STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: SEPTEMBER 10, 2012)

KATHRYN MANNING, individually and in her capacity as Administratrix of the ESTATE OF MICHAEL MANNING and KATHRYN MANNING, P.P.A., MARGARET MANNING, a minor; ROSE MANNING, a minor; PATRICK MANNING, a minor; and HELEN MANNING, a minor	:	
V.	:	**W.C. No. 2000-0063**
PETER J. BELLAFIORE, M.D.	:	

DECISION

LANPHEAR, J. This matter is before the Court on Plaintiffs' Post-Trial Motion for Sanctions. The Court is urged to consider sanctioning Dr. Bellafiore or his former counsel for their failure to make pre-trial disclosures concerning conversations with the deceased Plaintiff, Michael Manning. Sixteen days into the trial, new testimony emerged, significantly changing the Mannings' case. This decision details how any sanctions should be calculated and apportioned.

I

SUMMARY OF THE FACTS

This case was tried before a jury in January, February, and March 2004. Succinctly,[1] Mr. Manning's family alleged the following facts. Mr. Manning suffered a stroke on March 4, 1998,

[1] The facts and travel are recounted more thoroughly in this Court's previous Decision of November 4, 2005, Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660 (Super. Ct. Nov. 4, 2005).

and was taken to South County Hospital. He was treated by several physicians, including Dr. Peter J. Bellafiore, a neurologist. The doctors ordered a Magnetic Resonance Imaging exam ("MRI") on March 5, 1998. At that time, MRIs at South County Hospital were performed in a trailer brought to the hospital periodically via the MRI Network.

The MRI was attempted on Mr. Manning on two different occasions. During the first attempt at an MRI on March 5, 1998, Mr. Manning became nauseated, probably because of the confines of the closed machine. After receiving prescriptions of Ativan and Compozine, Mr. Manning was still not sufficiently calm and was left without an MRI. The second scan was not scheduled until March 7th for a scan on March 9th, when the MRI trailer was next scheduled to return to South County Hospital on its normal rounds.

On March 7th, shortly after talking with Dr. Bellafiore, Mr. Manning suffered a second, more devastating stroke. He was flown to Massachusetts General Hospital for immediate surgery. Despite the highly sophisticated treatment and surgery Mr. Manning received in Boston, he passed away several days later.

II

TRAVEL[2]

This case commenced in early 2000. The complaint alleged negligence and lack of informed consent against all Defendants. Discovery on this case was lengthy, intricate, and extensive. Each party identified fact witnesses and expert witnesses, propounded extensive interrogatories and requests for production, and conducted depositions. Attorneys and, in some events, witnesses, traveled about the country to complete the depositions. Lengthy transcripts

[2] As the travel of the case is significant to the issue of sanctions, this Court specifically makes findings of fact as to all of the details in the Travel discussed herein.

were ordered. A spirited battle of motions commenced to ensure that the discovery responses were appropriate and complete. After four years, the case was reached for a jury trial.

A

Pretrial Discovery and Disclosures

Dr. Bellafiore's interrogatory answers describe no refusal of treatment. Plaintiffs' interrogatory 16 asked for all defenses. Interrogatory 18 asked for the substance of conversations regarding Mr. Manning. The only answers supplied were vague references to the medical records. See Super. R. Civ. P. 33(c) (requiring a party to answer every interrogatory "to the extent the interrogatory is not objectionable"). Interrogatory 23 is even more specific, as it asked for descriptions of the conversations that Dr. Bellafiore had regarding the MRI or its alternatives. Again, there is no reference to conversations with Mr. Manning or Mrs. Manning.

Although they never received complete answers to their interrogatories, Plaintiffs' counsel completed a lengthy deposition of Dr. Bellafiore. Dr. Bellafiore indicated that he had discussions with Mr. Manning about "more Ativan to make him a little sleepier," and Mr. Manning refused. (Dr. Bellafiore Dep. 161-62.) Again, Dr. Bellafiore discussed "more sedation" with Mr. Manning on March 6, but never made a medical note of it.

In his pretrial statements to the Court, Dr. Bellafiore's shell game continued. For example, Dr. Bellafiore described his course of treatment on pages two to four of his Pretrial Memorandum of December 30, 2003, but never hinted of any refusal of treatment by Mr. Manning. The Mannings' Pretrial Memorandum made it clear that Dr. Hanley would testify that Dr. Bellafiore failed to meet the standard of care by his failure to obtain a MRI and MRA "on an emergency basis" and that "[a]n MRI/MRA should have been attempted with adequate sedation to make it feasible and, if unsuccessful, Mr. Manning should have undergone a cerebral

arteriogram." (Pl.'s Pretrial Memo. 6.) There was no doubt that the promptness of Dr. Bellafiore's treatment would be an issue at trial.

B

The Trial

The trial continued for thirty-five trial days.

At trial, Dr. Bellafiore recognized the importance of the MRI as the preferred method of determining the cause of the stroke and claimed he ordered a prompt MRI on March 5. Still, Mr. Manning was left without an MRI for days. This issue grew in importance during the trial, as the Mannings called experts who described the high risk of mortality and the probability that an angioplasty may have saved Mr. Manning. The Mannings' experts claimed the standard of care was to obtain the highest degree of imaging available within twenty-four hours.

During his initial examination, Dr. Bellafiore suggested that Mr. Manning no longer desired to enter a closed machine but admitted to keeping incomplete notes.[3] Surprisingly, on the sixteenth day of trial, Dr. Bellafiore testified that Mr. Manning flatly rejected any sedation for the MRI, but the physician never documented the refusal or discussed it with Mrs. Manning. Allegedly, this refusal was just moments before Mr. Manning's second, life-threatening stroke. (Tr. 2254-58.)

Dr. Bellafiore's testimony was a stark departure from what had been disclosed pretrial. While the medical records show several orders for the MRI and illustrate the failed MRI of March 5, there is no indication that Mr. Manning flatly refused to undergo the MRI. The Physician's Order Sheets (Trial Ex. 3D) show Mr. Manning remained scheduled for an MRI on March 7. Dr. Bellafiore's Progress Note (Trial Ex. 3E) shows that the Rhode Island Hospital

[3] See, for example, his direct examination of February 2, 2003.

staff "recommended anesthesiology to help with sedation for closed magnet study on Monday." There is no record of refusal in these notes or is it mentioned in the Discharge Summary. To the contrary, the Discharge Summary states that on March 7, "[w]e then elected to have Anesthesia see the patient in consultation with the idea of heavily sedating the patient and obtaining the MRI . . . on 3/9/98." (Trial Ex. 3B, at 3.)

Dr. Bellafiore's trial testimony was drastically different. On the sixteenth day of trial,[4] Dr. Bellafiore revealed—for the first time—that he had a lengthy conversation with Mr. Manning about a variety of drugs on March 5 or March 6, 1998:[5]

> "A. Well, what I'm telling you is that I did offer him Ativan. And then I also talked to him about IV sedation, whatever they want to call it, conscious sedation with the help of an anesthesiologist[.] (Tr. 2254).
>
> . . . .
>
> "Q. And if I understand you correctly, not only did you offer—though it's not documented, not only did you offer Ativan twice on the 5th and again on the 6th, you offered this conscious sedation also twice on the 5th and then again on 6th?
>
> "A. Right. I told him about conscious sedation. We had had—I've had a number of patients who had seizures who are developmentally delayed. . . . And a good way of doing it, because they're so uncooperative, is to give them this IV Versed, which is that sedative.

[4] February 22, 2003.

[5] The trial transcript (at 2247-60) does not make clear whether this conversation occurred on March 5 or 6. Dr. Bellafiore testified he had two conversations with Mr. Manning regarding conscious sedation on March 5, and two more on March 6. These conversations are not documented in the medical records or the discovery. In apparent contradiction, the Discharge Summary reports that during March 5 and 6, Dr. Bellafiore was focused on an open MRI being done at Rhode Island Hospital. By the Discharge Summary, when Rhode Island Hospital reported its continued problems on March 7, Dr. Bellafiore then called for an anesthesiology consult.

> "So I told him about those patients that I had experience with and told him it was something that we could certainly arrange for or try to do. Id. at 2256-57.
>
> . . . .
>
> "Q. Is that what he told you?
>
> "A. What he said to me—and I remember it, because I was struck by it. He told me, 'I'm sorry, Doc.' I remember it when people call me Doc. It just makes me feel like a doctor. 'I know you need me to do this test to figure out what to do, but I just can't do it.' This was on the morning of the 5th after I told him all the things that could be possibly wrong. And I told him about conscious sedation. I told him about Ativan. I told him the open MRI may not give us the answer we need. I basically held—and told him he could have a stroke, he could have a tumor. I was holding a neurological gun to his head. That's when he told me, "I'm sorry, Doc, if you need me to do this, I just can't do it." I was struck because I never had a patient apologize to me about that before. And frankly, I felt a little guilty because here's a guy who's sick, who's probably scared to death, and I'm making him feel so guilty he's apologizing to me.
>
> "At that point I told him, you know. 'Okay. We can try for the open MRI, see what we can get, we'll go from there.' And I didn't document any of that." Id. at 2257-58.

So much of this information was brand new. Although the Plaintiffs asked questions to procure these details in advance—in interrogatories and at deposition—the following information was never supplied:

- The term "conscious sedation," which Dr. Bellafiore seems to use throughout his trial testimony, had not been used before.
- Talking to Mr. Manning about bringing in an anesthesiologist had never been described.
- The drug, Versed, was never identified earlier.

