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FEB 17 2016

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

<p>JEROME WILSON, et al.,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>IHC HOSPITALS, INC., et al.</p> <p>Defendants.</p>	<p>RULING AND ORDER ON PLAINTIFFS' MOTION FOR SANCTIONS</p> <p>Civil No. 150100044</p> <p>Date: February 17, 2016</p> <p>Judge Christine S. Johnson</p>
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This matter is before the Court on Plaintiffs' request for sanctions. An evidentiary hearing was conducted by the Court on January 21-22, 25, and 28, 2016. Plaintiffs were present with counsel, Mr. Roger P. Christensen, Mr. Joseph W. Steele, and Ms. Patricia Kunig. Defendants were present through counsel, Mr. Steven C. Bednar and Mr. John T. Nelson. Having considered the evidence presented, and being advised in the governing law and applicable rules, the Court now grants Plaintiffs' motion, based upon the following:

BACKGROUND

The present controversy is based upon allegations of medical malpractice. Defendant IHC Hospitals, Inc., ("IHC") was previously

represented by Ms. JoAnn Bott (“Ms. Bott”).¹ In advance of trial, Ms. Bott engaged in ex parte meetings with Dr. Richard Boyer (“Dr. Boyer”), a treating physician. The extent of these meetings were not disclosed at the time of trial, and Plaintiffs presently contend that Dr. Boyer’s expert opinion was altered as a result of Ms. Bott’s conduct. Other irregularities occurred during trial, including multiple violations of the trial court’s order in limine precluding reference to collateral source payments. At the conclusion of trial, the jury entered judgment on a special verdict finding that IHC had not been negligent. Plaintiffs appealed that verdict, and the Utah Supreme Court reversed. *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, 289 P.3d 369. This matter has been remanded to this Court for a new trial based upon the collateral source violation, as well as for an evidentiary hearing to investigate Ms. Bott’s ex parte meetings with Dr. Boyer. The following findings and conclusions address the latter.

FINDINGS OF FACT

Credibility Findings

1. Ms. Bott was called as a hostile witness by the Wilsons. Ms. Bott exhibited a guarded and defensive demeanor, reluctant to offer answers that would be unfavorable to IHC’s position. For example, she fiercely defended IHC’s tactics at trial, chiding the Wilsons’ attorney regarding the jury’s finding of no negligence. She refused to acknowledge that there was any tactical advantage in obtaining a favorable opinion from a treating physician, as opposed to retaining a “hired gun” expert. She also denied that a physician might change his or her opinion after meeting with an attorney. This seems naive at best, and disingenuous at worst. She also maintained the intractable position that *Debry* was limited to its facts, despite the remand order on this case from the Utah Supreme Court which clearly held that *Debry* was not limited and governed the parties’ conduct here.

2. Ms. Bott also appeared to have a selective memory at times. She had extremely specific recollections regarding a separate medical malpractice case filed by the Butterfield family, even correcting counsel if she believed that he

¹During the time these events transpired, Ms. Bott used the surname Carnahan. She has since changed her name and goes by JoAnn Bott. In order to avoid confusion, the Court will refer to her as Ms. Bott.

had misstated the record on that matter. However, the particulars of some aspects of this case eluded her. For example, she didn't recall that IHC took the position at trial that Dr. Boyer was more credible as an expert because he was the treating physician—a point which the transcript reveals was given significant emphasis. She did not recall that a court order was required to compel Dr. Boyer's appearance at trial—an unusual fact plainly documented in the record. She recalled almost nothing regarding her December 2001 meeting with Dr. Boyer. These lapses appear to be more convenient than genuine.

3. All things considered, Ms. Bott at times exhibited a lack of candor.

4. Dr. Boyer was called as an adverse witness by the Wilsons. Dr. Boyer had a rather flat affect, rarely expressing much emotion. The exception to this would be Dr. Boyer's apology to the Wilson family for the ex parte meetings with Ms. Bott. At that point, Dr. Boyer displayed what appeared to the Court to be genuine emotion and sincere remorse for any harm caused to them. Otherwise, Dr. Boyer's demeanor was devoid of emotion. This may be attributable to his reluctance to testify at all. Indeed, he acknowledged a certain animosity towards the legal system generally, believing it to be a hindrance to the medical profession.

5. Notwithstanding his reluctance to testify, Dr. Boyer did generally appear to offer truthful testimony to the best of his recollection, although some admissions were grudgingly offered. For example, Dr. Boyer eventually acknowledged that clinical information conveyed to him by Ms. Bott in an ex parte meeting made its way into Jared's medical record when he dictated an addendum to Jared's MRI. However, Dr. Boyer did have difficulty offering a consistent description of his motivations in making that addendum. He first insisted that it was made for the sole purpose of assisting in Jared's care, but was unable to satisfactorily explain why that same interest would not have directed a second addendum when he concluded that there were signs of dysplasia in both hemispheres of Jared's brain—a change which carried significant medical implications. Dr. Boyer finally conceded that he dictated Jared's addendum, at least in part, for use in litigation.

