

DISTRICT JUDGE BENJAMIN H. SETTLE  
MAGISTRATE JUDGE J. RICHARD CREATURA

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NATHAN ROBERT GONINAN,  
  
Plaintiff,

v.

WASHINGTON DEPARTMENT OF  
CORRECTIONS, et al.,

Defendant.

No. 3:17-cv-05714-BHS-JRC

PLAINTIFF’S REPLY IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER  
AND FOR SANCTIONS AGAINST  
DEFENDANTS

NOTED FOR HEARING ON AUGUST 24,  
2018

REPLY

A. DEFENDANTS DO NOT DISPUTE THEIR BAD FAITH CONDUCT AND THUS,  
GOOD CAUSE FOR A PROTECTIVE ORDER EXISTS

Defendants do not dispute they were repeatedly advised not to directly engage with Ms. Lotusflower regarding any matter related to this litigation without first notifying her attorneys. Defendants also do not dispute that after being so advised, they questioned Ms. Lotusflower regarding this litigation and failed to provide her attorneys notice – not just once, but twice. Defendants further fail to controvert they asked Ms. Lotusflower questions that seek information protected by litigation privileges. Defendants do not even dispute the offensive nature of the

PLAINTIFF’S REPLY IN SUPPORT OF MOTION  
FOR PROTECTIVE ORDER AND FOR SANCTIONS  
AGAINST DEFENDANTS - 1

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1 questions, or the impact the questions have had on Ms. Lotusflower. Instead, Defendants argue  
2 there is no need for Court intervention because they need “no additional information from Ms.  
3 Lotusflower to establish her readiness assessment.” *See* Dkt #73 at 4:19, 20; 5:5, 6; and 6:8,9.

4 Defendants’ own evidence undermines the position taken in their response and highlights  
5 the need for court-intervention. On one hand, Defendants advise the Court they “do not believe  
6 that any additional information is needed from Ms. [Lotusflower],” but on the other hand leave the  
7 door open for further litigation related contact with Ms. Lotusflower. *See* Dkt. #73 at 4:19, 20,  
8 6:8.9; and 6:26 – 2; *see also* Declaration of Steven Levine, Dkt. #75 at ¶9. This lawsuit was filed  
9 by Ms. Lotusflower because of Defendants’ unconstitutional blanket ban of gender affirming  
10 surgery and other necessary medical treatment for transgender people. *See* Dkt. #1-1. It is  
11 uncontroverted that Defendants did not institute any change to their transgender policies until *after*  
12 Ms. Lotusflower filed this lawsuit. *See* Dkt. ## 49-1 & 62-1. As of today, Ms. Lotusflower  
13 Lotusflower remains unable to obtain the medically necessary gender affirmation surgery that she  
14 seeks. Thus, this case is ongoing and the medical activities Defendants describe moving forward  
15 are core to this litigation. Because of the inherently coercive environment of prisons, and lack of  
16 autonomy of incarcerated people, a protective order is warranted to best prevent Defendants from  
17 further harassing, intimidating and traumatizing Ms. Lotusflower, no matter the motive for it.

18 Also inconsistent with Defendants’ now position are the details contained in the  
19 inflammatory post-assessment email authored by Dr. Levine and adopted by Defendants as part of  
20 their “readiness assessment.” Specifically, when inquiring about Ms. Lotusflower’s “motivation  
21 for the law suit [sic] to obtain surgery,” Defendants asked, in relevant part: “do you realize what  
22 this lawsuit means for you in terms of *more evaluations*, deposition by lawyers asking personal  
23 questions, trial, appeal of whatever verdict is reached, risk that a verdict will take a long time to be  
24 given and that surgery if granted may not occur for another several years.” *See* Exhibit I to Davis  
25 Declaration at Dkt. #68-9 (emphasis added). Defendants – through their licensed psychologist and  
26 psychiatric consultant - intentionally suggested to Ms. Lotusflower that she would be subject to

1 each of these experiences, including additional readiness evaluations. These questions are  
2 inconsistent with the position now taken by Defendants. *Id.* Certainly Defendants did not make  
3 such suggestions to Ms. Lotusflower - someone Defendants claim suffers from PTSD and other  
4 psychiatric mental illness – to intentionally mislead, manipulate and convince her that she would  
5 be subject to an evaluation they have no intentions of conducting. Either way, Defendants cannot  
6 have it both ways and their own evidence leaves a question about whether they are earnest in their  
7 representation to this Court of no further litigation contact with Ms. Lotusflower.