- Conversations with Mr. Manning about sedations on March 5 or March 6 were not mentioned by Dr. Bellafiore earlier.
- Even more surprising was Dr. Bellafiore's new revelation that Mr. Manning apologized ("I'm sorry, Doc.").

This information was presented to the Mannings' counsel, for the first time, on the sixteenth day of the trial. Dr. McNeice, the treating physician, had completed his direct testimony. By then, the Mannings had called four expert witnesses, all out-of-state physicians, at considerable expense. Their direct testimony was now complete. Then, and only then, the entire defense changed and different facts were thrown into the mix of an already complex trial.

Although the Plaintiffs sought prompt relief, the trial continued. The jury found for all Defendants on all counts.

C

Post-Trial Proceedings

When the jury found for Dr. Bellafiore and the other Defendants, the Mannings promptly filed motions for Judgment as a Matter of Law and for new trial. On November 4, 2005, this Court issued a Decision on the pending motions. See Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660 (Super. Ct. Nov. 4, 2005). A new trial was granted, and Dr. Bellafiore appealed this Court's 2005 Decision. In a Decision by the Rhode Island Supreme Court, this Court's new trial order was affirmed, Manning v. Bellafiore, 991 A.2d 399 (R.I. 2010).[6]

Following the appeal, the case was ripe for a new trial on the issue of Dr. Bellafiore's liability (the other Defendants having been dismissed). Through the assistance of counsel, the

[6] Although the Rhode Island Supreme Court issued a Decision affirming the order for a new trial, it did not address the issue of sanctions, though the issue was raised in the defendant-appellant's brief.

parties settled the issue of Dr. Bellafiore's liability, leaving only the issue of sanctions outstanding. This Court conducted hearings on whether sanctions remained appropriate.

Thereafter, this Court issued an Order on March 14, 2011, stating:

> "1. The Court finds that an order imposing sanctions upon Dr. Bellafiore or his attorney(s) is appropriate. An award of sanctions is justified for the actions described in the Court's Decision of November 2005. Plaintiff is reserved her right to seek sanctions for other conduct. . . .
>
> 2. The type of sanctions and the extent of sanctions to be imposed on Dr. Bellafiore or his counsel, or both, have not been established. . . . [After hearing, the Court will] determine the type of sanctions to be awarded, the type of sanctions, the amount of any monetary sanction, and how the sanction(s) should be assessed[.]" Manning v. Bellafiore, No. WC-2000-0063, Mar. 14, 2011 (Order), Lanphear, J.

As arguments continued, this Court itself expressed a concern for the conduct that occurred at trial; it continued to express its desire to allow the respondents to enjoy an opportunity to be heard, even yielding to the respondent on the procedures it may follow:

> "Court: Well, we defer to the defendants [respondents]. How do you want to proceed? Do you wish to present a case to show that the conduct identifiable by the plaintiffs—and by the Court—was not sanctionable? Do you wish to have time to prepare a defense and to determine who should be sanctioned?" (Tr., July 19, 2011.)

Discovery was allowed, and a formal hearing commenced. After protracted hearings through the fall and winter of 2011-2012, this Court received extensive testimony and other evidence concerning the sanctionable conduct. Dr. Bellafiore obtained independent counsel. The firm of White and Carlin was segregated from Dr. Bellafiore at the sanction hearings as two independent respondents. Each of the respondents received notice, appeared, presented evidence, and was given an opportunity to be heard relative to the sanctions issue.

III

FINDINGS OF FACT REGARDING SANCTIONS

The Court notes that in 2000, well before the trial of this action, Dr. Bellafiore submitted a letter to the Rhode Island Board of Medical Licensure and Discipline in response to an inquiry from the Board. Dr. Bellafiore prepared this writing and submitted a draft to Attorney White's firm for review. The law firm reviewed the letter, prepared some editorial changes, and kept a copy of the letter in its files. The letter (Sanction Hr'g. Ex. 1) is dated August 27, 2000.

The letter to the Board stated that, on May 5, 1998, Mr. Manning said he "did not wish to try an MRI again in a non-claustrophobic machine even with maximum sedation." The letter also provided that a similar conversation was held on March 6, but Mr. Manning agreed to an MRI under general anesthesia on March 7, the date of his second stroke.

In October of 2000, as Dr. Bellafiore and Attorney White were drafting answers to interrogatories for this civil action, the doctor vaguely referenced the letter to the state board when marking up the drafted interrogatory answers. (Ex. E). When the law firm produced the interrogatory answers, Dr. Bellafiore reviewed them and signed them, even though he recognized that they did not detail all the conversations with the Mannings regarding sedation or any offer of the drug Ativan to Mr. Manning.

The Court finds Dr. Bellafiore's testimony to be of limited credibility at the sanction hearings. While he recognized the incompleteness of his discovery responses, he never questioned them. A highly educated and intelligent individual cognizant of the significance of the case, his oath, and the documents, he claimed that he was only following his attorney's requests to be concise and direct. When the proceeding became tense, he claimed he "hid behind the protection of my attorney." His testimony, interrogatory answers, deposition, trial, and the

sanctions hearings all are in a constant state of fluctuation. While Dr. Bellafiore attempted to justify his actions, he leaves the Mannings and the Court with a different version until his revelations on trial day sixteen. He knew his sworn answers were indirect, evasive, significantly incomplete, and had little concern for the result. Additional findings of fact, including Section IV, Subsection D, infra, are set forth below as needed.

IV

ANALYSIS

The new revelations disclosed by Dr. Bellafiore at trial were pivotal to a fair determination of the facts and essential to any fair response to the questions posed in discovery. All of this information could have, and should have, been disclosed earlier. Indeed, Dr. Bellafiore admitted his failure to disclose this information in discovery. (Tr. 2253-54, 2547, 2647).[7]

As reflected in the previous Decision, this unexpected, undisclosed testimony significantly altered the focus of the trial and justified the granting of a new trial. As stated by this Court's 2005 Decision, relating to motions filed after the verdict:

> "Obviously, discovery abuses are a challenge to the trial court. In the midst of a lengthy, hotly contested medical malpractice case, the failure to disclose such an important defense was not only critical, it left the court in the midst of a dilemma for which there was no just resolution (not to mention the disarray to the extensively prepared plaintiffs' case). . . . In hindsight, the injustice was never cured. The Court only precluded the fact finder

[7] For example, this Court notes the following exchange:

> "Q. And we can also agree that in this Interrogatory, that you signed in January of 2001, you did not take the opportunity to set forth all of those conversations that you say you had with your patient on March 5th and March 6th, correct?"
>
> "A. Yes." Id. at 2647.

> in its quest for the truth, when its proper role was to accommodate the fact finder within the confines of the rules and fairness."
>
> . . . .
>
> "After years of preparation, cross-country travel for depositions, and paying ghastly fees to experts, plaintiffs were left with everything they attempted to avoid: trial by surprise where the Mannings were left to proceed by the seats of their pants."
>
> "This flagrant abuse, in itself, justifies extensive relief, see Insurance Company of North America v. Kayser-Roth, 770 A.2d 403, 412 (R.I. 2001), including a new trial against Dr. Bellafiore. The Mannings have requested entry of a default judgment against Dr. Bellafiore. Frankly, there is no easy, just solution. A default prevents a full trial by jury, and Dr. Bellafiore would likely be entitled to a jury trial on the issue of damages. A new trial requires even more testimony and expense. Accordingly, the trial court leaves open the question of sanctions—specifically whether the Mannings should be compensated for expert fees, legal fees and other sanctions, for trying this case twice. . . ." Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660, at *17-18 (Super. Ct. Nov. 4, 2005) (footnote omitted).

The impact of these new revelations was tremendous. To say the Mannings' counsel were blindsided would be an understatement.[8] The term, "conscious sedation," became a confusing, undefined term for the rest of the trial and the post-trial motions. Versed obviously brought a different level and different method of sedation. Plaintiffs' counsel, highly prepared throughout the trial, now struggled to determine if this medication had been referenced before and the effects of the medication. See Hernandez v. JS Pallet Co., Inc., 41 A.3d 978, 984 (R.I. 2012) ("The purpose of * * * [the] discovery rules is to enable litigants to prepare for trial free from the elements of surprise and concealment so that judgments can rest upon the merits of the case rather than the skill and maneuvering of counsel." (quoting Gormley v. Vartian, 121 R.I. 770, 775, 403 A.2d 256, 259 (1979)). Immediately after this revelation, the Mannings' counsel

[8] Even though the trial was eight years ago, the trial justice distinctly recalls the look of astonishment on Plaintiffs' counsel immediately after Dr. Bellafiore's colloquy.

plodded along by questioning Dr. Bellafiore on the level of consciousness and the side effects. (Tr. 2257-58.) Of course, Mr. Manning's newly revealed, alleged apology and refusal of treatment, quoted by Dr. Bellafiore, cast the underlying facts in an entirely new light.

In the context of this case, the failure to disclose such essential information is shocking. See Heal v. Heal, 762 A.2d 463 (R.I. 2000) (recognizing that while an attorney may not be held responsible for the false communications of a client, an attorney has a duty as an officer of the court to advance arguments in good faith, without factual misrepresentation, after a reasonable inquiry). The complaint contained counts of negligence and the lack of informed consent. To reveal or even suggest, so late in the case, that Mr. Manning was informed of risks and refused treatment, was simply astonishing.

