. Right. My understanding of what is required
6 for a waiver to be effective is it's knowledgeable, it's
7 voluntary, and it's intelligent. I was getting an email
8 from two knowledgeable and intelligent human beings who
9 are now members of this State's Bar, and it was
10 unrequested, unsolicited, and unequivocal that it was
11 voluntary.

12 I think that the rest of the paragraph that
13 you did read should give some context. It should inform
14 the Board as to why I might have thought that.

15 Q. We are agreeable. It says -- let me ask you:
16 Apart from this Navajo Indian case, because ultimately
17 the facts are the facts. And I think it's clear -- I
18 mean I don't think you're going to have much confusion
19 of the facts. You have to do some interpretation. The
20 issue ultimately for some entity is going to be the law.

21 MS. ANDERSON: Okay, but I'm not going to
22 have him answer questions --

23 MR. JAFFE: I understand that. But what I
24 want to ask him is -- he's testified about the law and
25 what his understanding of a waiver is, right?

1 MS. ANDERSON: Right.

2 Q. (By Mr. Jaffe) So my question is: Do you have
3 any case support beyond what you cited in your papers to
4 give light on the issue of an email constituting a
5 waiver? Is anything --

6 THE WITNESS: I'd love to answer that.

7 MS. ANDERSON: Okay.

8 A. I can tell you I did some research about this.
9 There is case law in other states. In New York, for
10 example, there's a case where attorney conduct and
11 attorney statements in emails -- and I don't have the
12 cite, I'm sorry -- was construed as a valid waiver. So
13 it's out there. I didn't cite it in my response because
14 I was trying to rely on New Mexico case law.

15 Q. Right.

16 A. You know, I think there's -- New Mexico is a
17 small state.

18 Q. Right.

19 A. It doesn't have a whole lot of case law like
20 New York or California, whose codes have been in
21 operation for 200-plus -- you know, longer than ours,
22 with more people, more disputes. The answer to your
23 question is yes, there is.

24 In my brief research out there, if you do a
25 Google Scholar search, you'll probably find it.

1 Q. Right. And there's case law going the other
2 way, too, and you can't rely on a lawyer?

3 A. Well, every state has a different opinion on
4 this, and --

5 Q. Well, I think that's right.

6 A. -- I think this is a case of first impressions.

7 Q. Right --

8 MS. ANDERSON: In this state.

9 MR. JAFFE: Thank you. I appreciate the
10 indulgence.

11 MS. MARTINEZ: I just want to clarify.
12 There are three representations in that December 29
13 email. It says, "We would be willing to waive," and
14 then it says, "Consider this offer to waive the
15 limitation period for any or no reason." And the last
16 sentence, "If for any reason you want a brief waiver of
17 the limitation period, we are agreeable."

18 And we contend it is that language upon
19 which Mr. Banner reasonably relied, and the parties
20 proceeded and discussed a settlement. Unfortunately,
21 they were not able to reach a settlement, and he
22 promptly issued the NCA.

23 MS. ANDERSON: Thank you, Mr. Banner.

24 THE WITNESS: Am I excused?

25 MS. ANDERSON: You are excused.

1 MR. JAFFE: Thank you for coming.

2 [Recess taken from 5:45 to 6:01 p.m.]

3 MS. ANDERSON: Are we ready to reconvene?

4 MR. JAFFE: Sure. Thank you.

5 MS. ANDERSON: If we're ready, then let's
6 go ahead and --

7 MR. JAFFE: Very, very briefly --

8 MS. ANDERSON: Yes?

9 MR. JAFFE: I'd like to call Ms. Krehbiel
10 to the stand for one question.

11 MS. ANDERSON: Okay.

12 LORRI KREHBIEL

13 after having been first duly sworn under oath,
14 was questioned and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. JAFFE:

17 Q. Two questions. You heard Mr. Banner's
18 testimony?

19 A. I did.

20 Q. Did you at any time in an oral communication
21 state or imply that you thought that the waiver was
22 effective to him?

23 MS. ANDERSON: I'm sorry, I didn't hear --

24 Q. (By Mr. Jaffe) That the waiver of the statute
25 of limitations -- that there was a waiver of the statute

1 of limitations contained in the email?

