cooper rough transcript.txt

D I S C L A I M E R

THIS TRANSCRIPT IS A ROUGH DRAFT TRANSCRIPT. IT IS SUBJECT TO THE PROVISIONS OF CCP SECTION 2025 (R)(2) IT HAS BEEN TRANSLATED FROM STENO INTO ENGLISH BY COMPUTER. THIS TRANSCRIPT HAS NEITHER BEEN EDITED NOR PROOFREAD BY THE Court REPORTER.

THIS UNEDITED DRAFT MAY CONTAIN UNTRANSLATED STENOGRAPHIC SYMBOLS, AN OCCASIONAL REPORTER'S NOTE, A MISSPELLED PROPER NAME, OR OTHER NONSENSICAL WORD COMBINATIONS.

THE VIDEOGRAPHER: Here begins volume number I Videotape No. 1 of the deposition of Richard Cooper in the matter of Health Grades versus MDX Medical in the U.S. District Court district of Colorado case number is 11-cv-00520-PAB-BNB. Today's date is October 9th, 2012, the time on the video monitor is 10:00 am. Video operator's name is Kenneth McNeal, contracted by Merrill Legal Solutions at 20705 Ventura Boulevard, Suite 205, in Woodland Hills, California. This deposition is taking place at the

♀

Hampton Inn at 3700 West Florida Avenue in Hemet, California. And was noticed by Jesus VAZQUEZ of

Rothgerber Johnson. Counsel, please identify yourselves and state whom you represent.

MR. VAZQUEZ: Jesus VAZQUEZ, from Rothgerber Johnson & Lyons, representing the plaintiff Health Grades.

To my left is Kirsten Stoll-DeBell with the firm Merchant & Gould, also representing the Plaintiff Health Grades.

MR. STIMPSON: Scott Stimson, Sills Cummis & Gross representing the witness and MDX.

THE WITNESS: Richard Cooper. I am the witness.

MR. STIMPSON: We got that.

THE VIDEOGRAPHER: The court reporter is today is Karen Pearson-Bell of Merrill.

Would the court reporter please swear in the witness.

EXAMINATION

BY MR. VAZQUEZ:

Q. Good morning, Dr. Cooper. As you know, my name is Jesus VAZQUEZ. And I am taking your deposition today.

♀

I would like to mark the first exhibit, please, Cooper 1.

(Deposition Exhibit 1 was marked for identification by the Reporter and is annexed hereto.)

(Discussion off the record.)

BY MR. VAZQUEZ:

Q. Well, it would have to come from the doctor, though, wouldn't it?

A. No. I think there is cases that it came from the physician assistant or the he one of the doctor's staff, or it might have come from the hospital itself. Who knows. It's not -- it's not been determined.

Q. Well, you mean the hospital where the physician works?

A. Possibly that. Possibly the physician's wife did it at home overnight. I mean there is no -- there is no clarification as too who is restricted to access and who is not. Could have been from anywhere.

Q. So the possibilities that you just reference were -- could be from the doctor, could be from the doctor's assistant or the doctor's wife or a hospital where the doctor works or -- did I miss any --

A. It's unknown -- no, I think that covers pretty much the gamut of what I said.

Q. Okay. Dr. Cooper, does the MDX server

♀

sends the physician's computer a web form that displays what information MDX has collected regarding that physician?

A. Again I haven't seen the source code so I wouldn't know whether it's a form or some other implementation, Java. It's entirely up to the implement terse and that hasn't been established in the case.

Q. Well, in an effort to try to simplify the questions, Dr. Cooper, do you agree that information is passed from a doctor or his or her agent to the MDX server in order to edit the information on the fields with we with discussing?

MR. STIMPSON: Objection to the form of the question.

THE WITNESS: By "agent" do you include the doctor's wife or husband and the hospital and --

BY MR. VAZQUEZ:

Q. Yes.

A. -- a third party and -- That's a reasonable supposition but I don't think that's been demonstrated.

Q. Okay. I think I asked? But I am going to ask it in a ditch norm. Do you know Dr. Cooper whether the MDX server use as computer web form?