The discussion of using the medication Versed was also jaw-dropping. At trial, Dr. Bellafiore claimed that Versed, to be administered intravenously, was considered as a means to get Mr. Manning through the MRI test. Pretrial, the Mannings' counsel had dedicated significant time at Dr. Bellafiore's deposition to determine the conversations that the physician had with his patient. The inquiries included whether Dr. Bellafiore explained the significance of the risks to Mr. Manning, Dr. Bellafiore Dep. at 162, 164-65, whether he documented their conversations, id. at 197-200, 206-07, and whether he considered the MRI to be a priority. Dr. Bellafiore indicated he used Ativan for claustrophobia, id. at 150, and the amount depended on the level of anxiousness, id. at 151-53. Dr. Bellafiore testified at the deposition that he ruled out use of other sedatives as "dangerous." Id. at 156, 168. Dr. Bellafiore was specifically asked to describe his conversation with Mr. Manning on March 5 after the failed MRI:

> "Q. And so what did you tell Mr. Manning about sedation?

A. I said we could try giving him more Ativan to make him a little sleepier to see if he could tolerate the test." Id. at 161-62.

The pretrial testimony continued by examining why the physician failed to document a conversation wherein he described "life threatening problems" to his patient. Id. at 162, et seq. The other pretrial disclosures to the Court and the Mannings were even less specific.

Dr. Bellafiore's trial testimony was starkly different. When asked if he used Ativan for claustrophobia, he sheepishly retorted, "That's the first thing I try." (Tr. 2248.) Dr. Bellafiore added that after Ativan, "I also talked to him about IV sedation, whatever they want to call it, conscious sedation with the help of an anesthesiologist." (Tr. 2254.) He testified that he told Mr. Manning the benefits of conscious sedation but never documented the discussion. (Tr. 2256.) Dr. Bellafiore then revealed for the first time, while on the stand at trial and after Plaintiffs' experts had finished, that he had experience with Versed as a useful calming sedative for MRIs and "it was something we could certainly arrange for or try to do." (Tr. 2257.)[9]

In its 2005 Decision, quoted above, this Court described the "injustice never cured," which "justifies extensive relief." After remand to this Court, the respondents again and again

[9] Even Dr. Bellafiore acknowledged that his testimony was different from his discovery responses:

"Q. And you were asked at your deposition, "[s]o what did you tell Mr. Manning about sedation?

"A. Yes.

". . . .

"Q. And Doctor, at no point in that answer did you ever indicate that was the first thing or that there were other things you told him, correct?

"A. No, I didn't indicate it in that answer." (Tr. 2252.)

questioned whether sanctions should be imposed. Further hearings were held, and memoranda submitted. The Court allowed discovery and considered dispositive motions, but concluded in its Decision of March 14, 2011:

> "1. The Court finds that an order imposing sanctions upon Dr. Bellafiore or his attorney(s) is appropriate. . . .
>
> "2. The type of sanctions and the extent of sanctions . . . have not yet been established." Manning v. Bellafiore, No. WC-2000-0063, Mar. 14, 2011 (Order), Lanphear, J.

Regardless of the numerous findings by the Court that the conduct was sanctionable, respondents returned to the Court, undaunted, further questioning the appropriateness of sanctions. Failing in that argument, respondents asserted that sanctions should only be imposed if, and only if, the Mannings tried this case at a second trial. This argument also misinterpreted the Court's clear orders. While the Court found conduct worthy of sanctions, it always kept the issue open as to whether there was other sanctionable conduct, how the sanctions should be imposed, and whom should be sanctioned: Dr. Bellafiore or his counsel.

A

Rule 11 Sanctions

Our Supreme Court recently addressed the reimbursement of fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Specifically, the Supreme Court acknowledged that "the American Rule" of attorneys' fees requires "that each litigant must pay its own attorney's fees, even if the party prevails in the lawsuit," but a court may award attorneys' fees as an exercise of "its own inherent power to fashion an appropriate remedy that would serve the ends of justice." Blue Cross & Blue Shield of Rhode Island v. Najarian, 911 A.2d 706, 711 n.5 (R.I. 2006). The Court explained that this remedy is available only in one of three narrowly defined circumstances, including (1) "the common fund exception

that allows a court to award attorney's fees to a party whose litigation efforts directly benefit others," (2) "as a sanction for the willful disobedience of a court order," or (3) "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Blue Cross & Blue Shield of Rhode Island, 911 A.2d at 711 n.5 (internal quotations and citations omitted). Where an appropriate basis for an award of attorneys' fees exists, the award "rests within the sound discretion of the trial justice." Id. at 710.

The matter before this Court is Plaintiffs' Post-Trial Motion for Sanctions for failure of Dr. Bellafiore and Attorney White to disclose pre-trial conversations between Dr. Bellafiore and Mr. Manning. The thrust of Plaintiff's Motion accuses Dr. Bellafiore and Attorney White of acting in bad faith for improper purposes. Such allegations are most appropriately discussed in the context of Rule 11 sanctions. Indeed, Rule 11 of the Superior Court Rules of Civil Procedure provides trial courts with broad authority to impose sanctions—expressly listing "a reasonable attorney's fee" among possible sanctions—against attorneys for advancing claims without proper foundation.[10] See Super. R. Civ. P. 11.

Specifically, Rule 11 of the Superior Court Rules of Civil Procedure states, in pertinent part:

[10] The Court abstains from deciding whether defective interrogatory answers violate Rule 11, Rule 26, or Rule 37: a question to which there is no ready answer. Compare Brubaker v. City of Richmond, 943 F.2d 1363, 1383 n.26 (4th Cir. 1991) (holding that Rule 26, and not Rule 11, applies to answers to discovery requests) with Jankins v. TDC Management Corp., 131 F.R.D. 629, 630 (D.D.C. 1989) (holding that both Rule 11 and Rule 26 apply to answers to discovery requests) and R.W. International Corp. v. Welch Foods, Inc., 133 F.R.D. 8, 11 (D.P.R. 1990) (holding that Rule 11 applies to a refusal to provide information in response to a discovery request). The duties established by Rule 26(f) are virtually identical to those provided for in Rule 11: that the signing party certifies that the relevant document "is warranted by existing law . . . and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." In this case, the conduct plainly merits a sanction at least under Rule 11. See Cruz v. Savage, 896 F.2d 626, 630 (1st Cir. 1990) (explaining that the purpose underlying Rule 11 is to "deter dilatory and abusive tactics in litigation and to streamline the litigation process by lessening frivolous claims or defenses").

> "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper including a reasonable attorneys' fee." Super. R. Civ. P. 11.

To comply with Rule 11, counsel must make a "reasonable inquiry to assure that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper purpose." Pleasant Management, LLC v. Carrasco, 918 A.2d 213 (R.I. 2007) (internal quotations omitted).

While empowered to impose sanctions, this Court should never approach the issue of sanctions lightly. Legal sanctions play an important role in deterring wrongful conduct. Ryan v. Commodity Futures Training Corp., 145 F.3d 910 (7th Cir. 1998); see Pleasant Management, LLC, 918 A.2d at 217. Nevertheless, the courts must be tempered in their awards of sanctioning and be mindful of their need to reform the behavior of recalcitrant trial participants, never acting out of anger or frustration which result from permissible tactical moves. As another court has said:

> "[w]hile the Rule 11 sanction serves an important purpose, it is a tool that must be used with utmost care and caution. Even where . . . the monetary penalty is low, a Rule 11 violation carries intangible costs for the punished lawyer or firm. A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter. We may not impugn the reputation without carefully analyzing the legal and factual sufficiency of the arguments." Harlyn Sales Corp. Profit Sharing Plan v. Kemper Financial Services, Inc., 9 F.3d 1263, 1269 (7th Cir. 1993) (quoting FDIC v. Tekfen Construction & Installation Co., Inc., 847 F.2d 440, 444 (7th Cir. 1988)).

The Court should strive to consider the circumstances, giving fair deference to appropriate litigation tactics, and the merits of imposing sanction and do so only after applying judicial reason and temperance. See Bermudez v. 1 World Products, Inc., 209 F.R.D. 287 (D.P.R. 2002) (explaining that a court should consider the potential for significant repercussions, such as chilling attorney's enthusiasm or creativity, when determining whether Rule 11 sanctions are appropriate).

In the case at bar, this Court had little opportunity to prevent the harm caused by Dr. Bellafiore's surprise change in testimony so late into the trial. Our Supreme Court addressed a similar issue in Vincent v. Musone, 572 A.2d 280 (R.I. 1990), where a father filed a wrongful death action against a liquor store for the shooting death of his son. Allegedly, the shooting resulted from underage drinking after the assailant purchased liquor from defendant's liquor store. On the first day of trial (almost five years after the case was filed), the plaintiff was allowed to amend the case by adding a dram shop count, the only successful count at trial. After finding that the trial court improperly allowed the amendment, vacated the verdict, and remanded for a new trial on the dram shop count, our Supreme Court determined:

> "[T]he plaintiff shall be required to pay the reasonable expenses incurred by the defendants in connection with the first trial, including a reasonable counsel fee. Upon remand a justice of the Superior Court shall determine the reasonable costs of representing the defendants at the initial trial, including the reasonable cost of preparation." Vincent, 572 A.2d at 280, 284.

Here, a similar rationale is warranted. That is, the Court shall determine the reasonable costs of the Mannings in their action against Dr. Bellafiore through the initial trial and the preparation for that trial and charge those costs to the appropriate respondent to be sanctioned.