2 A. I did not. My recollection is that there was
3 an email sent that indicated that we would be raising
4 that as a defense. He called me about that, and my
5 response was, "I'm sorry, I don't like to do things like
6 this."

7 It was by way of an apology that he was
8 going to get drawn into this. But it was not in any way
9 saying we entered into an agreement to waive the statute
10 of limitations, and now we're changing our mind. I
11 never said anything like that. It was an apology to him
12 that we were going down this road.

13 CROSS-EXAMINATION

14 BY MS. MARTINEZ:

15 Q. Is the March 14 email that you had pulled out,
16 is that the email that we're referring to? There seemed
17 to have been a question that there was another email.
18 I'm a little confused.

19 A. I don't think it was, because I believe, as Mr.
20 Banner testified, there was an email saying something
21 along the lines of the defense regarding the statute of
22 limitations or something along that line. I think it
23 was different, but that's just my recollection.

24 I didn't bring my entire file, so I do not
25 have another email.

1 Q. So this email of March 14th says, "If you elect
2 not to do so or believe you do not have the authority to
3 re-present to the panel or present to the full Board" --
4 this was already after the statute had expired. This
5 was March 14th.

6 You go on to say, "then you are going to
7 have to move forward with the NCA, and we will present
8 our defenses in the administrative action."

9 Did you intend that to include that statute
10 of limitations?

11 A. Correct.

12 MS. ANDERSON: I have one question.

13 On the date that you sent the -- what I'm
14 going to refer to as the original email, December 29th?

15 THE WITNESS: Yes.

16 MS. ANDERSON: Was it your understanding at
17 that point that there was a tolling effect or a waiver
18 in place?

19 THE WITNESS: No. My understanding was
20 that we were offering that option to him. We were --
21 December 29th was right before December 31st, the
22 holiday, the season and everything. And we were
23 offering that option to him so that he would not feel
24 like he had to rush forward. It was an offer.

25 MS. ANDERSON: And it's your testimony that

1 he didn't accept that offer?

2 THE WITNESS: Right. I never received a
3 response or an email saying, "We are going to enter into
4 this agreement."

5 I think it's clear the email is talking
6 about what we would be willing to do, and that if he
7 wants a brief waiver, we would be agreeable to it. The
8 brief waiver was never defined. There was not anything
9 further that solidified this.

10 MS. ANDERSON: So if it was your view that
11 that January 6th date, for lack of documentation,
12 effectively ended the period of time in which the Board
13 could prepare and issue an NCA, what were the
14 circumstances under which you and Mr. Banner, and maybe
15 Mr. Jaffe as well, were communicating about settlement
16 agreements and stipulations and such?

17 THE WITNESS: Well, to be honest, I thought
18 that the statute of limitations argument, while legally
19 sound, might not appeal to the Board. And if we could
20 in fact reach an agreement, a stipulation that would
21 avoid this hearing and all the other issues, that that
22 would be worthwhile to the client, and I wanted to see
23 if we could get that accomplished.

24 MS. ANDERSON: Prior to this email that
25 nobody seems to have, or at least that we don't have in

1 front of us here today, had you ever communicated to Mr.
2 Banner that you did not believe that there was an
3 effective waiver in place?

4 THE WITNESS: I don't believe so.

5 MS. ANDERSON: Anybody else have any
6 questions?

7 DR. BEAUDETTE: I would, if I can ask just
8 a layman's simple question: It's your contention that
9 our NCA is invalid because it was done after the statute
10 of limitations ended. Is that the essence of your
11 argument, however that happened?

12 MS. ANDERSON: Are we asking the witness,
13 or are we asking the lawyer?

14 DR. BEAUDETTE: The witness. I'm sorry.
15 Excuse me.

16 MS. ANDERSON: So let me ask this -- let me
17 put a pause on that.

18 Does anybody have any questions for this
19 witness?

20 No redirect?

21 MR. JAFFE: Yes.

22 Q. (By Mr. Jaffe) What was your expectation?
23 What did you think was going to happen after this
24 letter, December 29th email, was sent? What were your
25 expectations? What did you expect to get back, if

1 **anything, or hear, if anything, from Mr. Banner?**

2 A. I thought that we would get a response that
3 would say I'll re-present this to the Board. That will
4 take X number of days or weeks, based on when the Board
5 next met. And that then we would enter into the waiver,
6 specifying how long the waiver was, and that he was
7 agreeing to present it to the Board -- to re-present it
8 to the Board.