That contains information the physician --

A. No, I don't.

Q. You don't know?

A. No.

Q. Okay. Dr. Cooper, assume that a physician decides to change her gender from male to female?

A. That is assumption you are making?

Q. Yes, sir that's what I said. Can you assume that for me?

A. If I want me to, sure.

Q. Okay. All right. What would be the message that is would be sent back to the server

for the gender field?

A. That could be any of the things that I have mentioned in previous responses. It could be a form, it could be Java Script, it could be TCP/IP, there is no -- there is no knowledge at this point. There has been no demonstration of precisely how those things are done or --

Q. I am asking you to assume that a physician simply wants to change their gender?

A. Yes.

Q. She Wants to change her gender from female to male.

A. Okay.

♀

Q. So take would be the information that the physician would exchange with the MDX server?

A. I don't know.

Q. How would the server know to change only the gender and no other field?

A. I don't know.

Q. Okay. Do you agree that in this case, the physician has verified her gender?

A. In --

MR. STIMPSON: Objection to the form of the question.

BY MR. VAZQUEZ:

Q. In the assumption physician wants to change her gender from female to male.

A. Sorry saying it's the physician who makes the change somehow that change gets made, and the gender is changed. And I think your question had

to do with whether that was verified.

Q. Yes, sir.

A. It would only be verified by the physician not by a third party. In the supposition that you are making. But whether that's in actual fact or not is completely unknown to me and hasn't been demonstrated.

Q. Okay so my question is I think just to be

♀

sure we are on the same page I think you answered it but please indulge me?

A. Yes.

Q. In this case the physician has verified her gender.

MR. STIMPSON: Objection. I got to have that question back.

MR. VAZQUEZ: Can you please.

THE WITNESS:

MR. STIMPSON: I'm not sure what the hypothetical is.

THE WITNESS: I am lack of foundation always also.

BY MR. VAZQUEZ:

Q. Will you? Let's start from the beginning we have a female physician, she wants to change her gender to male. Are you guys with me?

MR. STIMPSON: A female wants to change -- say she is a man and not a woman?

BY MR. VAZQUEZ:

Q. Right she is going to change her gender.

MR. STIMPSON: Okay.

THE WITNESS: But it hasn't been verified?

BY MR. VAZQUEZ:

Q. You said were you a little lost. I am

♀

trying to just set it up.

MR. STIMPSON: Why would a female want to --

MR. VAZQUEZ: That doesn't matter, Mr. Stimpson.

MR. STIMPSON: I'm just asking.

MR. VAZQUEZ: Let me just try and simplify it.

BY MR. VAZQUEZ:

Q. Wave female. She is a female. She is -- she notes that her gender as ask shown as a male?

A. Okay.

Q. She wants to change it to female?

A. Okay.

Q. She wants to correct the gender to appropriately show it, as she is a female and not a male?

A. Okay.

Q. That's the assumption.

A. Okay.

Q. She communicates the information in this case, in that case I just referenced. And has a physician verified her gender?

A. This is a supposition we are making not -- okay.

♀

Q. Yeah?

A. I wouldn't use the word "verified" on that no.

Q. Okay. I am not asking --

MR. STIMPSON: Let him answer, please, Mr. Vazquez. He's not done.

MR. VAZQUEZ: Well, don't coach him, Mr. Stimpson.

MR. STIMPSON: I'm not coaching him. I'm just saying don't cut him off just because you hear something you don't like.

MR. VAZQUEZ: Go ahead.

MR. STIMPSON: So let's hear hear the answer back. I want to know where he was.

THE WITNESS: Well, I don't think --

MR. STIMPSON: Hold on a second.

THE WITNESS: Oh.

MR. STIMPSON: I want to know where you stopped.

(The preceding answer was read.)

MR. STIMPSON: Are you finished your answer?

THE WITNESS: I think that's pretty close. I wouldn't use the word "verified," correct.

MR. STIMPSON: Okay.

♀

BY MR. VAZQUEZ:

Q. Why not?

A. Because verified implies finding the

ground truth of the statement and that could have been put in by anybody. Now if you are really assuming it is a -- the May -- is it a male changing to female? Because we have changed the story a couple times I am not really sure -- could you start with a new question please?