B

The Appropriateness of Sanctions in the Case at Bar

After remand, Dr. Bellafiore settled the medical malpractice claim with the Mannings. Thus, underlying issues of liability and damages are no longer before the Court. Dr. Bellafiore believes the remaining disputes concerning sanctions should be considered moot as the Mannings have been adequately compensated as the case in chief is resolved.

The issue of sanctions was clearly at issue during the appeal, remand, and settlement. To gloss over the question would ignore the respondents' improper conduct, which was motivated by improper purposes and lacking in good faith. Glossing over the question of sanctions would not only fail to punish the wrongdoer, but also belittle the harm incurred by the Mannings, who purposefully excluded the issue of sanctions from their settlement with Dr. Bellafiore. See Pleasant Management, LLC, 918 A.2d at 217. This Court cannot assume that the Mannings are adequately rewarded by the mere resolution of the underlying case, for the parties reserved the issue of sanctions, and proceeded through a full evidentiary hearing. Hence, this Court will treat the issue of sanctions separately from the settlement of the resolution of the underlying case.

C

The Conduct Was Deserving of Sanctions

Concluding an award of sanctions was warranted, this Court declared it would conduct a hearing to "determine the type of sanctions to be awarded, the type of sanctions, the amount of any monetary sanction, and how the sanction(s) should be assessed." Manning v. Bellafiore, No. WC-2000-0063, Mar. 14, 2011 (Order), Lanphear, J. To determine the type of sanctions to be imposed, the Court notes the purposes of sanctioning:

> "'These sanctions have a twofold purpose: to deter repetition of the harm, and to remedy the harm caused.' Lett v. Providence

> Journal Co., 798 A.2d 355, 368 (R.I. 2002) (citing In re Sargent, 136 F.3d 349, 352-53 (4th Cir.1998)). When faced with a Rule 11 violation, a trial justice 'has the discretionary authority to fashion what it deems to be an 'appropriate' sanction, one that is responsive to the seriousness of the violation under the circumstances and sufficient to deter repetition of the misconduct in question.'" Lett, 798 A.2d at 368. Michalopoulos v. C & D Restaurant, Inc., 847 A.2d 294, 300 (R.I. 2004).[11]

Here, the harm caused was tremendous. Again, as stated in the Court's post-trial Order of November 4, 2005, this Court found: "After years of preparation, cross-country travel for depositions, and paying ghastly fees to experts, plaintiffs were left with everything they attempted to avoid: trial by surprise. . . ." The Court continued by noting that a Court ordered default or new trial were inappropriate remedies. "Accordingly, the trial court leaves open the question of sanctions—specifically whether the Mannings should be compensated for expert fees, legal fees and other sanctions, for trying this case twice." Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660, at *15-16 (Super. Ct. Nov. 4, 2005). The Court continues to be concerned by the significant time and expense dedicated by the Mannings and their counsel to prepare and submit their case to the jury. The settlement of the malpractice case never resolved that issue or righted the specific wrongs being sanctioned. The parties specifically reserved the issue of sanctions for the Court. Failure to address the issue of sanctions simply because the parties settled a portion of the case rewards the wrongdoer and never restores the Mannings from

[11] A recent case outlines factors that the federal courts consider in apportioning sanctions, similar to those outlined by our Supreme Court:

> "[C]onsideration is normally given to multiple factors—for example, the egregiousness of the conduct, prejudice to the opposing party, the general policy favoring adjudication on the merits, the need to maintain institutional integrity, and deterrence of future misconduct." Starski v. Kirzhnev, 682 F.3d 51, 55 (1st Cir. 2012) (internal citations omitted).

the harm. See Pleasant Management, LLC, 918 A.2d at 217 (discussing the purpose of Rule 11 sanctions).

To be specific, by the time Dr. Bellafiore provided new, surprise testimony some sixteen days into the trial, much of the Mannings' case was completed. The Mannings had already concluded their direct testimony of Dr. McNeice and the other medical fact witnesses, called three expert physicians, and almost completed their direct testimony of Dr. Bellafiore. Dr. Payne, an internist from Cincinnati, had testified for the Mannings and left Rhode Island. Dr. Gelber, the Mannings' expert neurologist from Illinois, had completed his direct testimony and would return only for follow-up examination. Dr. Putnam, a neuro-interventionist surgeon who treated Mr. Manning at Massachusetts General Hospital, had testified for two days and would return for more follow up.[12] Dr. Hanley, a neurosurgeon from Johns Hopkins, was scheduled to testify as Plaintiffs' expert on February 3—the day after Dr. Bellafiore's surprise testimony. The liability case against Dr. McNeice seemed complete. Almost all of Mannings' complex case had been meticulously prepared and, indeed, almost all of the liability case was submitted.[13] The recipe was followed, the table set, the food baked and set on the plates. Even Dr. Bellafiore had already testified for a day and a half before he changed his version of the facts. Either Dr. Bellafiore willfully refused to answer direct questions on the specific issues during discovery and after court orders, or he provided false testimony. In either instance, he willfully disobeyed this Court's directives.

[12] To say that a physician testified does not quite capture the gist of the trial. Each doctor testified for two to four separate days, underwent examination by all counsel, and reviewed every scintilla of the extensive medical records.

[13] Each of the expert physicians had been deposed, which required preparation (of the witness and of counsel), travel to the home city of the physician, records production, transcript fees and other expenses. Interrogatories had been propounded and answered. Medical records had been reviewed. Fees had been negotiated and advanced. All of this resulted in significant time and expense.

It was obvious at trial that the Mannings had already incurred out-of-pocket, trial expenses of over $40,000 for their expert witnesses. Each of the experts provided his fee structure to the jury, though this did not always include transportation, accommodations, or a precise, current bill.

To begin to remedy the harm caused, the Mannings must be restored their costs of the trial against Dr. Bellafiore—at a minimum. The attorneys devoted significant time to trial preparation and the trial itself. Substantial fees were paid to experts. This work was essential to a well-prepared and properly presented case at the first trial. Much of this labor and significant expenses became redundant as a result of the changed testimony. The case now needed to be tried again.

While some of the costs should obviously be repaid, the Court must be reasonable in its assessment. The Mannings' case against Dr. McNeice and South County Hospital was submitted without incident. The Mannings do not claim any residual effect on their case against these Defendants, and the Court will not infer any fallout.

D

Who Should Be Sanctioned?

At hearing, the Court focused on the incomplete disclosures of Dr. Bellafiore in attempting to apportion sanctions, if any are awarded. While the Court had already found sanctionable conduct, the sanction hearings focused on why the information was not originally revealed in discovery responses and was suddenly revealed deep into the trial.

Under Rhode Island law, to comply with the requirements of Rule 11, counsel or the party must "make [a] reasonable inquiry to assure that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper

purpose. "The signature of an attorney constitutes a certificate by the attorney that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay." Mariani v. Doctors Associates, Inc., 983 F.2d 5, 7 (1st Cir. 1993). Courts employ a subjective standard to determine whether an attorney associates violated the pleading process. See, e.g., Forte Brothers, Inc. v. Ronald M. Ash & Associates, Inc., 612 A.2d 717, 724 (R.I. 1992).[14]

The Court will, therefore, consider the actions of the respondents in turn, making findings of fact where appropriate and assessing the credibility of the witnesses.

1

Dr. Bellafiore

Dr. Bellafiore's trial testimony was far more telling than his discovery responses. Either he was hiding the complete answers, or he opted to modify his version of the truth far into the trial. By his testimony, Dr. Bellafiore misled the Court, and the Mannings' counsel, into a chasm. If Mr. Manning truly informed Dr. Bellafiore that he refused all anesthesias and the MRI under any circumstances, then Dr. Bellafiore had a clear obligation to disclose that in his discovery answers. See Lett, 798 A.2d at 365 (citing Union Planters Bank v. L & J Development. Co., 115 F.3d 378, 384 (6th Cir. 1997) (holding that a court may sanction a party that is "'the root cause of the violations,'" and that Rule 11 "explicitly allows for the imposition of sanctions upon a party responsible for the rule's violations")). During trial, Dr. Bellafiore used vivid language to recount his recollections, such as "holding a neurological gun to the

[14] The amended Federal Rule 11, which "did away with the old standard of subjective good faith. . . , and replaced it with an objective one of 'reasonableness under the circumstances.'" Kale v. Combined Insurance Company of America, 861 F.2d 746, 757 (1st Cir. 1988). Attorneys and parties must now conduct a reasonable investigation before certifying that his or her pleading was well-grounded in fact and law. See Super. R. Civ. P. 11.

head," and "I remember it when people call me 'Doc,'" "I told him about Ativan," and "I am making him feel so guilty[.]" At trial, Dr. Bellafiore even recalls an apology by Mr. Manning and a specific discussion of intravenous Versed. With such a clear memory of the 1998 conversation in his 2003 trial testimony, it is logical that he recalled much more when he answered interrogatories in January of 2001 than when he testified at his deposition in September of 2001 and when he reviewed his deposition transcript.