9 Q. And then when you say enter into the waiver,
10 what do you mean by that? What was in your mind, you
11 know, at least as someone who wrote the letter? What
12 form would that -- I'll put in air quotes -- "waiver"
13 take place? Would that be telepathically, or how would
14 the waiver -- how do you do a waiver?

15 A. To me, it would be a pleading, much like the
16 motions and whatnot that were filed.

17 Q. Have you ever done waivers of things like that,
18 limitations?

19 A. In pleadings?

20 Q. In pleadings that you submit to the court?

21 A. To the court or to a board, yes.

22 Q. Have you ever relied on an oral waiver of a
23 statute of limitations in any case?

24 A. No.

25 Q. You've never done --

1 MS. ANDERSON: Are you asking her
2 personally?

3 THE WITNESS: I assume so.

4 MR. JAFFE: All right.

5 MS. ANDERSON: I'm making sure.

6 Q. (By Mr. Jaffe) It's not something you've done,
7 right?

8 A. No, I have not.

9 MR. JAFFE: Okay. Thank you.

10 MS. ANDERSON: Does anybody have any
11 questions for this witness?

12 MR. BOURBON: And being a nonlegal person,
13 I'll try to do my best at it. The email dated December
14 13th to you specifically, Ms. Krehbiel, from Thomas
15 Banner, "A proposed stipulation is attached. Let me
16 know if your client has any questions or concerns that I
17 might address," you're familiar with that?

18 THE WITNESS: I'm finding it. Exhibit 2,
19 yes, I see that.

20 MR. JAFFE: It's the cover and email for
21 the submission with the stipulation.

22 MR. BOURBON: Setting apart the whole
23 waiver issue for just about two seconds of this nonlegal
24 lawyer issue --

25 Q. (By Mr. Jaffe) December 13th, later that -- or

1 actually, I'd say maybe earlier that morning, "I
2 received your voicemail. I started drafting the NCA,
3 but I'll put that on hold and will instead email you a
4 draft of a proposed stipulation for you to review for
5 your client. I'll try to do that by the end of the day
6 today."

7 A. Yes.

8 MR. BOURBON: I'm assuming that that is a
9 professional legal association you're having with your
10 client. Would you answer yes to that?

11 THE WITNESS: I don't understand the
12 question. I'm sorry.

13 MR. JAFFE: An association, maybe?

14 MR. BOURBON: I would say -- let me put it
15 more blatantly. You're charging for that negotiation
16 that's going on with your client at that point, correct?
17 She's a client of yours, and she's entered into a
18 negotiation with you to help her solve this case?

19 THE WITNESS: Yes, I was hired to help her
20 resolve the case.

21 MR. BOURBON: So in those email exchanges,
22 you are acting on her behalf to try to settle the
23 allegations against her?

24 THE WITNESS: Correct.

25 MR. BOURBON: So in your mind, do you see

1 that as the start of negotiations with the New Mexico
2 Medical Board to settle her allegations?

3 THE WITNESS: I think we were working on it
4 before this.

5 MR. BOURBON: So even before that?

6 THE WITNESS: Yes, and these were
7 continuing negotiations and drafts.

8 MR. BOURBON: Thank you.

9 MS. ANDERSON: Does anybody else have any
10 questions for this witness?

11 All right. Thank you. You are excused.
12 Anybody else?

13 MR. JAFFE: No, no more witnesses.

14 MS. ANDERSON: Ms. Martinez --

15 MS. MARTINEZ: None.

16 MS. ANDERSON: -- anybody else you would
17 like to call?

18 Now Mr. Beaudette, you're up. His
19 questions directed to Mr. Jaffe.

20 DR. BEAUDETTE: Yes, Mr. Jaffe. Again,
21 Peter Beaudette. I'm a Board member, former resident of
22 Sacramento, as a matter of fact. But at any rate --

23 MR. JAFFE: 105 last week, so don't
24 complain about the heat.

25 DR. BEAUDETTE: Don't complain about the --

1 okay.