6. Dr. Boyer at times appeared quite entrenched in his beliefs. For example, Dr. Boyer steadfastly maintained his belief that disclosures he made regarding his patient were proper, despite being confronted with his obligations under

HIPPA, his Hippocratic oath, and his prior standard procedure in obtaining releases. He did, however, acknowledge a potential bias in his opinion in that his income has always been closely linked to IHC, and at the time this case transpired, approximately 90-95% of his business came from IHC.

7. Ms. Kirsten Weixler, an IHC risk manager, was called by the Wilsons. Ms. Weixler gave full, descriptive answers and did not appear guarded or defensive in any way. She presented a genuine and candid demeanor. The Court finds her to be a credible witness.

8. Mr. Allen Young, an attorney, was called by the Wilsons. Mr. Young had a clear recollection of the relevant facts and appeared to testify truthfully to the best of his recollection. He presented with a candid demeanor and provided a coherent account of his view of the events which transpired in a separate medical malpractice case which also involved Ms. Bott and Dr. Boyer. The Court finds him to be a credible witness.

9. Julia M. Houser's testimony was presented through review of her deposition. Ms. Houser is also an attorney, and an associate of Ms. Bott. The Court did not have an opportunity to observe her demeanor; however, no issues regarding her credibility were raised and the Court finds her testimony as a fact witness to be credible.

10. Mr. Jerome Wilson was called by the Wilsons. He presented a candid and genuine demeanor, and the Court finds his testimony to be credible.

Other Findings of Fact

11. In April of 1995, Plaintiffs, Jerome and Leilani Wilson (the "Wilsons") were expecting the birth of their son, Jared ("Jared"). Unfortunately, Mrs. Wilson suffered various complications which resulted in Jared's premature delivery on April 20, when he was approximately 24-27 weeks gestational age.

12. On August 25, 1995, Dr. Ronald Stoddard ordered an MRI of Jared's brain. This MRI, read by Dr. Douglas Wing, concluded that "the brain shows severe hydrocephalus, with marked dilation of the entire ventricular system. The pattern implies blockage of CSF flow at the basal cisterns of the skull." No dysplasia was noted.

13. Dr. Boyer agreed at the time of the evidentiary hearing on this matter that dysplasia is not visible in the 1995 MRI.
14. On May 28, 1996, a CT of Jared's brain was ordered by Dr. Anna Bodnar. This CT was read by Dr. Boyer. Dr. Boyer concluded that there were abnormalities "consistent with periventricular leukomalacia and bilateral cerebral atrophy. The possibility of a cortical dysplasia cannot be excluded, though I suspect the cortical abnormality reflects the overlying subdural collections."
15. On August 12, 1996, an additional CT scan was ordered by Dr. Marian Walker. The scan was interpreted by Dr. William Nixon, who found: "No acute problem noted. Interim clearing of left subdural fluid and decrease in the size of the chronic right subdural hematoma." No dysplasia was noted.
16. On November 11, 1996, a third CT scan was ordered by Dr. Walker. This scan was again interpreted by Dr. Nixon. He noted: "Follow-up examination continues to show an abnormal pattern with bilateral cerebral atrophy (right greater than left), subdural fluid (right greater than left) and absence of much of the left cerebellar hemisphere. Anomalous development (cortical dysplasia) in the right cerebral hemisphere is suspected."
17. On May 28, 1999, the Utah State Bar's Ethics Advisory Committee (the "Committee") issued an ethics advisory opinion, numbered 99-03. That opinion concisely states: "No ethical rule prohibits ex parte contact with plaintiff's treating physician when plaintiff's physical condition is at issue." The analysis to that opinion, in relevant part, elaborates as follows:

It is neither uncommon nor improper, under the Utah Rules of Professional Conduct, for an attorney to make ex parte contacts with witnesses involved in a controversy, including witnesses for the adversary. When that witness is a medical doctor, especially one who has treated the plaintiff in litigation, concerns may be raised about the physician's and both lawyers' ethical responsibilities to maintain confidences and to abide by other professional responsibilities.

Although there may be a potential for ethical misconduct arising out of such a contact, such misconduct can be separately addressed and remedied in accordance with the appropriate rules.

Both fact witnesses and experts may be in possession of confidences of the opposing party, or work product of that party's lawyer, about which it would be improper to inquire. See *American Protection Insurance Co. v. MGM Grand Hotel-at Vegas*, 748 F.2d 1293, 1301 (9th Cir. 1984), holding that "A corollary of the attorney's duty not to reveal confidences of a client is the duty not to seek to cause another to do so."

Using an ex parte contact to attempt to obtain information protected by the physician-patient privilege would violate Utah Rules of Professional Conduct 3.4(c), 4.4, and 8.4(d).