Frankly, Dr. Bellafiore's testimony at the contempt hearing bore limited credibility. Obviously, this Court was skeptical of Dr. Bellafiore's credibility at trial.[15] Mindful of its obligation to take a fresh look in evaluating the witnesses at the sanction hearing and with several years intervening, the Court was hopeful that Dr. Bellafiore would be more forthright. In his direct testimony during the sanctions hearing, the physician testified that he became concerned at the hostility during the deposition and chose to "hide behind the protection of my attorney." He sought refuge by noting that Attorney White had instructed him to be short, honest, and direct. See Kelvey v. Coughlin, 625 A.2d 775 (R.I. 1993) (attorneys accompanying clients to depositions must refrain from coaching the witness and from instructing his or her client not to answer questions unless it calls for privileged information). During cross-examination, Dr. Bellafiore cast blame on everyone but himself. First, acknowledging that his deposition testimony indicated he offered "sedation short of general anesthesia," the physician noted his answers were unclear as to whether he offered Ativan or sedation with anesthesia. He

[15] In addition to revealing more alleged facts, his testimony differed from that of the other treating physician. Dr. Bellafiore did not keep complete medical records, never documented the vision loss, and never discussed the potential artery tear with the Mannings. While acknowledging the treatment was Mr. Manning's choice, this Court concluded that Dr. Bellafiore never described different sedation methods with him, and failed to meet the standard of care. See Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660, at *4-5, 8-9, 17 (Super. Ct. Nov. 4, 2005).

then claimed that he reviewed the entire Department of Health letter with Attorney White and described his understanding of the term "maximum sedation." Dr. Bellafiore's use and definition of this term has often changed.[16] Obviously, he had limited desire to respond to or cooperate with pretrial discovery requests.

Dr. Bellafiore's credibility is further impaired by his acknowledgement that he reviewed and modified draft answers to interrogatories, leaving them true, but incomplete. See Super. R. Civ. P. 33(c) (providing that a party has a continuity duty to update and amend answers to interrogatories). Clearly well-prepared for the sanction hearing, his demeanor was similar to that at trial. He continually avoided questions by attempting to rephrase them and claimed he did not have extensive recall in some key areas. For example, while he acknowledged he was extensively prepared for his trial testimony by Attorney White, Dr. Bellafiore was vague about how he was prepared. In attempting to cast blame on Attorney White, he changed his testimony on whether he used the term "maximum sedation" in preparing with Attorney White, but asserted that he defined the term for Attorney White. The Court was again left with doubts as to the physician's credibility and found his testimony very self-serving. Dr. Bellafiore's testimony did not lead the Court to surmise that counsel masterminded the entire shell game.

Dr. Bellafiore testified under oath at the depositions. Dr. Bellafiore signed the interrogatory answers under oath. Even though he may not have been trained in the law, his extensive education and high intelligence establish that he recognized the significance of his oath. He bears significant responsibility for the sanctionable conduct.

[16] In Dr. Bellafiore's affidavit of April, 2011, he defines maximum sedation as "sedation just short of general anesthesia or patient unconsciousness." During his testimony on September 11, 2011, he defined it as the "maximum amount I could give him to sedate him so . . . I didn't have to put him on a ventilator. . . ." See Tr. at 55-56, Sept. 29, 2011.

2

Attorney White

Attorney White's circumstances are different than those of Dr. Bellafiore. There was no showing that he knew that Dr. Bellafiore had such a detailed recollection of the specific events of the key conversation, held moments before Mr. Manning's second stroke. As counsel, Attorney White had a direct obligation to protect the interests of his client. He also has a responsibility to the Court.[17] Michalopoulos, 847 A.2d at 302.

Of course, the involvement of the respective respondents in this failure to disclose was a major issue at the sanctions hearing. In July 2000, Dr. Bellafiore was required to detail the treatment of Mr. Manning to the Rhode Island Board of Medical Licensure and Discipline. On page two of his letter, Dr. Bellafiore writes that Mr. Manning "did not wish to try an MRI again in a non-claustrophobic machine even with maximum sedation." (Dr. Bellafiore Ex. A.) Attorney White assisted the physician with this correspondence. (Dr. Bellafiore Sanction Hr'g., Ex. B.) Four months later, Attorney White assisted in drafting answers to interrogatories propounded by the Mannings. (Ex. D.) Even when reminded of the correspondence to the State Board, Attorney White failed to include the reference to maximum sedation in Dr. Bellafiore's interrogatory answers. See Dr. Bellafiore Ex. E. Attorney White excluded any reference to the "maximum sedation" refusal of Mr. Manning in Dr. Bellafiore's Pretrial Memorandum to the Court of December 2003. See Dr. Bellafiore Ex. G; see also Michalopoulos, 847 A.2d at 302 (explaining that an attorney has a "duty on behalf of his [or her] client to advance all arguments

[17] In a turn of events, the sanctions hearing left the client bidding against counsel over the issue of who should pay. Dr. Bellafiore became the chief protagonist against White & Carlin on this issue. He never revealed any master plan by counsel to deceive the Court, though one would suspect that if anyone knew of such a plan, it would be Dr. Bellafiore.

zealously, he [or she] also has a duty to advance those arguments in good faith, without factual misrepresentations, and after proper consideration").

Throughout the sanction hearing, the firm of White, Carlin and Kelly ("WCK") asserted it had no knowledge of Dr. Bellafiore's alleged offer of conscious sedation[18] to Mr. Manning and Mr. Manning's clear refusal of the sedation. Attorney White testified that he was not told that conscious sedation had been offered to Mr. Manning before the day of his second stroke, and he was not told that Mr. Manning refused the sedation. This, Attorney White suggests, was never discussed with their physician-client, nor was it a major pretrial concern.

While the issue may not have been on the front burner before trial, the Mannings continually suggested that this case presented numerous complexities. Indeed, the suggestion that Mr. Manning never had the opportunity to decide on whether to be placed under heavy sedation was consistently raised by the Mannings prior to the trial. The amended complaint of October of 2001 contained a separate count alleging a lack of informed consent against Dr. Bellafiore. In interrogatories, the Mannings queried Dr. Bellafiore about risks involved in treatment, Mr. Manning's assumption of those risks, and the content of all conversations with Mr. Manning. (Pl.'s Interrogs. 14, 16, 18). During Dr. Bellafiore's depositions, the Mannings' counsel broached this issue once again—specifically asking about an increased level of sedation. (Dr. Bellafiore Dep. 156, 161-62, 168, 181-82, 198, 219, 220.) Dr. Bellafiore's responses were clearly limited to sedation to make Mr. Manning "a little sleepier." Id. at 161-2. He also expressed his concern that more sedation could increase the risk of another stroke. Id. at 181.

[18] Apparently Dr. Bellafiore used the terms "conscious sedation" and "maximum sedation." While these terms may not be typical medical nomenclature, the mere use of either term infers that some sedation was offered. Neither party references the sedation in the discovery, corrects his disclosure, or anticipates the obvious importance of the subject.

Supplemental interrogatories issued in August of 2002 demonstrate the Mannings' desire to delve into the adequacy of sedation and Mr. Manning's sphere of knowledge. Their answer asserted "an MRI/MRA should have been attempted with adequate sedation to make it feasible."[19]

Dr. Bellafiore and his counsel should have recognized that the issue of sedation, and whether Mr. Manning gave informed consent, were very much in issue. They had a duty to disclose facts, when asked. See Super. R. Civ. P. 33(c). Counsel knew, or should have known, of this clear obligation. See Heal, 762 A.2d at 470 ("As officers of this Court, attorneys ought to know whether a pleading is intended to be abusive or to further delay or whether it is based on the good faith belief that the claim has some merit."). Whether or not the attorneys had knowledge of the conversation between Dr. Bellafiore and Mr. Manning is another issue. Attorney White asserts that Dr. Bellafiore never disclosed his conversations regarding sedation with Mr. White. The failure of Dr. Bellafiore to disclose the conversations to his attorney can easily evolve into a question of professional negligence—whether it was the obligation of Dr. Bellafiore to disclose all conversations or Attorney White's obligation to ask him. See Pleasant Management, LLC, 918 A.2d at 218 (counsel must make a "reasonable inquiry to assure that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper purpose"). Shifting the burden of proof to the opposing side (i.e., requiring the Plaintiff to prove the intricacies of the Defendant's relationship with Defendant's counsel) is counterintuitive as the parties cannot easily explore the attorney-client communications of their adversaries.

[19] Plaintiff, Kathryn Manning, Individually, Supplemental Answer to Interrogatory Number 8, Propounded by Defendant, Peter J. Bellafiore, M.D., at 1-2.

Fortunately, the Court does not need to delve far into the professional relationship. The July 26, 2000 correspondence of Attorney Paul Galamaga is quite telling. Attorney Galamaga, a former partner of Attorney White, did not participate at trial but worked on the litigation with Mr. White prior to the trial. In a letter to Norcal, Dr. Bellafiore's medical liability insurer, Attorney Galamaga states:

> "I also inquired of Dr. Bellafiore as to why he had not chosen to do an MRI in the closed machine under some type of anesthesia, and he indicated that he felt that the risks based upon Mr. Manning's presentation far outweighed the benefits. (This seems to be in line with the general thinking.) I then inquired, however, as to why he did not make further efforts to get Mr. Manning an MRI done at another hospital in Rhode Island. . . . Despite repeated questions by myself regarding why he didn't try and get an open MRI somewhere else, Dr. Bellafiore was adamant that that was simply was (sic) not a realistic option at that time." (Pl.'s Hr'g. Ex. 10.)