2 So again, it's my understanding that it's
3 your contention that the NCA is invalid because we did
4 not execute that by the time under the statute of
5 limitations?

6 MR. JAFFE: Yes, that is the law -- that's
7 the law in New Mexico. There is a statute of
8 limitation.

9 DR. BEAUDETTE: By the way, a lot of
10 states -- most states don't have a statute of
11 limitations. California is six years. You know,
12 New York -- I'm from New York, New York. They don't
13 have statutes. So for whatever reason, you guys decided
14 to have a statute. And you guys, in my opinion, have
15 the shortest statute in the country.

16 THE CHAIR: New Mexico exceptionalism.

17 MR. JAFFE: That's right. And like I say,
18 you know, the small state that it is, you guys have
19 litigated to the Supreme Court the issue of: Is it
20 really a statute? So I don't think there's really any
21 issue. Really, the issue is waiver of estoppel.

22 MS. ANDERSON: Anybody else? Yes?

23 DR. KOMADINA: I will include to ask this
24 question, too. It's a legal question. In my life, a
25 waiver would constitute some kind of an agreement

1 between two parties. And I may wish I had a Ferrari
2 that Dr. Styka would give me, but unless he agrees to
3 give it to me, I could wish all day long and it doesn't
4 exist. So I would think in a waiver, that a waiver
5 doesn't exist unless it's accepted by both parties.

6 And I find no evidence in what you've
7 presented to us that there's any acceptance before the
8 statute of limitations runs out of that waiver offer.

9 Am I missing it someplace? Can somebody
10 show me where that is?

11 MS. MARTINEZ: I believe the testimony by
12 Mr. Banner was it was accepted based on the fact that
13 the parties undertook settlement negotiations. So
14 Mr. Banner was ready to present and file the NCA because
15 he knew that the deadline was fast approaching.

16 He was told -- and I'm paraphrasing. He
17 was told, "Don't file this. We're going to try to reach
18 a settlement agreement." And in fact, the language from
19 counsel actually says, "We didn't do this on purpose.
20 You know, take your time," and so they ensued having
21 settlement negotiations.

22 In your example, if he doesn't say anything
23 but he hands you the keys and you drive away, you've
24 accepted that. And in this case, what happened here was
25 the parties had a consideration, and they continued to

1 have multiple conversations, and they were attempting to
2 resolve it. And he testified that he related upon that
3 representation that is in that December 23rd email.

4 MR. JAFFE: Well, if I may get to respond?

5 MS. ANDERSON: 29?

6 MS. MARTINEZ: 29, thank you.

7 MR. JAFFE: First of all, the only thing
8 that happened is nothing happened, right? That's the
9 only thing that happened.

10 What should have happened -- look, this is
11 why it's uncomfortable. He did everything but the one
12 thing he had to do under New Mexico law, do an
13 agreement. And I'll tell you, you know, we would have
14 negotiated it. We would have done it. He didn't do the
15 one thing.

16 So let's say, you know, the real analogy is
17 you want his Ferrari. You know, he doesn't give you the
18 keys, nothing happens for two months, and he says,
19 "Where's my Ferrari?"

20 He says, "Well, I accepted it."

21 "What did you do?"

22 "I did something."

23 So the bottom line is, you know, ultimately
24 you guys don't have a general counsel, I gather. I mean
25 you're a healthcare lawyer, but ultimately --

1 MS. ANDERSON: I'm a Board member.

2 MR. JAFFE: But you're a lawyer?

3 MS. ANDERSON: Yes.

4 MR. JAFFE: But ultimately, a general
5 counsel would say look at the law. The law is that a
6 waiver requires certain things. I mean this good-faith
7 reliance, it's not in his papers. It doesn't exist. I
8 mean they're just making this stuff up. You know, a
9 waiver is a known -- right?

10 You know, your practice is -- it seems to
11 me that the practice that he created is you put it in
12 writing. I've never heard of this kind of thing where
13 you waive a right, you know, based on informal/formal
14 email. I'm willing to do this, I'm doing it. Do the
15 job. The job of the Board prosecutor is to effectuate
16 your wishes.