Overreaching by counsel in the ways discussed above is prohibited by ethical rules, as is similar improper influence on the part of plaintiff's counsel.

18. Ms. Bott was aware of 99-03.

19. In her testimony at the evidentiary hearing on this matter, Ms. Bott acknowledged that it would be unethical for a lawyer to encourage a doctor to change his or her medical opinion, and that the Utah Rules of Professional Conduct would not permit such conduct.

20. 99-03 was not without controversy, and reconsideration of it was requested shortly after it was issued. The Committee held a hearing where arguments were presented by those who supported it, and those who did not. On October 29, 1999, the Committee approved 99-03R, which affirmed the original opinion. The analysis of 99-03R provides, in relevant part:

As the requesters note, certain courts have adopted the public policy position that the protection of the physician-patient privilege can best

be served by prohibiting ex parte contact between defense counsel and treating physicians. Other courts, however, have weighed the physician-patient privilege against the competing policies of facilitating the uncovering of truth, facilitating settlements, conserving judicial resources and decreasing litigation costs and have ruled in favor of allowing ex parte contacts.

The Committee does not have authority to decide between the competing public-policy positions at issue here. We can only apply clearly articulated judicial policies and clearly drafted statutes to the Utah Rules of Professional Conduct. Once the Utah courts or the Utah Legislature has spoken definitively, we can follow their lead.

21. Ms. Bott was aware of 99-03R, its analysis, and the circumstances surrounding its release.
22. On March 9, 2000 the Utah Court of Appeals issued its decision in *Debry v. Goates*, 2000 UT App 58, 999 P.2d 582. *Debry* held that physicians and therapists have a duty of confidentiality which was separate and apart from the physician-patient privilege. The *Debry* Court directed that physicians and therapists should notify a patient before any ex parte communications, even where those communications might fall under the exception to the physician-patient privilege.
23. Ms. Bott was aware of *Debry*. She further acknowledged that she was aware that attorneys who practiced in this area of the law were regularly meeting and discussing the impact of *Debry*, and whether it impacted 99-03 and 99-03R.
24. Approximately one month after *Debry* was issued, Judge Gary Stott of the Fourth Judicial District Court made a ruling in an unrelated IHC case. See *Sant v. IHC Hospitals, Inc.*, Civil No. 980406090. Plaintiff's counsel had directed letters to treating physicians directing them not to speak with defense counsel, based upon the controversy detailed *supra*. IHC objected to these letters and filed a motion requesting that they be withdrawn. Ms. Bott was counsel for IHC at a hearing on the motion, which was conducted just four days after *Debry* was issued. Neither side presented *Debry* as authority, although Ms. Bott acknowledged that she was aware of it at the time of the hearing. Judge Stott

did not cite to *Debry* in his ruling, which held in favor of IHC. *See Order*, Civil No. 980406090, dated April 10, 2000.

25. *Debry* gave rise to a further request to review 99–03 and 99-03R. In a letter dated June 15, 2000, the Committee declined to modify the earlier opinions. The Committee stated:

The *Debry* Court did not set forth a prescription for a specific course of action in every case by physician; did not modify the attorneys responsibilities under the Utah Rules of Professional Conduct; and was not inconsistent with the reasoning and conclusions reached in opinions 99–03 and 99–03R.

26. Ms. Bott was aware that the Committee had again been asked to revisit 99-03 and 99-03R because of *Debry*, and she was informed of the Committee’s decision not to modify the earlier opinions. She was further aware that ongoing discussions regarding this issue continued in the legal community.

27. During this same time, Dr. Boyer was asked to review a CT scan for a separate child, Kylie Butterfield. In a report dated July 7, 2000, Dr. Boyer offered the following impression: “Newborn head CT shows intracranial hemorrhage and focal areas of ischemia and both cerebral hemispheres, consistent with both mechanical and hypoxic/ischemic injury to the brain.”

28. At the evidentiary hearing on this matter, Dr. Boyer agreed that a “hypoxic/ischemic injury” refers to low oxygen and low blood supply. He conceded that this is consistent with birth asphyxia.

29. Based largely on Dr. Boyer's findings in this scan, a lawsuit was ultimately filed alleging medical malpractice in the delivery of Kylie Butterfield. Mr. Allen Young (“Mr. Young”) served as counsel in that case (the “Butterfield Case”).

30. On March 8, 2001, the Wilsons filed suit against IHC alleging medical malpractice in Jared’s birth. Their theory of the case was generally alleged in the Complaint. The Wilsons described that clear indications of infection were present during Leilani’s hospitalization, and that her health care providers failed to properly treat that infection. *See Complaint*, ¶6. The Wilsons believed

that the infection reduced blood flow to Jared's brain, thus resulting in his brain injury. Although cortical dysplasia, a congenital abnormality, had been suggested in two prior CT scans of Jared's brain, it had not been noted in other imaging studies, including the 1995 MRI, and there had been no diagnosis for that condition. The Wilsons further believed that Jared was at approximately 27 weeks gestational age, and that he had a good chance for normal development, had it not been for IHC's negligence.