Q. Let's start again?

A. Okay.

Q. This is the same question. I don't think it's really that comply indicated?

A. Okay.

Q. We have a female?

A. Yes.

Q. She wants to change the gender field on the Vitals database?

A. Yes.

Q. To note that it is -- a she is a female because it says male?

A. Okay.

Q. She communicates that change to that field.

A. Yes.

♀

Q. In this -- in that case, has she verified her gender?

MR. STIMPSON: Objection this question hats been asked and answered now.

THE WITNESS: I wouldn't use the word verified. I don't think that's a proper use of the term. She had edited. But "verified" implies that there is an observer not participating in the

process who gives true or false to a particular answer. So I don't think the person providing the information can also be called the person who verified the information. That's a matter of the English word verified and what it means. She edited it I will agree. But she didn't verify in the sense I would use that word.

BY MR. VAZQUEZ:

Q. What else would she need to do to verify the information then?

A. She wouldn't be able to verify it. It would take a third party another let's say a record from a medical school, something other than the physician to do -- to use the word "verify." She did, according to your supposition, edit but she did not, according to my understanding of the word verify, verify.

♀

Q. So your testimony, then, Dr. Cooper, is that a male physician cannot verify his own gender? Is that correct?

A. I would say it's broader than that. A physician cannot verify his own information.

Q. I am talking about gender.

A. Whether it's gender or licensure or any of those things. He can edit them yes but he didn't verify them. By nature of the word verify.

Q. So it is your testimony that a male physician cannot verify his own gender?

A. Correct.

Q. Okay. Do you agree that in this case, the physician has at least confirmed the accuracy of her gender?

MR. STIMPSON: Objection to the form.

THE WITNESS: I think it's the same question in a sense. The physician can change anything that's -- that's -- the site allows the physician to change. But that does not imply verification.

BY MR. VAZQUEZ:

Q. Okay. Could you take a look at Exhibit 3 which is the Markman order?

A. Exhibit 3. Okay.

♀

Q. And Page 15 of the Markman order please.

A. Okay.

Q. Do you see -- well if you turn -- did I say Page 14, sir?

A. You said 15. I'm sorry.

Q. I'm sorry. Good if you could go to Page 14, it's right at the bottom of 14, the sentence that begins sentence: "The Court agrees"?

THE WITNESS: "The Court agrees with plaintiff that there is no need to construe the word verified and to the extent it were to be construed the plane and ordinary meaning could apply. (When the claim language involves little more than the application of the widely accepted meaning of commonly understood words, construction is relatively straightforward and the ordinary meaning may be readily apparent even to lay judges.

BY MR. VAZQUEZ:

Q. Okay. And then there was a footnote there, Footnote No. 8.

A. Yes.

Q. And could you -- Do you see the footnote at the bottom sir?

A. I do yes.

Q. And do you see about halfway through it

there is a parenthetical that ends with "Phillips." And then there is a sentence that begins with the word: "Here"?

A. Yes.

Q. Would you please that into the record?

A. The sentence starting with "Here"?

Q. Yes, sir.

A. "Here the specification makes claim clear that the act of verifying, and that's in quotes, requires only that the Web site receive confirmation of the information from some other source in this instance the healthcare provider.

Q. And can you keep going please?

A. Continue? Indeed, the confirmation described appears to not extend beyond receipt of such information from the first healthcare provider. Shall I continue?

Q. No, sir. So having now seen what the Markman order states with respect to verifying --

A. Yes.

Q. -- verified, once the physician sends the

information could not first paging or saying that she is in fact a female, and would like that information changed or corrected --

A. Yes.

Q. -- is that verified?

MR. STIMPSON: Objection to the form. Asked and answered.

THE WITNESS: I disagree with the Markman construction of verified or lack of construction. Because it has very specific meaning in computer science. It's not just to edit, it's to confirm. To relate to ground truth rather than to assertions.

BY MR. VAZQUEZ:

Q. Okay. And then do you agree that in this case, the physician has at least confirmed the accuracy of her gender?

MR. STIMPSON: Objection. Form --

THE WITNESS: No. I regard that word similar to "verify." "Confirm" means to establish ground truth, not to simply provide information.