17 MR. BOURBON: Mr. Jaffe, as a Board member,
18 I would just say that we don't have Mr. Banner here any
19 longer to counteract some of the accusations that you're
20 kind of implying about his status as our former Board
21 prosecutor. I would just ask that we stay away from
22 that aspect of discrediting our prosecutor. I would
23 appreciate that because I think he's done good work for
24 us.

25 MR. JAFFE: I think he's done good work for

1 you. I'm not suggesting that. But unfortunately, this
2 is the issue. My supposition is he didn't do the one
3 thing he had to do, right? And the fact that we would
4 have agreed to it under New Mexico law, it doesn't
5 matter. And all the other stuff is irrelevant under the
6 case law, and that's what I believe a court is going to
7 find.

8 Yes, sir?

9 DR. SPENCE: This may be a poor analogy,
10 but I'm not a lawyer --

11 MR. JAFFE: I know. None of you guys are
12 saying you're a lawyer. And that's what scares me,
13 because you're all asking shrewder questions than any
14 that I've thought of. All you guys are not just
15 hayseeds. I mean you're asking the right questions.

16 DR. SPENCE: You have a suspect in custody
17 in the Police Department, and the Police Department asks
18 whether he waives his Miranda rights. And he makes a
19 statement, "I agree to waive my Miranda rights." Is
20 that something that is signed, or is it a video
21 recording? Because there's a statement by the person,
22 "I agree to a waiver."

23 MR. JAFFE: That's an excellent question.

24 DR. SPENCE: I don't know whether it's ever
25 inviting or --

1 MR. JAFFE: I think you sign over it in a
2 waiver. I mean because otherwise, you get in all this
3 stuff. They don't do that. You sign a written waiver.

4 This concept of this oral waiver doesn't
5 really exist in New Mexico law.

6 DR. SPENCE: So all Miranda waivers are
7 written?

8 MR. JAFFE: Yeah. I mean you signed a
9 writing. I mean I -- like the criminal practice that I
10 do.

11 MS. ANDERSON: We'll play along for a
12 minute. Miranda warnings are given; suspects starts
13 talking. Is there a waiver?

14 There's a waiver. I mean the right answer
15 to that is there's a waiver.

16 MR. JAFFE: Right. But the practice is you
17 get him to sign in writing because then it obviates --

18 DR. SPENCE: In a perfect world --

19 MR. JAFFE: Right.

20 DR. SPENCE: -- but we're not in a perfect
21 world.

22 MR. JAFFE: Well, no, but the practice is
23 you get it in writing. You have to get it in writing
24 because then the guy says you never did it because then
25 there's a custody issue.

1 MS. ANDERSON: But you're not disputing
2 that there are some writings in the -- I mean we've been
3 talking email. You're talking about a different kind of
4 writing. You're talking about a writing that's actually
5 signed by Dr. Costello?

6 MR. JAFFE: Well, I'm talking about a
7 formal writing. The point is -- look, Miranda is a
8 requirement by the Supreme Court based on criminal
9 process, right? This is really more akin to a civil
10 waiver.

11 CHAIR JENKUSKY: Can I use another analogy
12 that might be imprecise? In medicine there's a concept
13 of informed consent. And the amount of consent you have
14 to obtain from a patient, I think, is balanced by the
15 risks of the procedure.

16 So if you're giving a relatively benign
17 drug and, you know, you just say this drug is for this,
18 if you're going to -- I'm a psychiatrist. If you're
19 going to do shock treatments, you're going to get
20 written permission to do that treatment with all the
21 risks, and in some cases a court order, because you're
22 giving -- the risk is so much greater.

23 Did you address sort of that risk/benefit
24 that --

25 MR. JAFFE: Oh, absolutely.

1 CHAIR JENKUSKY: -- you are giving up a
2 right --

3 MR. JAFFE: Oh, absolutely.

4 CHAIR JENKUSKY: -- and so --

5 MS. ANDERSON: Hang on --

6 THE COUR REPORTER: One person at a time,
7 please.

8 MS. ANDERSON: Yeah, only one person at a
9 time.

10 CHAIR JENKUSKY: So should it require
11 something in writing and not something that's kind of
12 read between the lines of --

13 MR. JAFFE: You know, I'm sorry I didn't
14 think of that question. Once again, you guys are better
15 than the lawyers. That's exactly the point.