31. Approximately nine months later, on December 17, 2001, Dr. Boyer met ex parte with Ms. Bott (the "2001 Meeting").

32. At that time, Dr. Boyer had previously met with Ms. Bott on approximately 5-10 separate and unrelated cases, including the Butterfield Case. Dr. Boyer understood during all such meetings, including those regarding the Wilson's case, that Ms. Bott was an attorney representing IHC. Because it is Dr. Boyer's practice not to initiate contact with attorneys, he testified that he believed Ms. Bott initiated all meetings with him. Ms. Bott concurred in that testimony.

33. Dr. Boyer took notes during the 2001 Meeting. Those notes reflect that he billed IHC for one half hour. They confirm that Ms. Bott was present and discussed IHC's theory of the case with Dr. Boyer, including her position that Jared was at approximately 24-25 weeks gestational age as opposed to 27, that Mrs. Wilson was anemic and had refused a pre-delivery transfusion that may have allowed for better blood flow to Jared, and that Jared had cortical dysplasia. Dr. Boyer's notes also document that Ms. Bott informed Dr. Boyer that the Wilsons were a "wealthy Utah Co. family" and that Dr. Barry Pressman would be testifying for plaintiffs. Dr. Boyer references the reports from the previous images of Jared's brain, and details the following impressions:

- 1) Don't need infection to explain finding
prematurity + IVH [intraventricular hemmorage] + PVL
[periventricular leukomalacia] + anemia sufficient
- 2) ? cortical dysplasia

34. Dr. Boyer agreed that he accepted Ms. Bott's representation that Jared was 24 to 25 weeks gestastional age. He also agreed that the impressions from

his notes in the 2001 Meeting are the product of, at least in part, the clinical history detailed to him by Ms. Bott, and that Ms. Bott failed to indicate to him that some of these representations were contested issues. He also acknowledged that his impressions, as detailed in his note, would be helpful to IHC's position.

35. The note from the 2001 Meeting concludes that Dr. Boyer needed to review the imaging from Utah Valley Regional Medical Center, as well as an MRI that may have been performed out of state.

36. Following the 2001 Meeting, Ms. Bott directed a letter to Dr. Boyer on December 28, 2001. Her letter states: "Enclosed are some additional films I received from Utah Valley Regional Medical Center. After you have reviewed the films, I would appreciate your giving me a call to discuss your findings."

37. On January 12, 2002, Dr. Boyer made an additional note reflecting that he reviewed the films Ms. Bott had forwarded to him, including an MRI taken at UVRMC. IHC was billed one quarter hour for his time. Dr. Boyer's notes do not reflect that Ms. Bott was present. Dysplasia was not observed in this MRI, but Dr. Boyer's notes mention interventricular hemorrhage in the left occipital horn. His concluding impression is that there is probable IVH, hydroencephaly, and PVL with "nothing specific for infection."

38. Meanwhile, the Butterfield Case was proceeding. Ms. Bott was counsel for IHC in that matter as well. Ms. Bott's office drafted an affidavit for Dr. Boyer for use at a pre-litigation panel before Utah's Division of Occupational and Professional Licensing ("DOPL"). Dr. Boyer approved the affidavit with his signature on August 22, 2002 (the "Boyer Affidavit").

39. Mr. Young was first presented with the Boyer Affidavit at the DOPL pre-litigation panel for the Butterfield Case.

40. The Boyer Affidavit details Dr. Boyer's review of Kylie Butterfield's original CT scan, which he had originally interpreted, as well as a subsequent MRI which had been interpreted by Dr. Hedlund.

41. Dr. Boyer conceded that Ms. Bott likely elected to discuss Kylie Butterfield's MRI with him as opposed to Dr. Hedlund because of the working

relationship he and Ms. Bott had formed in reviewing multiple cases. Dr. Boyer also recognized that Dr. Hedlund's impressions supported the Butterfield's position, and his ultimately did not.

42. The Boyer Affidavit offered a new opinion suggestive of a stroke injury as opposed to birth asphyxia. The Boyer Affidavit states, in relevant part:

The pattern of brain injury is not typical of an intrapartum hypoxic ischemic event or birth asphyxia In general the pattern of injury is indicative of damage caused by such conditions as maternal cocaine usage, systemic disease, maternal diabetes, renal disease and infection or other causes of focal brain injury.

43. On February 21, 2003, a new MRI was ordered for Jared by Dr. Gregory Wynn (the "2003 MRI"). This MRI was reviewed by both Dr. Thomas Markel, a neuroradiology fellow, and Dr. Boyer. The impressions were that the "findings are most consistent with preterm delivery not only involving periventricular white matter but the right basal ganglia. This appears to be a combination of periventricular leukomalacia and affects of periventricular hemorrhagic infarction." No dysplasia was noted.