The five-paged, single-spaced letter by Attorney Galamaga contains no reference to anesthesia concerns or Mr. Manning's refusal of any treatment. Given that the issue had been raised, continued to reappear, and was discussed in early preparations, counsel had an obligation to ensure that Dr. Bellafiore's responses to discovery were full and complete.[20] White & Carlin had an obligation to know what had been disclosed by Dr. Bellafiore previously, and what was in its own file. Indeed, Rule 11 establishes that an attorneys' signature on a court paper:

> "constitutes a certificate by the signer that the signer has read the pleadings, motions, or the paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, is well grounded in fact and is warranted by existing law . . . , and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or need increase in the cost of litigation[.]" Super. R. Civ. P. 11.

[20] The Rules of Civil Procedure require the responses to discovery to be complete, non-evasive, and supplemented if necessary. Super. R. Civ. P. 26(e) and 37(1)(3).

The Court finds that Dr. Bellafiore's counsel was obligated but failed to determine the issues with Mr. Manning's anesthesia and Mr. Manning's concerns about the anesthesia. Although counsel's conduct should be sanctioned, the Court limits the extent of counsel's culpability. There was no showing, nor was it alleged by Dr. Bellafiore, that Mr. White had planned for the new evidence to emerge for the first time at the trial. While this Court is clearly convinced that Dr. Bellafiore bears the lion's share of responsibility for the failure to respond, counsel has some responsibility as well. See International Depository, Inc. v. State, 603 A.2d 1119, 1124 (R.I. 1992) (sanctioning state attorney for "lack of diligence in spite of [the state] having had ample opportunity to prepare for trial" when the attorney failed to update its answers to interrogatories to notify opposing council of potential witnesses).

3

Apportionment of Sanctions

Each of the parties recognized that apportionment could be an issue for this Court, so notice and an opportunity to be heard has been provided. See Michalopoulos, 847 A.2d at 302. In Rhode Island, "[a]bsent extraordinary circumstances, due process requires that an offender be given notice and an opportunity to be heard before sanctions are imposed." Id. Here, on July 19, 2009, this Court itself expressed its concern for the conduct that occurred at trial and its desire to allowed Defendants to enjoy an opportunity to be heard on the issue of sanctions. In fact, the Court deferred to the Defendants as to how they wanted to proceed regarding sanctions. (Tr., July 19, 2011.) Thereafter, discovery was allowed, and a formal hearing was commenced through the fall of 2011 and winter of 2012. Accordingly, each of the respondents received notice, appeared, presented evidence, and was given an opportunity to be heard relative to the sanctions issue. See Michalopoulos, 847 A.2d at 302.

Turning to the issue of how to apportion responsibility, this Court must consider whether the obligations may be joint and several or defer the apportionment to a later proceeding. If the Court found the responsibility for disclosure was simply joint and several, it would fail to address the parties concerns, or mete out a fair determination of liability. There is no doubt that Dr. Bellafiore is primarily culpable. He responded to his attorneys' questions, drafted interrogatory answers, signed answers under oath, responded to deposition questions under oath, verified the transcripts for their accuracy, and uncorked the surprise testimony deep into the marathon trial. However, as shown, Mr. White's conduct is also sanctionable to a lesser extent. Their liabilities are individual and distinct. Accordingly, the Court apportions the responsibility for sanctions to be: Dr. Bellafiore at eighty percent (80%), White and Carlin at twenty percent (20%).[21] See Roberts v. Chevron, U.S.A., Inc., 117 F.R.D. 581, 587-88 (M.D. La. 1987) (sanctioning plaintiffs $46,178.82 and sanctioning plaintiffs' counsel $5000 because of his lesser culpability: plaintiffs filed a second suit for the sole purpose to delay, harass, and prevent another party from recovering on a valid judgment and unnecessarily increased the costs of litigation while plaintiffs' counsel failed to meet their continuing obligation to reevaluate their litigation).

Dr. Bellafiore contends that the charges incurred by the Mannings should be reduced as he was one of three defendants, and the Mannings failed to apportion their expenses among the various defendants. (Dr. Bellafiore Mem. 25, Jan. 9, 2012.) However, it was the sanctionable conduct rooted in Dr. Bellafiore's defense which caused the need for the second trial—and created the chaos of the first trial. The motion for new trial was not granted for the Mannings'

[21] The Court finds that the Mannings did not cause or contribute to their own harm; it was purely the sanctionable conduct of the respondents which caused the harm. While more questions may always be asked in discovery, the Mannings were thorough; it was obvious what they were searching for and the respondents were obligated to reveal the facts.

case against Dr. McNeice or South County Hospital, and those defendants have not been sanctioned. All of the additional costs are incurred as a result of Dr. Bellafiore's defense.

E

The Appropriate Method of Sanctioning and Awarding Attorneys' Fees

In sanctioning, the Court attempts to deter improper conduct and remedy any loss to the non-offending party. Therefore, the Court first considers how to make the Mannings whole;[22] that is, in the position they would be in had the sanctioned conduct not occurred.

The trial justice is vested with some discretion to formulate what he or she considers to be an appropriate sanction with respect to Rule 11 in accordance with the articulated purpose of the rule, which is "to deter repetition of the harm, and to remedy the harm caused." Michalopoulous, 847 A.2d at 300. In cautiously exercising such discretion, this Court is mindful of the guiding words of the Supreme Court of the United States which warned "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). Therefore, "[a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Id. at 44-45.

Here, obviously the Mannings' presentation at trial was based on facts known through counsel's investigations and court discovery. So much of the attorneys' efforts, including the trial itself and some of the preparation costs, were for naught. It is reasonable to require the respondents to pay for all losses incurred from their conduct and the resultant deception. Merely requiring the respondents to proceed through a second trial is an insufficient sanction here; the

[22] The Court indicated post-trial that it would determine "whether the Mannings should be compensated for expert fees, legal fees and other sanctions, for trying this case twice." Manning v. Bellafiore, No. WC-2000-0063, 2005 WL 2981660, at *16 (Super. Ct. Nov. 4, 2005).

conduct being sanctioned necessitated the ordering of the second trial, but much of it was at the Mannings' expense. They retained counsel, experts testified, and much of their case was presented. Ordering the second trial does nothing to make the Mannings whole; it simply burdens them with more expenses and labor.

Our Supreme Court has provided significant guidance in determining the amount of reasonable attorneys' fees:

> "A trial justice determines the reasonableness of the fee by considering the factors enumerated in Rule 1.5. See Colonial Plumbing & Heating Supply Co. v. Contemporary Construction Co., 464 A.2d 741, 743 (R.I. 1983). These factors include the following: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the amount involved and the results obtained; and the time limitations imposed by the client or by the circumstances." Keystone Elevator Co., Inc. v. Johnson & Wales University 850 A.2d 912, 921 (R.I. 2004).

This Court has had occasion to consider what constitutes a proper fee for an attorney's services. In Palumbo v. United States Rubber Co., 102 R.I. 220, 229 A.2d 620 (1967), this Court stated that an attorney's fee should be "consistent with the services rendered, that is to say, which is fair and reasonable." The Court held that:

> "[w]hat is fair and reasonable depends, of course, on the facts and circumstances of each case. * * * We consider the amount in issue, the questions of law involved and whether they are unique or novel, the hours worked and the diligence displayed, the result obtained, and the experience, standing and ability of the attorney who rendered the services. * * * Each of these factors is important but no one is controlling." Id. at 223-24, 229 A.2d at 622-23.

Subsequently, the court adopted Supreme Court Rule 47, the Code of Professional Responsibility, and Disciplinary Rule 2–106—Fees for Legal Services—which provides:

> "DR 2–106. Fees for Legal Services.—(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

> "(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> "(1) The time and labor required, the novelty and difficulty legal service properly.
>
> "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> "(3) The fee customarily charged in the locality for similar legal services.
>
> "(4) The amount involved and the results obtained.
>
> "(5) The time limitations imposed by the client or by the circumstances.
>
> "(6) The nature and length of the professional relationship with the client.
>
> "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> "(8) Whether the fee is fixed or contingent.
>
> "(C) A lawyer shall not enter into an agreement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Colonial Plumbing & Heating Supply Co. v. Contemporary Construction Co., Inc., 464 A.2d 741, 743 (R.I. 1983).

The Rhode Island Supreme Court encourages the trial courts to make specific findings concerning the worth of the legal services provided:

> "We have previously stated the approach that should be taken in determining the award of attorney's fees. This approach involves 'an original evaluation of the worth of the legal services rendered, rather than reviewing for reasonableness a particular fee already reduced to a precise figure.'" Colonial Plumbing & Heating Supply Co. v. Contemporary Construction, et al., 464 A.2d 741, 744 (R.I. 1983) (quoting Young v. Northern Terminals, Inc., 130 Vt. 258, 261, 290 A.2d 186, 189 (1972)). Based on this prior

> holding, we believe that this matter should be returned to the Superior Court for a more detailed exploration of the attorney's-fee award, so that a precise and factually-based determination may be reached regarding the award's reasonableness." Stolgitis v. State, 678 A.2d 1248, 1249 (R.I. 1996).

1

The Contingency Approach

Counsel for the Mannings were retained by the family on a contingency basis. As a result, they are paid, a percentage of the net judgment or settlement, plus expenses.[23] Several times, this Court suggested to counsel that the Plaintiffs should be compensated differently as they retained counsel on a contingency fee basis.

It is common for plaintiffs in Rhode Island personal injury, medical malpractice, and wrongful death actions to compensate their counsel on a contingency fee basis whereby the attorneys receive an agreed percentage of the eventual recovery. Such an arrangement is beneficial to those who are unable to bear the initial costs of counsel, experts, and other litigation expenses. Rule 1.5 of the Rhode Island Rules of Professional Conduct requires that all attorneys fees be reasonable, but recognizes that fees are either fixed or contingent.[24] Counsel for

[23] The Court presumes this is the contingency but is not aware of the exact percentage or the precise terms of the agreement with the Mannings.