16 There's no higher requirement than a waiver
17 of a substantive right. That's why it's one thing to
18 waive a deadline to file discovery. You know, you have
19 20 days, instead of 30. This is a statute of
20 limitations. There's nothing in New Mexico civil
21 administrative law higher than this limitation. As a
22 matter of fact, the limitations provision is not only in
23 the Uniform Licensing Act, it's in your Medical Practice
24 Act. This is the most sacrosanct right that doctors
25 have in the State of New Mexico, period.

1 Let me address one other thing. What's the
2 first thing you guy learn in medical school about
3 recordkeeping? You all know this phrase: If it ain't
4 in writing, it didn't happen. Right? That's the way
5 you guys operate.

6 How many doctors have you prosecuted for
7 having medical records that don't have complete
8 information? You guys insist on it. I've done many
9 cases where the medical records are just inadequate,
10 where a guy doesn't put down that he did a physical.
11 And I'm in California on a case like that. So the
12 writing is critical.

13 There is -- I ask anyone to come up with a
14 higher right in the State of New Mexico of protection
15 than the limitations of action. There's complete case
16 law. Even some of the other limitations, that's it.

17 And that's why I think ultimately, you
18 know, the notion that you can create some kind of
19 formal/informal waiver where your own practice -- or at
20 least this guy's -- your own practice is to have it in
21 writing by the respondent and also notarized. If not
22 even -- you require a notary.

23 If we submit something with our signature,
24 you're not going to accept it. You're not even going to
25 present it to the Board because it's not notarized, so

1 look where we're going here. You have the highest
2 right, and an oral email which was overly chatty, and
3 you did it for a lot of reasons, and that you're going
4 to keep a case in violation of the statute of
5 limitations?

6 I can tell you what the Vargas Court or the
7 Valdez Court would say about that. They're not going to
8 go for it. There has to be some case law, in my
9 opinion.

10 You know, you're a lawyer. I mean you
11 obviously have a different opinion.

12 MS. ANDERSON: Well, no. I don't think you
13 know what my opinion is. But I'm just saying it would
14 be a mistake to guarantee what any particular court is
15 going to say --

16 MR. JAFFE: Absolutely. This is my -- I'm
17 an out-of-stater. I'm a -- you know, I'm not even from
18 here, you know, but I've read the cases. I mean the
19 only thing a lawyer can do is look at cases.

20 I know what I would do in this
21 circumstance, and I know what this woman expected, and I
22 know what I expected I know the client was bugging me,
23 "Where's the waiver?" Every day, "Where's the waiver?
24 I want to see it," and we've got no answer for her. So
25 what do you do?

1 MR. BOURBON: I would make a motion to go
2 into executive session.

3 MS. ANDERSON: We are going to.

4 Does anybody have any other --

5 MR. JAFFE: No, we have no more comments.

6 MS. MARTINEZ: I guess I have one more
7 comment. If you all were expecting the waiver, was
8 there any point in time that you all asked Mr. Banner
9 for the written waiver?

10 MR. JAFFE: The truth is, I thought he
11 dropped the case. I thought we convinced him that
12 you're not even prosecuting under the right AMA rule. I
13 thought the case was over. I thought he just decided to
14 drop it.

15 You know, I was kind of surprised. I said
16 look, I told -- 50/50 whether you're even going to
17 continue. Really, I was shocked when he did this thing.
18 The unfortunate part of all this is Ms. Anderson is
19 completely right. We had to address the jurisdictional
20 issue.

21 I'm really here to talk about supplements,
22 because this is of great interest to the people of
23 New Mexico. You have the multilevel marketers, you have
24 the integrative medical practitioners. I really want to
25 talk about that. I didn't want to waste two hours on

1 this. You know, I think it's of great public interest,
2 but Ms. Anderson is right.

3 Anyway, I apologize for taking so much
4 time, but I would have preferred this, you know,
5 otherwise. But thank you very much. I have nothing
6 further.