44. This impression was suggestive of a brain injury acquired in the perinatal period as a result of an obstruction of blood flow. This was consistent with the Wilson's theory of the case.

45. After reviewing the 2003 MRI, Ms. Bott determined to schedule a second meeting with Dr. Boyer. This meeting is documented by Dr. Boyer's handwritten notes dated April 9, 2003 (the "2003 Meeting"). Dr. Boyer's note confirms that both Ms. Bott and IHC's risk manger, Kirsten Weixler, attended, as well as a legal associate, Ms. Julia M. Houser. Dr. Boyer billed IHC for one hour of time.

46. Ms. Bott called for the meeting for the express purpose of discussing whether dysplasia was present or not. During the meeting, Dr. Boyer determined he did see evidence of dysplasia.

47. Dr. Boyer maintained in his testimony that Ms. Bott did not influence him to change his medical opinion. Based upon the evidence presented, the Court does not find this claim to be credible.

48. Following the meeting, Dr. Boyer dictated an addendum (the "Addendum") to the 2003 MRI. The Addendum is dated April 9, 2003. It states that "additional review of the exam reveals that there is definitely cortical dysplasia in the right hemisphere on the margins of the deep cleft which extends nearly to the right ventricle." Dr. Boyer then summarizes his conclusions as follows:

this MRI scan demonstrates a combination of both congenital and acquired abnormalities of this child's brain. (1) The congenital abnormality is right hemispheric cortical dysplasia, a lesion occurring late in the first or early in the second trimester of fetal development. (2) The acquired abnormality is periventricular leukomalacia with probable right hemispheric ventricular infarction, consistent with premature birth at approximately 25 weeks gestation. Effects of prematurity are seen in both cerebral hemispheres, greater on the right and in the cerebellum, greater on the left. Review of any earlier imaging studies performed in the perinatal period may be useful in detecting hemorrhage.

There is no need to implicate other causes of brain injury such as infection, neoplasm or external trauma to explain the combination of findings demonstrated on this imaging study.

49. Dr. Boyer conceded that Ms. Bott informed him that the Wilsons believed Jared's injury was due to infection and external trauma, and that the Addendum responds to these issues. Dr. Boyer acknowledged that by specifically answering Ms. Bott's concerns and appearing to rule out infection and trauma, the Addendum is similar to a report from a retained expert rather than a traditional medical record from a treating physician. Dr. Boyer ultimately recognized that the Addendum was misleading to the jury.

50. The same day the Addendum was created, Dr. Boyer directed a letter to Ms. Bott. The letter states: "I am enclosing the addendum dictated after our meeting today in the above case. It is listed as a 'preliminary report' but has

been finalized in our Hospital Information System. Charge for today's services for one hour (minimum) at \$200/hour = \$200."

51. Dr. Boyer included with the letter a copy of the Addendum along with an invoice for \$200.

52. Dr. Boyer did not forward a similar letter to the Wilsons. Rather, he allowed the primary care physician to inform them through the normal course of business. Alternatively, Dr. Boyer anticipated that the Wilsons would become aware of his revised conclusions at a future deposition.

53. Upon receiving Dr. Boyer's letter, Ms. Bott did not directly inform opposing counsel of the Addendum. Instead, she sent them a letter requesting that Dr. Boyer be scheduled for a deposition. Her letter is dated April 14, 2003.

54. On January 26, 2005, a third ex parte meeting between Ms. Bott and Dr. Boyer occurred (the "2005 Meeting"). The 2005 Meeting is scheduled through a January 13, 2005 email to Dr. Boyer from Ms. Bott's office. The email states:

The x-rays that were delivered yesterday refer to the Butterfield case. The case JoAnn [Bott] wants to discuss with you on 1/26 is Wilson. She hasn't said to me whether she will take the films with her or have them delivered prior to your meeting. I'll ask her about it though when she gets back in the office on Tuesday. :)

55. No notes from the 2005 Meeting have been uncovered, and neither Dr. Boyer nor Ms. Bott recalled the substance of the meeting; however, Dr. Boyer agreed that this meeting was held in advance of, and likely to prepare for, his anticipated deposition.

56. On February 17, 2006, Dr. Boyer met with Ms. Bott and an IHC risk manager regarding the Butterfield Case (the "2006 Meeting"). This meeting is documented through Dr. Boyer's handwritten note, which appears as an addendum to the bottom page of the Boyer Affidavit.

57. Dr. Boyer's note from the 2006 Meeting indicates that he had again reviewed Kylie Butterfield's imaging studies, specifically with respect to the

timing of her brain injury. He placed the infarction, or area of tissue death, to a probable time period of 2-5 days before her birth.

58. This conclusion, if accepted as true, effectively ruled out any possibility that Kylie suffered from birth asphyxia during her delivery.