BY MR. VAZQUEZ:

Q. Do you agree that in this case, the physician has confirmed the accuracy of the fields that she did not change?

MR. STIMPSON: Objection to form.

THE WITNESS: Same responses as previous time.

BY MR. VAZQUEZ:

Q. And so why not? It is a different question.

A. It's a different question, but you are still using the word confirm. And I don't believe the word confirm is appropriate. I think for the same reason that verify is not appropriate. The physician can edit the information according to your supposition, but I don't see that as providing ground truth. That would come from as it said above another party.

Q. I'm sorry. What did you -- what did you just reference when you said "another party" just to be clear on the record? The Markman order? I thought I just read disagreed with the Markman order with is --

A. I disagree with the word "verify" as interpreted without the context of the computer science use of that term.

Q. Okay.

A. "Confirm" is equivalent to that.

Q. Okay. Do you agree that in this instance that we are discussing, the physician wanting to edit her gender, that the Vitals Web site would have received gender information from the

♀

physician?

A. In the supposition that you are making that the supposition sends that information? Then I would assume in that supposition that the server

receives that information in some form.

Q. What would happen if the physician does not change anything? Would the message -- would any messages being sent back to her?

A. To her.

MR. STIMPSON: To her?

BY MR. VAZQUEZ:

Q. Yes. Here we are talking about a female physician who wants to change -- make sure that her gender is noted as female.

A. Okay.

Q. So if the physician does not change anything, would there be any messages that are sent back to the server?

A. Again that's a matter of the implementation of my -- it's purely a guess I would guess there is no information sent back to the server if there is no change. But, you know, the question is very, very unformed, I think is the right description.

Q. Okay. Does the system record that the ♀

physician has registered with Vitals the Vitals Web site?

A. I don't know. I haven't looked at the source code of the Vitals Web site.

Q. Do you know if the Vitals Web site system records whether the physician has changed or not changed certain fields?

A. I don't know. I haven't looked at the software or the database or even the HTML

presentation.

Q. I am going to list some fields, Dr. Cooper, and I would you it tell me whether the Vitals Web site has actually ever received an edit or edits to that field of the MDX physician database.

A. Okay.

Q. Specialty information?

A. I don't know.

Q. Gender?

A. I don't know.

Q. Awards and honors?

A. I don't know.

Q. Professional appointments?

A. Again I don't know.

Q. Professional membership?

A. I don't know.

Q. And languages?

A. I don't have personal knowledge of that either.

Q. So when you say I don't know, that means maybe the Web site has received it, maybe it hasn't you don't know?

A. I simply don't know.

Q. Okay?

A. That's all the answer that I can realistically provide.

Q. Given your disagreement with the Court, Markman order with respect to verified, you did not

use the Court's interpretation of verified in your opinion is that correct?

A. I think the Court's interpretation of that particular -- or lack of interpretation of that word actually it wasn't construed in the Markman order as I recall, the lay term lay meaning of the term instead was substituted. And I am saying that within the field of computer science where the accuracy and truth of the data has a special meaning, that the word verify or its equivalent synonym such as "confirm" mean that there is some other party besides the provider of the information

that verifies that.

Q. So did you use the Court's interpretation of verified in your opinion or opinions?

MR. STIMPSON: Objection that's been asked and answered just now.

THE WITNESS: I would say I have already answered that.

BY MR. VAZQUEZ:

Q. I'm sorry sir you can you just answer it again? I don't believe that you did -- I -- my question is: We have already established that you disagree with the Court's interpretation with respect to verify; correct?

MR. STIMPSON: Objection that misstates his testimony.

THE WITNESS: Yeah. I -- I don't think I said it that way. II said the Court chose not to could not straw in the Markman order the word

verify and I believe that the Court should have construed that. I think within the meaning of the context of that patent which is -- deals with computer science, the word verify has a more formal meaning that relates to establishing the ground truth of a fact or a piece of data or a statement.

BY MR. VAZQUEZ:

Q. But Dr. Cooper, the Court said that the doctor providing information is good enough, did it not?

MR. STIMPSON: Objection. Form.