7 MR. BOURBON: And in conclusion, I just
8 have to say, as a Board member for six years, we would
9 never just drop a case. That's sloppy Medical Board
10 work. So that would not be a relevant thought pattern
11 to come from such professional folks. Case closed.
12 Thanks.

13 MR. JAFFE: Thank you.

14 MS. ANDERSON: All right. So we've got a
15 motion to go into closed session. Do we have a second?

16 DR. STYKA: Second.

17 CHAIR JENKUSKY: Yes.

18 MR. BOURBON: Yes.

19 DR. BEAUDETTE: Yes.

20 MR. JAFFE: Can I --

21 MS. ANDERSON: Let's finish the vote.

22 DR. KOMADINA: Yes.

23 DR. STYKA: Yes.

24 DR. CARSON: Yes.

25 DR. SPENCE: What's this --

1 MS. ANDERSON: To go into closed session.

2 DR. SPENCE: Yes.

3 MS. ANDERSON: Yes. Okay.

4 MR. JAFFE: May I just inquire? It's
5 already 6:30. Is there any chance we can hear this
6 other motion, if need be, or do we ask for a reset for
7 that in case we have to do it?

8 MS. ANDERSON: We're going to go into
9 closed session, and then I will let you know. I think
10 it is probably unlikely that we're going to hear that
11 motion today.

12 MR. JAFFE: That's what I think because of
13 the lateness of the hour. We would like -- I
14 desperately want to talk to you people in this way
15 face-to-face about supplements. You know, I've
16 represented alternative practices for 30 years. You
17 have the good fortune to have one of the luminaries in
18 the country in alternative health and integrative
19 practice, and I just feel that there's a different
20 approach you can take.

21 Thank you.

22 MS. ANDERSON: Thank you.

23 [Recess taken for closed session from 6:23
24 to 6:50 p.m.]

25 CHAIR JENKUSKY: We are going to take a

1 vote on two motions. So the first, Dr. Spence?

2 DR. SPENCE: Regarding Case Number 2017-013
3 before us, we are going to deny the request to dismiss
4 the Notice of Contemplated Action.

5 CHAIR JENKUSKY: Second?

6 MS. ANDERSON: Second.

7 CHAIR JENKUSKY: Recused.

8 MR. BOURBON: Yes.

9 DR. BEAUDETTE: Recused.

10 DR. STYKA: Yes.

11 DR. KOMADINA: No.

12 DR. CARSON: Yes.

13 DR. SPENCE: Yes.

14 MS. ANDERSON: Yes.

15 CHAIR JENKUSKY: So the first motion is
16 denied. We have a second motion, however.

17 DR. STYKA: The second motion is I would
18 like to dismiss Case Number 2017-013 with no further
19 action taken up by the Board.

20 CHAIR JENKUSKY: Do I have a second?

21 MR. BOURBON: Second.

22 CHAIR JENKUSKY: Recused.

23 MR. BOURBON: Yes.

24 DR. BEAUDETTE: Recused.

25 DR. STYKA: Yes.

1 DR. KOMADINA: Yes.

2 DR. CARSON: Yes.

3 DR. SPENCE: No.

4 MS. ANDERSON: Yes.

5 MR. JAFFE: That's our case?

6 CHAIR JENKUSKY: That's your case.

7 MR. JAFFE: The second one, too?

8 MS. ANDERSON: Yes. You're dismissed.

9 MR. JAFFE: Thank you.

10 MS. ANDERSON: Thank you for your time.

11 MR. JAFFE: Thank you.

12 [The hearing was concluded at 6:53 p.m.]

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1 STATE OF NEW MEXICO.
2 COUNTY OF BERNALILLO
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9 REPORTER'S CERTIFICATE

10 I, DEBRA ANN FRIETZE, New Mexico Certified Court
11 Reporter No. 251, do hereby certify that I reported the
12 foregoing proceeding in stenographic shorthand and that
13 the foregoing pages are a true and correct transcript of
14 those proceedings and was reduced to printed form under
15 my direct supervision.

16 I FURTHER CERTIFY that I am neither employed by nor
17 related to any of the parties or attorneys in this case
18 and that I have no interest in the final disposition of
19 this case.
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