59. Mr. Young learned of Dr. Boyer's new opinion when he was presented with Dr. Boyer's note from the 2006 Meeting at the time of Dr. Boyer's deposition.

60. Mr. Young subsequently requested to meet with Dr. Boyer regarding the Butterfield Case. Dr. Boyer refused.

61. Mr. Young believes that the Ms. Bott's ex parte meetings with Dr. Boyer, and specifically the Boyer Affidavit, caused significant harm to the Butterfield Case. He testified that "it was the most unfair shot at justice I ever had."

62. Due to a series of delays, Dr. Boyer was not deposed on the Wilson's case until September 20, 2005. It was during this deposition that both the Wilsons and their counsel learned of the 2003 Meeting. This was also the first occasion that cortical dysplasia was mentioned to the Wilsons.

63. Cortical dysplasia appears largely to be an issue raised for trial purposes. Jerome Wilson explained that, to this day, Jared's primary care physicians have not discussed the issue of cortical dysplasia with his family.

64. On August 10, 2006, the Court of Appeals issued a ruling in *Sorensen v. Barbuto*, 2006 UT App 340, 143 P.3d 295 ("*Sorensen I*"). This ruling clarified *Debry* and held that a physician's ex parte communication with the opposing side constitutes a breach of a physician's duty of confidentiality.

65. Ms. Bott was aware of *Sorensen I*, and she subsequently issued a letter to Dr. Boyer advising that "it is no longer appropriate for me to look to you for review with regard with [sic] patients you have treated[.]" The letter is dated September 11, 2006 and included a copy of *Sorensen I*.

66. Despite her earlier letter, on January 18, 2007, Ms. Bott's assistant communicated with Dr. Boyer through email (the "2007 Email"). The subject line reads "Wilson case" and the body states:

I am contacting you regarding your review of the Wilson case. JoAnn [Bott] asked me to let you know that this case has been slow moving but there is a possibility that it will go to trial within 6 months. I need to know if you need any additional records and verify that you can still support the case. Thank you for your assistance in this matter.

67. Dr. Boyer replied that "[m]y opinions have not changed and I am willing to testify to them. The only additional material I would need is if Jared has had any additional brain imaging studies. Otherwise, not. Thanks. Keep me posted."

68. Ms. Bott asserted that she was surprised that her assistant had sent the 2007 Email, and that it was done by mistake after she directed her assistant to send a message to all retained experts on the Wilson's case. Notwithstanding this explanation, the 2007 Email is not a group email directed to multiple retained experts, but is rather directed only to Dr. Boyer.

69. *Sorensen I* was reviewed by the Utah Supreme Court in *Sorensen v. Barbuto*, 2008 UT 8, 177 P.3d 614 ("*Sorensen II*"). *Sorensen II* affirmed the decision of *Sorensen I* that an ex parte meeting between a physician and opposing counsel was a violation of the physician's duty of confidentiality.

70. Ms. Bott was aware of *Sorensen II*.

71. As the trial on this matter approached, Dr. Boyer again reviewed Jared's films and noted dysplasia in both hemispheres of Jared's brain. His medical opinion was again revised to reflect these changes, although he did not dictate a second addendum to Jared's medical record. Dr. Boyer also asked two colleagues within his office to review the 2003 MRI, and they were eventually convinced that they saw bilateral dysplasia as well.

72. Dr. Boyer agreed that creating any addendum to a medical record is rarely done, and estimated that it might be appropriate in 1 out of 100 cases. He agreed that he probably should have dictated a second addendum, due to

Jared's altered diagnosis. He conceded that a second addendum would be rarer still, and seen in 1 out of 10,000 cases.

73. Dr. Boyer's diagnosis for bilateral dysplasia appears generally to coincide with arguments the Wilsons raised during litigation. The Wilsons asserted that Jared's original diagnosis for unilateral dysplasia was inaccurate because unilateral dysplasia should manifest itself through a seizure disorder, but Jared did not have seizures. After this argument was raised, dysplasia was identified in both hemispheres of Jared's brain. Dr. Boyer acknowledged that Jared's cognitive issues are more consistent with bilateral dysplasia.

74. Dr. Boyer conceded that Jared's dysplasia is "subtle" and comparable images in medical textbooks do not exist.

75. Trial for the above-captioned case was conducted on November 3-19, 2008 by Judge Fred Howard. During the trial, IHC repeatedly violated Judge Howard's order in limine precluding reference to any collateral source benefits received by the Wilsons. The jury found in favor of IHC, concluding that IHC had not been negligent.

76. The Wilsons appealed, and the Utah Supreme Court reversed the jury's verdict. The case was remanded for a new trial, as well as for an evidentiary hearing on IHC's ex parte meeting with Dr. Boyer. The *Wilson* Court was aware only of the 2003 Meeting, and instructed that an evidentiary hearing would be necessary in order to properly consider whether sanctions against IHC are warranted.