THE WITNESS: In your scenario, the doctor provided information.

BY MR. VAZQUEZ:

Q. And the court said that was good enough did it not?

MR. STIMPSON: Objection to the form.

THE WITNESS: I believe that the Court said that. But I wouldn't agree with that, no.

BY MR. VAZQUEZ:

Q. So you disagree with te the Court in that instance?

A. I disagree with that particular lack of construal of that word.

Q. So, Dr. Cooper, do you intend to give testimony that conflicts with the Court's Markman order?

MR. STIMPSON: What? Excuse me can I have that back?

(The pending question was read.)

THE WITNESS: In the case of the word

verify, I intend to explain to the Court that the word has a deeper meaning in computer science than it does inially terms in the vernacular.

BY MR. VAZQUEZ:

Q. So you do intend to give testimony that conflicts with the Court's Markman order correct?

A. The same response.

MR. STIMPSON: Objection to form.

BY MR. VAZQUEZ:

Q. Dr. Cooper who knows a person's gender other than the person himself or herself?

A. I couldn't imagine anyone who would know it better than the person themselves, yes.

Q. Thanks. Dr. Cooper, I believe that in your report, you give two reasons why you believe that Vitals does not literally infringe the healthcare provider verified information limitation. Correct?

A. Where in my report do I say that?

Q. I believe Paragraph 13 and Paragraph 15.

A. Paragraph 13 deals with my background.

Q. Are you looking at your rebuttal report?

A. I am looking at the original report.

Q. I'm sorry. I should have been clear.

A. You are thinking of the rebuttal report?

Q. Yes, sir.

A. And which?

Q. Paragraph 13 and 15?

A. Which exhibit that was? That was No. 1, I think?

Q. Number 1, I believe.

A. Okay. Could you ask the question again, please?

Q. In your report, you give two reasons why you believe that Vitals does not literally infringe the healthcare provider verified information limitation. Correct?

A. Well, I said there is no evidence that Vitals.com healthcare providers verify in any of the above three sentences the database entries describing the first healthcare provider.

Q. Well, my question is whether -- you give two reasons, and then we will discuss the reasons. Are there two reasons you give why you believe that Vitals does not literally infringe the healthcare provider verified information limitation?

A. That depends. I'm not sure how you are counting two. In Paragraph 13 I agreed with what I wrote then. I haven't changed my opinion. Since then. Which is that I agree that Dr. Greenspun.

In fact who said that the meaning of verify it is to prove, confirm, or substantiate an assertion, there is evidence that Vitals.com healthcare providers verify in any of those sense the database entries described in the healthcare provider.

Q. Okay. That was a long answer. Did you mention somewhere in there that you have changed your opinions?

A. No, I mentioned that I have not.

Q. You have not. Okay?

A. Have not changed my opinions.

Q. Thank you. Paragraph 13 you first argue that the information provided by the physicians to Vitals or to Vitals Web site does not meet the definition of the term verified. Right?

A. That's correct.

Q. And then in Paragraph 15 your second argument is that whether Vitals is capable of receiving verified information from a physician is not relevant to infringement. Is that right?

A. Paragraph 15 just a moment. Okay I'm sorry would you repeat the question?

Q. Sure. Your second argument is that whether the Vitals Web site is capable of receiving verified information from a physician is not

relevant to infringement. Is that right?

A. That's correct. Capability is not actuality.

Q. Okay. And with respect to the first argument at Paragraph 13, if the Court stands by its interpretation of "verified" referenced in footnote 8 of the Markman order that argument would go away correct?

MR. STIMPSON: Objection to the form of the question it misstates the Court's order.

BY MR. VAZQUEZ:

Q. You may answer.

A. Could you say again please?

Q. Yes. If the Court -- with respect to your argument in Paragraph 13 --

A. Okay.

Q. -- that the information -- that the information provided by the physicians to the Vitals Web site does not meet the definition of the term verified -- we discussed that remember?

A. That's correct.

Q. -- with respect to that, if the Court stands by its interpretation of the word verified as discussed in footnote 8 of the Markman order, wouldn't that argument go away?