[24] Numerous federal statutes award fees weighted for contingency fee arrangements. This includes the Social Security Act, 42 U.S.C. § 406(a)(2)(A) and the Veterans' Benefits Act, 38 U.S.C. § 5904(d)(1). The United States Supreme Court recognized contingency fees in Stanton v. Embrey, 93 U.S. 548, 556 (1877) and the American Bar Association formally approved of such fees in 1908. As Justice Ginsberg noted in Gisbrecht v. Barnhart, 535 U.S. 789, 803 (2002): "Contingent fees, though problematic, particularly when not exposed to court review, are common in the United States in many settings. Such fees [are] perhaps most visible in tort litigation. . . ." The same decision referenced how contingency fee agreements may be accepted as a basis for determining fee awards:

> "Courts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have

defendants when not pressing counterclaims or other recovery, are often retained on a fee for time dedicated plus costs. In such instances, the attorneys' fees are based on the time they dedicate to the matter, and they pass on the costs which they incur.

Obviously, these fee arrangements are strikingly different. A firm dedicated to business clients, paid by time dedicated plus costs incurred, must track the time of the attorneys and the expenses in a tracking system by each file or client. This is no easy task where an attorney may be focusing on a variety of client matters during a single day. In a contingency based practice concentrating on plaintiffs' personal injury cases,[25] tracking time dedicated to a particular file is often a wasted endeavor. Unless such a firm anticipates requesting reimbursement of attorneys' fees, time tracking would appear to be of no use. Here, the Mannings' counsel were left to

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> appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved." See, e.g., McGuire v. Sullivan, 873 F.2d 974, 983 ('Although the contingency agreement should be given significant weight in fixing a fee, a district judge must independently assess the reasonableness of its terms.'); Lewis v. Secretary of Health and Human Services, 707 F.2d 246, 249-250 (C.A. 6, 1983).
>
> * * *
>
> "The courts below erroneously read § 406(b) to override customary attorney-client contingent-fee agreements. We hold that § 406(b) does not displace contingent-fee agreements within the statutory ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those agreements. Accordingly, we reverse. . . ." Gisbrecht v. Barnhart, 535 U.S. 789, 808-09, 122 S.Ct. 1817, 1828-29 (2002).

[25] The firm of DeLuca & Weizenbaum concentrates on personal injury cases and is usually retained on a contingency basis. (Testimony of Atty. Boren, Oct. 20, 2011.) See also the firm's website at http://www.delucaandweizenbaum.com/Medical-Malpractice/FAQ-About-Medical-Negligence.shtml, which states: "Our firm handles all litigation cases on a contingency fee basis. You will only pay attorneys fees as a percentage of what we help you recover in a negotiated settlement or jury award. If you don't recover money damages, you won't pay lawyer fees. We will explain our contingency fee structure and, if possible, associated costs during your initial free consultation."

recreate their time: not just the two months of trial, but three or more years of preparation time. It would be more logical to compensate them in accord with their agreed method of compensation, a percentage of the award of which they were deprived. See, e.g., Mackler Products, Inc. v. Turtle Bay Apparel Corp., 153 F. Supp.2d 504 (S.D.N.Y. 2001) (where aggrieved party had a contingency fee agreement with its attorney and therefore did not incur additional attorney's fees as a result of perjury suborned by opposing attorney, which extended and multiplied the proceedings, yet the court found compensatory sanction against the opposing attorney appropriate); Geler v. National Westminster Bank USA, 145 F.R.D. 25 (S.D.N.Y. 1992) (Attorney's fees awarded under Rule 11, despite contingency fee agreement, because such sanctions are "not primarily aimed at reimbursing the victim for whatever extra funds he was required to expend because of the infraction, but to disciplining the violator who filed papers in court without having made a proper inquiry into the facts or law.").

Another sharp distinction between the two fee arrangements is the allocation of risk. With the time plus costs method, attorneys rely on the faithfulness of their own clients paying them regularly. The contingency method has greater risk: compensation is never maximized unless the litigation is highly successful. When litigation fails completely or if a lower verdict or settlement results, attorneys may receive less than they hoped. Presumably, such a firm needs substantial successes to balance out cases with lower returns. This is an important distinction when applied to the case at bar. The Mannings' attorneys had appropriately pursued pre-litigation investigation, discovery, and weeks of trial at their own expense, assuming the trial would mirror the discovery. Based on that scenario, they risked their own investments of time with the expectation that recovery would be significant. Their resultant fees would also be substantial. When Dr. Bellafiore's testimony changed, the likelihood of the Mannings' recovery

was dashed through no fault of the Mannings or their attorneys. Survival of the case into a second trial was the only means by which the Mannings, or their counsel, could hope to receive what they originally anticipated.[26]

Compensating Plaintiffs' counsel on the time-plus-expense model ignores the reality of the world of the contingency attorney. It fails to consider the loss of their investment and the prospect of high returns from a substantial success.[27] Of course, it also ignores the frustration and emotional investment of the plaintiffs themselves who are left with the prospects of reliving another trial. The contingency model extends legal services to those who are unable to pay upfront, while imposing risk on the attorneys' income. Accepting such risk in order to extend legal services to the needy is commendable. When a contingency arrangement is obvious in operation but short-circuited by sanctioned conduct, this Court believes that application of a similarly designed fee model would be the more appropriate approach. The Mannings should recover attorney's fees based on the award they would have received at the first trial, had the case been tried fairly. See Mackler Products, Inc., 153 F. Supp.2d at 510-11.

The instant case provides an excellent example. The trial endured for weeks before the plaintiffs' counsel could even begin to expect that all of their work would be rendered useless. By then, depositions in various locations had been completed, experts had been retained and prepared, opening statements had been given, economic analyses had been calculated, and

[26] Of course, the contingency structure left the Plaintiffs and their counsel with no income after the first trial and no more upfront money for the second trial. A query is whether the Mannings or their counsel could afford a second trial.

[27] A short example may assist. Pursuant to G.L. 1956 § 10-7-2, a minimum recovery in a wrongful death action is $250,000 (though the Mannings claimed far more in damages). If the Mannings' counsel were to receive just a one-third fee of the minimal statutory recovery, their fee would be about $83,333. In his closing statement, Attorney DeLuca suggested a verdict of over $5,000,000 to the jury, which would result in a significantly higher, risk-based fee. The numbers are very high and have no real relationship to the customary hourly rate in the plaintiffs' marketplace, or the amount of time the attorneys recorded in their bill-tracking systems.

experts had been flown into Rhode Island—all in dedication to this trial. Trials take tremendous effort, and extended trials are Herculean tasks: from the preparation of timelines on presentation boards to the outline of examination of the principal witnesses; from the compilation of the medical exhibit books, to the arrangements to serve subpoenas; from learning complicated medical phraseology; and to undertaking depositions of doctors with special expertise in different cities. An enormous amount of time, effort, money, and dedication is dedicated upfront.

When all is expended for naught, because of sanctionable conduct, a decent respect for the efforts and preparation of the harmed party prompts the Court to consider what has been lost. It is the attorney who must start again, and retry the case. It is the attorney, who has already taken considerable risk with the contingency fee, who is left to expend the same effort, costs and time to go to trial once again. Compensating the Plaintiffs in accord with the contingency award expected by their attorneys would appear to be far more consistent with their actual losses. Requiring Plaintiffs' counsel to try the case once again necessitates a substantial loss to Plaintiffs' counsel which could best be made whole by restoring the lost expectation. See Lett, 798 A.2d at 368 ("These [Rule 11] sanctions have a twofold purpose: to deter repetition of the harm, and to remedy the harm caused.").

Here, we have a fair idea of the value of counsels' effort in the first case. The first trial, though it eventually ended with an order for a new trial, also yielded real results. After the trial, appeal and order for new trial, settlement negotiations began anew and bore fruit. The Mannings recovered monies from Dr. Bellafiore's representatives and presumably their counsel earned a fee. However, that recovery and resultant fee should not be taken as the basis for lowering the sanctions award. To do so would be to place the sanctioned party in the same position it was in,

had it not committed the offending conduct. To appropriately sanction a party, and award reasonable expenses to attorneys who had taken the case on a contingency-risk basis, the Court should logically look first to the contingency fee arrangement and use that as the basis for determining the amount of the sanction. See, e.g., Alvarado v .Cassarino, 706 So.2d 380 (Fla. 2d DCA 1998) (explaining that in the context of a contingency fee case warranting award of reasonable attorney fees to a prevailing counsel, the trial court may add to the lodestar figure the contingency risk factor or subtract from the fee based upon the results obtained).

In the instant case, however, the Court is prevented from doing so. The contingency fee agreement is not in evidence, and the Court cannot simply infer its terms. Plaintiffs failed to introduce the agreement, even though the Court suggested the possibility of a sanction based on the contingency agreement.[28] Accordingly, the Court is left to apply well-established law and struggle with reviewing time records for attorneys who had no reason to maintain contemporaneous time records and, frankly, had much more work to do. See, e.g., Monaghan v. SZS 33 Associates, L.P, 154 F.R.D. 78 (S.D.N.Y 1994) (attorneys' fees awarded as a sanction under Rule 11, despite the fact that the attorneys were handling the case under a contingency fee contract).