8 **B. DEFENDANTS ARE NOT PREJUDICED BY ENTRY OF A PROTECTIVE ORDER**

9 In response to Plaintiff’s motion, Defendants contend a protective order is not necessary  
10 because they “never intended to seek protected information or interfere with Lotusflower’s  
11 litigation.” *See* Dkt. 73 at 5:17-19. Defendants’ intention is of no import here. The impact of their  
12 conduct on Ms. Lotusflower, however, is indeed material. The questions posed by Defendants – no  
13 matter the excuse offered – are facially offensive and elicit information subject to litigation  
14 privileges. While they claim to not to have “intended” to cause harm by asking the inflammatory  
15 questions, they do not dispute – nor can they – the questions were improper and reckless.

16 Furthermore, Defendants cite no legal authority to support the notion that their intent  
17 should matter in this instance, nor do they dispute the applicable law cited in the moving brief by  
18 Plaintiff. And equally important, Defendants fail to articulate any prejudice to them, should the  
19 Court enter an Order of Protection. In fact, the only person that has been prejudiced and will  
20 continue to be prejudiced should Defendants’ conduct persist is Ms. Lotusflower. The risk of harm  
21 to Ms. Lotusflower is too great. Defendants, on the other hand, will suffer no prejudice with the  
22 entry of a protective order. Instead, they will simply have to abide by an order that demands  
23 lawful, and civil, communication with Ms. Lotusflower, and involvement by her legal counsel  
24 when needed communications relate to this litigation. This is hardly a burdensome ask.

**C. DEFENDANTS’ RESPONSE BRIEF BOLSTERS THE NEED FOR SANCTIONS**

Similar to their response to Plaintiff’s request for an Order of Protection, Defendants try to

1 evade sanctions by attempting to attribute the offending conduct to Dr. Levine, refusing to  
 2 acknowledge that Dr. Levine was not the individual who asked Ms. Lotusflower the offensive  
 3 questions now before this Court. Defendants asked the questions. Dr. Levine authored the  
 4 questions, but he cannot and does not direct or exercise control over Defendants.

5 Also notably missing from Defendants' response is any meaningful mention of Dr. Richel,  
 6 who actually asked the offending questions and is the binding nexus between the conduct and  
 7 Defendants. *See Haeger v. Goodyear Tire & Rubber Co.*, No. CV-05-02046-PHX-GMS, 2018 WL  
 8 1182551, at \*3 (Mar. 7, 2018) ("Notwithstanding various exceptions, a principal is commonly  
 9 liable for the conduct of its agents."). In lieu of best evidence, Defendants offer the Court the  
 10 declaration of Dr. Karie Rainer, who (1) claims to be familiar with Ms. Lotusflower but throughout  
 11 her declaration repeatedly refers to her by a name she has never gone by; and (2) admittedly lacks  
 12 personal knowledge about the events at issue. *See* Dkt. #74. In that declaration, Dr. Rainer artfully  
 13 skirts the issue of Defendants offending conduct, instead choosing to summarily disclose in a  
 14 publicly filed pleading Ms. Lotusflower's medical information and diagnosis, which has no  
 15 bearing on the underlying motion, and essentially blame the victim for Defendants' reckless, bad  
 16 faith litigation conduct. *See* Dkt. ## 73 & 74. Oddly, Dr. Richel did not submit a declaration,  
 17 although he possesses personal knowledge of the events given he was present during each  
 18 litigation contact with Ms. Lotusflower. *See* Dkt.

19 According to Dr. Levine and Defendants, Dr. Levine is a highly credentialed, longtime  
 20 board certified psychiatrist. *See* Dkt. #73 at 2:23 – 3:3. However, details in his declaration and  
 21 Defendants' response are troubling, especially his claim that "I was concerned that [the litigation]  
 22 could provide her with false hope of surgery and how denial of surgery at this time could affect her  
 23 mental health and well-being." *See* Dkt. 75 at ¶6. A cursory review of the questions he emailed to  
 24 Defendants debunks his excuse:

1. Motivation for the law suit [sic] to obtain surgery

a. Do you realize that the ACLU has a motive beyond getting you surgery? If so,

1 what is it? Why do you think you, in particular, were selected and not many  
2 others?

3 b. Do you realize what this lawsuit means for you in terms of more evaluations,  
4 deposition by lawyers asking personal questions, trial, appeal of whatever verdict  
5 is reached, risk that a verdict will take a long time to be given and that surgery if  
6 granted may not occur for another several years.

7 c. This process builds up your hope for surgery and asks you to be convincingly  
8 distressed—suffering from your genitals--asks you to exaggerate your distress, and  
9 yet it may fail to win in the court. What do you think this would do to your  
10 emotional life?