77. During post-trial discovery on the sanctions issue, the Wilsons learned of the 2001 Meeting and the 2005 Meeting.

CONCLUSIONS OF LAW

This matter is before the Court on remand, with directions to take evidence and consider what, if any, sanctions are appropriate. The Supreme Court offers the following instructions:

In deciding whether sanctions are appropriate and the nature of any sanction it may impose, the court should consider, among other things,

the willfulness of counsel's conduct; the degree to which its impropriety was apparent at the time; the likelihood that evidence or testimony was altered as a result of the meeting; the prejudice to the opposing party; and the detrimental effect of the ex parte contact on the trial and the judicial process.

Wilson v. IHC Hospitals, Inc., 2012 UT 43, ¶94, 289 P.3d 369.

The Court will address each of these factors in turn.

A. Sanctions Against IHC are Appropriate Under the Factors Outlined by the Utah Supreme Court

1. *Ms. Bott's Conduct was Willful*

Based upon the facts presented, it is evident that Ms. Bott arranged to meet with Dr. Boyer on at least three occasions for the express purpose of discussing the issues being litigated in this matter. Those meetings include the 2001 Meeting, the 2003 Meeting, and the 2005 Meeting. Evidence of a fourth meeting is present when one considers the 2006 Meeting, held to discuss the Butterfield Case. These meetings were not chance encounters. Neither were they brief discussions to simply clarify Dr. Boyer's medical opinion. Rather, these meetings were repeated strategy sessions where litigation theories were outlined and medical opinions were ultimately altered. Notably, the 2003 Meeting took one hour and was attended not only by Ms. Bott, but by co-counsel and IHC's risk manager. A risk manager was also present for the 2006 Meeting. This Court can conceive of no reason a risk manager would be invited to such a meeting, unless it is to signal the treating physician that a large damage award may turn upon his or her opinion. This is a not-too-subtle attempt to influence, particularly where the physician receives 90-95% of his income from the hospital, as Dr. Boyer acknowledged.

In considering the events described to this Court, a pattern emerges with Ms. Bott and Dr. Boyer meeting on repeated cases for the purpose of coordinating IHC's position and Dr. Boyer's testimony. This coordination is clear in the manner in which Dr. Boyer and Ms. Bott worked together. During the 2001 Meeting, Ms. Bott outlined IHC's case against the Wilsons. Dr. Boyer accepted the facts as recited by Ms. Bott, and those facts then bleed into Jared's

medical record. Dr. Boyer described needing to view Jared's other films, and Ms. Bott promptly acquired the films and forwarded them to Dr. Boyer.

Further coordination occurs in the 2003 Meeting. Ms. Bott requested the 2003 Meeting specifically to discuss the issue of cortical dysplasia, which had not been previously diagnosed. During the meeting, Dr. Boyer concluded that dysplasia was “definitely” present, and he promptly created the Addendum. Dr. Boyer now acknowledges that he created the Addendum, at least in part, for use in the pending litigation. He did not notify the Wilsons regarding the Addendum, instead allowing this new information to trickle down to them through the normal course of business. However, he wasted no time in notifying Ms. Bott and mailed a copy of the Addendum to her that same day. In this way, Ms. Bott became privy to Jared's new diagnosis long before the Wilsons ever learned of it.

Similarly, the 2005 Meeting was scheduled by Ms. Bott and planned in order to confer in advance of Dr. Boyer's scheduled deposition. The 2007 Email again demonstrates coordination, as Ms. Bott's office sought confirmation that Dr. Boyer still intended to offer testimony which would be favorable to IHC. This pattern of conduct is the type of coordination which is typical for a retained expert, but not what one would expect to see for a treating physician who was merely offering a neutral opinion about a patient's care.

One may fairly infer further coordination between Ms. Bott and Dr. Boyer based upon Jared's evolving diagnosis as the Wilson's case progressed towards trial. The initial diagnosis of unilateral dysplasia was not a good fit to the facts of the case, given that Jared did not suffer from a seizure disorder. It is perhaps not a coincidence that Dr. Boyer was able to find “subtle” dysplasia in both hemispheres of Jared's brain in order to better coordinate the medical testimony with the arguments being raised in litigation.

Coordination is also clear in the Butterfield Case. Ms. Bott sought a meeting with Dr. Boyer to review Kylie Butterfield's MRI, even though a different doctor had interpreted that film. Ms. Bott and Dr. Boyer conferred regarding Kylie Butterfield's MRI, and a new opinion which was highly favorable to IHC was developed. Ms. Bott prepared the Boyer Affidavit containing this new opinion, and Dr. Boyer signed it. The two met again in advance of Dr. Boyer's deposition, and Dr. Boyer offers further details

regarding the timing of Kylie Butterfield's brain injury. This new information, again highly favorable to IHC, is added to the Boyer Affidavit.