MR. STIMPSON: Objection. It misstates the Court's order.

MR. VAZQUEZ: No, it doesn't but you may answer.

MR. STIMPSON: Yes, it does. "Interpretation."

THE WITNESS: Yeah, I guess I don't understand the question. If the Court stands by, I think the purpose of the hearing is to help the Court decide based on the actual practice in the field. And the Court necessarily needs to get that kind of feedback.

BY MR. VAZQUEZ:

Q. What hearing are you just referring to in

your answer?

A. The Markman hearing.

Q. Okay. The Markman hearing already occurred correct?

A. Yes.

Q. And we have a Markman order now right?

A. Yes.

Q. And in footnote 8 of the Markman order of Page 15?

A. Which exhibit?

Q. 3.

A. 3.

Q. The Page 15 of Exhibit 3 --

A. Just a moment please. Okay. Page --

Q. 15 --

A. Okay, 15 Exhibit 8 -- or Footnote 8.

Q. Do you recall you read into the record the sentence beginning with the word "here"?

A. Yes, I do.

Q. And do you see the which it says indeed, the confirmation described appears to not extend beyond receipt of such information from the first healthcare provider." Do you see that?

A. Yes, I do.

Q. And I believe you disagree with that.

A. No, I do believe that the confirmation appears not to extend beyond receipt of information from the first healthcare provider. I don't consider that verification.

Q. Okay. The Court appears to consider that

verification. Do you agree with that?

MR. STIMPSON: Objection to the for mitt stays the Court's order.

THE WITNESS: I believe that is documented in the Markman order I am hoping that the Court will reconsider.

BY MR. VAZQUEZ:

Q. Okay. Since you are hoping that the Court will reconsider you don't agree with what the Court has stated with respect to verifying; right?

A. I think that's been established, yes.

Q. Okay. If the Court sticks to its interpretation of verifying --

A. Yes.

Q. -- or put another way, declines your request that it reconsider, wouldn't your argument that the information provided by the physicians does not meet the definition of the term verified then go away?

MR. STIMPSON: Objection to form misstates the Court's order.

THE WITNESS: The Court did not construe the term "verified" but instead left it to be the lay interpretation. So in that sense, since the Court didn't construe it there is, I think, room to debate whether "verify" or "confirm" has the meaning that you are associating with it or the meaning that I am associating with it.

BY MR. VAZQUEZ:

Q. If you were to state the -- what it is that would you like to the Court to reconsider, how would you state that?

A. That verification within the context of the computer science field means that verification confirmation, validation, all have to do with establishing a fact from -- establish -- asserted by one party an assertion, by another source.

Q. And how is that different from what the Court has stated in its Markman order?

A. The Court didn't state in its Markman order a construal of the word verify.

MR. STIMPSON: When you get to a good place Jesus you need to take a break.

THE WITNESS: I could use a break also.

MR. VAZQUEZ: Well, I -- just let me do one more question.

MR. STIMPSON: That's fine.

BY MR. VAZQUEZ:

Q. So you had would ask the Court to reconsider as you stated and what you are asking the Court to reconsider is for it to adopt your interpretation of verified as you have state in your response?

A. Well, the Court did not could not view verified.

Q. Yes.

A. So I don't think the Court has established

a specific meaning that's referred to the lay interpretation. I believe that the Court should instead add to the Markman order or at least interpret in its lay interpretation of verification within the context of computer science which involves an independent verification, not a -- not just the source of date.

Q. So in your view Dr. Cooper, if a physician who is male wants to edit their gender field and sends that information to the MDX server, that information is not verified?

A. Correct.

Q. Okay.

MR. STIMPSON: Okay. Break now?

MR. VAZQUEZ: One more one more.

MR. STIMPSON: Better be brief.

BY MR. VAZQUEZ:

Q. But the Court has rejected your interpretation; correct?

A. I don't believe it -- no I don't believe that's true. I believe the Court has not construed the meaning of verified.

Q. All right we will pick it up when you get back?

♀

THE VIDEOGRAPHER: The time now is 11:07 we are off the record.

(Recess taken.)

THE VIDEOGRAPHER: Right now it's 11:33. We are back on the record.