11 Dr. Levine surely was aware of the impact such questions can have on a vulnerable person amid  
12 ongoing litigation and yet, intentionally injected these questions into the evaluation. *See* Dkt. # 75  
13 at ¶2; *see also Norsworthy v. Beard*, 87 F. Supp.3d 1164 (N.D. Cal. 2015) *Norsworthy v. Beard*, 87  
14 F. Supp. 3d 1164, 1190 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir.  
15 2015).

16 Defendants' attempt to discourage Ms. Lotusflower from continuing with this litigation is  
17 not only improper due to the considerable amount of power, control, and authority Defendants  
18 exercise over inmates, in general, but also because Defendants use a necessary process to further  
19 harm an already suffering inmate. Defendants' control and dominion is evident by their unilateral  
20 refusal to allow Ms. Lotusflower's attorney or a third party to attend what is clearly a Fed. R. Civ.  
21 P. 35 examination.<sup>1</sup> In addition to the unequal power position between Ms. Lotusflower and  
22 Defendants, Ms. Lotusflower, as an inmate, faces particular difficulty in expressing her desire to  
23 remain silent, question the legality of a line of questioning, ensuring her counsel is present during  
24 all questioning, and generally asserting her constitutional rights. As the Eastern District of Virginia

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<sup>1</sup> Dr. Rainer states in her declaration, "the Department does not permit outside third party presence at any medical or mental health examination. It would be unusual and an individual's responses would not be considered voluntary if they were directed by a third party on how to provide answers during a mental health evaluation." Dkt. #74 at ¶7. She incorrectly speculates that Ms. Lotusflower's attorneys do not know how to comport with Fed. R. Civ. P. 35 examination standards and admits DOC is inflexible in this regard, even where good cause exists and Washington case law holds otherwise. *See also Tietjen v. Department of Labor & Industries*, 13 Wn. App. 86, 89, 534 P.2d 151 (1975) (the plaintiff is entitled to have his attorney present); *see also Greenhorn v. Marriott International, Inc.* 216 F.R.D. 649, 654 (USDC ... Kansas 2003) (observers and/or tape recording should be allowed under Fed. R. Civ. Pro. 35, where good cause exists). These procedures are not disruptive in state court examinations, and there is no reason they should be disruptive in federal court examinations.

1 observed, inmates are in a uniquely vulnerable position during litigation. *Adams v. NaphCare, Inc.*,  
2 No. 2:16-cv-229, 2016 WL 10492102, at \*14 (E.D. Va. July 25, 2016). Defendants' reckless  
3 behavior not only acted as a means to frustrate Ms. Lotusflower's attorney-client relationship, but  
4 also to intimidate her into dropping her lawsuit.

5 **D. THE RELIEF SOUGHT IS MEASURED AND APPROPRIATE**

6 In sum, the only excuse provided by Defendants to the Court for their bad faith litigation  
7 conduct can be summarized as "we didn't mean to do it." *See* Dkt. #73. However, that position is  
8 neither convincing nor sufficient to overcome the annoyance, embarrassment and oppression  
9 caused by them and suffered by Ms. Lotusflower, who is under Defendants' direct and ongoing  
10 dominion, custody and control. In order to avoid the risk of similar behavior – given Defendants'  
11 admission that they will continue to have contact with Ms. Lotusflower about core litigation issues,  
12 the Court should issue a protective order. The protection should prohibit Defendants, and their  
13 agents, from (1) contacting Ms. Lotusflower regarding any litigation related matter without first  
14 providing her attorneys with notice; (2) engaging in conduct intended to harass and/or intimidate  
15 Ms. Lotusflower; (3) engaging in conduct intended to disrupt the relationship between Ms.  
16 Lotusflower and her attorneys of record in this case; (4) prohibiting Ms. Lotusflower's attorneys  
17 from participating in Fed. R. Civ. P. 35 activities moving forward; and (5) using any facts or  
18 details obtained as a result of the unauthorized litigation related contact with Ms. Lotusflower.

19 The Court should also sanction Defendants to prevent them, or their agents, from  
20 conducting any more evaluations in relation to this litigation. Defendants should be strictly limited  
21 to using only evaluation content obtained through permissible contact with Plaintiff, and the  
22 information obtained through evaluation activities following June 18, 2018 should be stricken.  
23 Defendants should also be sanctioned in an amount that represents the legal fees incurred to bring  
24 this motion. Alternatively, and at the very least, the Court should admonish Defendants to refrain  
25 from the conduct described herein, while also addressing the fruit of the poisonous tree as  
26 proposed herein.

1 DATED this 24<sup>th</sup> day of August, 2018.

2 /s/ Antoinette M. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed Plaintiff's Reply in Support of Motion for Protective Order and for Sanctions Against Defendants with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED this 24<sup>th</sup> day of August, 2018

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