Although this Court suspects that a contingency-factored model would be more equitable here and would result in a higher return to the Mannings, the Mannings did not seek such an award here. All parties concur that if attorneys' fees are to be awarded, a time-plus-expense approach should be utilized, and the Court will therefore utilize such.

[28] Not only did the Court ask counsel at hearing whether the Plaintiffs should be compensated on a percentage basis, but the Court continued to follow this tack. In its Order of December 2011, the Court stated: While not required, the Court continues to welcome briefing on the issue of how plaintiffs' counsel should be compensated if they are compensated, as they appear to have been retained by plaintiffs on a contingency fee basis."

2

The Time-Plus-Expense Approach

One goal of sanctions is to place the Mannings in the position they would have been in had the sanctionable conduct not occurred. This, of course is an impossible task. When the jury heard information that was not known in discovery, the harm had already occurred and could only be corrected through a new trial. The sanction, therefore, will focus on the costs and expenses incurred for the first trial because the sanctionable conduct made those costs and expenses futile. This method should reimburse costs incurred by the Mannings for the first trial, and a fair award of attorneys' fees for the first trial.[29]

Some of those expenses were unique to the first trial and could not be reused at a second trial. For example, while the Mannings' counsel would be able to re-use certain demonstrative aids, such as magnified medical charts, it could not re-use an airline ticket already used by an expert to testify at the first trial, or the expense of the expert's time at the first trial.

Dr. Bellafiore argues that because counsel for the Mannings did not maintain contemporaneous hourly bills, the Court should significantly discount any monetary request. (Dr. Bellafiore Mem. 2, 5, 7, Jan. 9, 2012.) This Court notes the Mannings' attorneys did not keep contemporaneous time records because they did not bill by time (and did not anticipate that

[29] While the Rhode Island Supreme Court has indicated that the trial courts have considerable discretion in determining the appropriate sanction—Malinou v. Miriam Hosp., 24 A.3d 497, 506 (R.I. 2011); Ahmed v. St. Joseph Health Services of Rhode Island, 22 A.3d 380, 381 (R.I. 2011)—it has set no ironclad formula. This approach is logical because issues involving sanctions reach the Court in different contexts. The Court may be attempting to encourage compliance with prior orders (e.g. Town of Coventry v. Baird Properties, 13 A.3d 614 (R.I. 2011)), or promptly penalize an ongoing trial or discovery violation. In this action, with the underlying action resolved, the Court has the opportunity to consider the appropriate sanction in more detail. Further, the parties here appear to be in agreement that a reimbursement compensating Plaintiffs' counsel for their time is an appropriate method of determining a sanction.

sanctions would result). To penalize counsel for not keeping time records—records they would normally have no use for—is simply unfair.

3

Calculations of the Time, Expenses, and Sanctions

Detailed time and expense records were submitted by the Mannings as exhibits 18A and 19. They provide sufficient descriptions of the time and labor dedicated to the case, and the work which was done. The time records were not maintained contemporaneously for the reasons discussed above. However, time was rounded down, and the Mannings' counsel employed a conservative approach in charging for only what was unquestionably rendered useless by the sanctionable conduct and what was clearly recalled by counsel. With this information, the testimony of counsel, and the Court's recollection of the trial and hearings, the Court is confident that it can determine some, but not all, of the work performed, which was necessary but rendered useless as a result of the need for a retrial.

Attorney Boren was found to be highly credible. He appeared highly qualified on the subject of his testimony, answered all questions clearly and directly, was never argumentative, and very cooperative. He described his intricate understanding of the fees charged by Rhode Island attorneys in various fields with various experience. He validated this analysis by detailing his substantial knowledge of fees charges by other attorneys. He described the fine reputation of Attorney DeLuca and his extensive experience as a medical malpractice attorney. He acknowledged that he did not know Attorney Weizenbaum as well, but described her reputation and experience to the best of his ability. Attorney Boren's analysis established to the satisfaction of the Court that the hourly rate for attorneys of the caliber of the Mannings' trial attorneys would have charged a rate of $300 to $350 per hour. With his testimony, the affidavits in

evidence, and the time and expense calculations in evidence, it was established that much of the time and expenses outlined were customarily charged in the locality for such work, in accord with the experiences, reputations, and abilities of the Mannings' attorneys, were customary and were reasonable under the circumstances. See In re Matter of Schiff, 684 A.2d 1126, 1131 (R.I. 1996) (explaining that the determination of whether attorney's fees are reasonable requires particular facts in the form of affidavits or testimony that are "sufficient to satisfy the court, or indeed a client, that the hours expended were actual, non-duplicative and reasonable . . . and to apprise the court of the nature of the activity and the claim on which the hours were spent").

The Court has reviewed each of the time and expense runs in detail and specifically finds:

A. In regard to the trial expenses, several of the requested costs for preparing the exhibits are rejected as they are reusable. Costs incurred for expenses directed at other Defendants (for example, the expert expenses for the internal medicine physician) have been excluded.[30] The Court allows $38,398.53 for total trial expenses. This includes the expenses incurred for Dr. Hanley, Dr. Gelber, and one-half of the costs of Dr. Wright. It includes all the costs of travel and meals incurred at trial. Those expenses were incurred by the Mannings and rendered unnecessary as a result of the sanctionable conduct.

[30] Trying to extract one defendant out of the three is no easy task. However, the Court is convinced that had the litigation proceeded against the other defendants and not Dr. Bellafiore, the case would have resolved promptly or resulted in a shorter trial.

B. In regard to the attorneys' fees for attorney work performed in trial preparation, the Court allows twenty-three hours of attorneys' work pretrial which was rendered unnecessary as a result of the sanctionable conduct. Although the Court suspects that much more time was dedicated by the Mannings' attorneys to preparing the trial against Dr. Bellafiore, these are the only hours which the Court can determine, from the evidence submitted, which were rendered useless or redundant as a result of the sanctionable conduct.

C. The trial continued for thirty-three trial days, for a total of 217 trial hours.[31] This is based on twenty-six trial days at seven hours per day and seven trial days at five hours per day. The Mannings requested compensation for ninety-nine hours of attorneys work performed at trial. The Mannings suggest that just six hours per trial day should be compensated, even though the trial took place an hour away from their home office, each attorney was consistently well-prepared and available each morning, and the attorneys were required to be available at the courthouse for at least seven hours on most days. The attorneys were present in the courthouse, dedicated to this case, even when the trial was interrupted by the Court's consideration of other matters. The Court has no doubt that

[31] Fees are apparently not requested for out-of-court work during the trial, or for similar issues argued at the appeal.

the attorneys continued their work each evening and weekend—not just in scheduling the next days' witnesses, but in re-preparing for examination of each witness in light of the ongoing changes in a dynamic trial.

D. The Mannings suggest that the sanction renumerate only one of their attorneys at trial, though Attorneys DeLuca and Weizenbaum were there at almost all times. Each of them examined witnesses, and they clearly worked as a team, listening attentively to the testimony and offering advice to the examining attorney. They each participated in legal arguments to the point where the Court requested that only one attorney argue each issue. The respondents who are being sanctioned were well aware that two attorneys were preparing for and participating at trial. The Court therefore allows one attorney to be compensated for all of his or her time and the other attorney to be compensated at fifty per cent of his or her time for a total of 325.5 trial hours.

E. The Mannings further suggest that the bill be reduced by one-half as there were two other Defendants at trial. The entire trial became jumbled as a result of the sanctionable conduct of the respondents. The Court's review of trial material concluded that a significant majority of the time at trial was dedicated to the case against Dr. Bellafiore. To lessen the

sanction simply because other defendants were once involved, is to reward the wrongdoer. The Court declines to do so.

F. There is no doubt that substantial time out of Court was dedicated not only to the trial, during the trial, but also endured after the trial during the appeal. The Mannings do not request compensation for this time, at an obvious discount to the sanctioned respondents.

G. The Mannings request compensation for thirty-three and one-half hours which their attorneys dedicated to the sanction proceedings. Although Exhibit 19 is a full exhibit, the Mannings should have maintained contemporaneous time records for the sanction proceedings, with hours more appropriately divided.[32] There would be no need to re-create time records or estimate prior time records as counsel should have recognized, by January, 2011, the need to track hours dedicated to this case. The Court therefore awards a total of 25 hours to the Mannings for their work after January 1, 2011.

H. As the range of customary hourly fees for work of this type for counsel of the significant reputation, experience and ability as Attorney DeLuca and Attorney Weizenbaum,

[32] As Justice Selya recently stated when applying the Lodestar analysis for attorneys fees, "Appropriate supporting documentation includes counsel's contemporaneous time and billing records and information establishing the usual and customary rates in the marketplace for comparably credentialed counsel." Spooner v. EEN, Inc. 644 F.3d 62, 68 (C.A.1 (Me.), 2011) (citations omitted).

Attorney Boren concluded fees of $300 to $350 would customarily be charged. The Court therefore approves an hourly rate of $300 per hour.

I. The hours awarded 25 + 325.5 + 33.5 equals 382 hours. These 382 hours at $300 per hour equal $114,600. Expenses of $38,398.57 are awarded. The total sanction award is $152,998.57.

V

Conclusion

Sanctions totaling $152,998.57 shall be paid by the Respondents to the Plaintiffs. Eighty percent (80%) of such sanctions shall be paid by Dr. Bellafiore. Twenty percent (20%) of such fees shall be paid by White and Carlin.

Counsel shall submit the appropriate Order for entry.