This pattern of coordination one would expect to see with a retained expert. It is purposeful, willful conduct. This factor weighs in favor of sanctions.

2. *The Impropriety of Ms. Bott's Conduct was Clear at the Time*

IHC's primary argument goes to this factor. IHC maintains that, while the Supreme Court has now concluded that Ms. Bott's meetings with Dr. Boyer were improper, she acted in good faith and believed that her ex parte meetings with Dr. Boyer were within ethical rules as they were understood at that time.

This argument is grounded upon 99-03, which states that “[n]o ethical rule prohibits ex parte contact with plaintiff’s treating physician when plaintiff’s physical condition is at issue.”

However, the opinion also provides the caveat that attorneys must comply with the Rules of Professional Conduct, including Rule 4.4. Rule 4.4 of the Rules of Professional Conduct provides, in relevant part:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 4.4(a).

The comment to that rule elaborates:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

Certainly the privileged doctor-patient relationship at issue here would come within this provision. Thus, in reading 99-03 together with the Rules of Professional Conduct, it is clear that ex parte contact with a treating physician was never sanctioned when that contact violated the physician-patient privilege.² The open question was whether a physician or therapist had any duty to his or her patient beyond the physician-patient privilege that might be intruded upon by an ex parte meeting with a lawyer. This issue is clearly noted in 99-03R, which describes the debate held between those who advocated in favor of 99-03, and those who believed that ex parte meetings with treating physicians should be discouraged as a matter of public policy because they “erode[d] the physician’s fiduciary relationship with the patient.” The Committee declined to weigh that argument, determining that such considerations were better left to others: “Once the Utah courts or the Utah Legislature has spoken definitively, we can follow their lead.” 99-03R.

In remanding the present case, the Utah Supreme Court has directed that *Debry* provided that definitive answer, and that Ms. Bott's ex parte meetings with Dr. Boyer were improper. Even so, Ms. Bott maintained in her testimony that *Debry* was limited to its facts, and did not apply to her. Not only has the Utah Supreme Court held otherwise, but a plain reading of *Debry* does not support Ms. Bott's position.

It is true that the substantive conclusion of *Debry* focuses on the specific facts of the case, stating, “[w]e conclude that *under these circumstances*, a patient must at least be afforded the opportunity for protection.” *Debry*, 2000 UT App 58, at ¶ 28 (emphasis added). However, the following sentence includes very broad language which describes the fiduciary responsibility of not only therapists (such as the therapist at issue in that case) but physicians as well. The court concluded that this duty existed even when pending litigation would implicate the exception to the physician-patient privilege:

² The exception to the physician-patient privilege as set forth in Rule 506(d) of the Rules of Evidence provides, in relevant part: “No privilege exists . . . [f]or communications relevant to an issue of the physical, mental, or emotional condition of the patient . . . in any proceeding in which that condition is an element of any claim or defense[.]”

As part of a therapeutic relationship, a *doctor or therapist* has an obligation to protect the confidentiality of his patients *that transcends any duty he has as a citizen to voluntarily provide information that might be relevant in pending litigation*. Before disclosing confidential patient records or communications in a subsequent litigation, a *physician or therapist* should notify the patient. *Even if the communications may fall into the exception to the privilege*, the patient has the right to be notified of the potential disclosure of confidential records. Such notice assures that the patient can pursue the appropriate procedural safeguards in court to avoid unnecessary disclosure.

Id. (emphasis added).

Thus, Ms. Bott's position that *Debry* did not apply to the facts of this case is without merit. Moreover, her continued reliance on 99-03 is not well-founded. As noted *supra*, 99-03 and 99-03R always cautioned that Rule 4.4 of the Rules of Professional Conduct applied. That rule directs that Ms. Bott may not violate Jared's rights as a patient, or encourage Dr. Boyer to violate his duty as a treating physician. Encouraging Dr. Boyer to violate his fiduciary responsibility to Jared thereby violated Rule 4.4, and 99-03.

In drawing this conclusion, the Court acknowledges that, at the time these events unfolded, there were those within the legal community that read *Debry* with a more narrow view. For example, Judge Medley clearly adopted a limited construction before being reversed in *Sorensen I*.³ Conversely, there were also those who embraced the interpretation made clear by *Sorensen I* and *Sorensen II*. This segment of the legal community repeatedly approached the Committee, requesting that 99-03 be modified.

As such, there appears to have been obvious tension among legal practitioners creating somewhat of a gray area. This gray area was easily exploited by Ms. Bott (and likely others) who were determined to use 99-03 as

³It is possible that Judge Stott also read *Debry* with a narrow construction, as he permitted IHC lawyers to meet ex parte with treating physicians in his ruling, issued shortly after *Debry*. However, it is more likely that Judge Stott did not know of *Debry*. Judge Stott's case was argued only four days after *Debry* was issued, and Ms. Bott acknowledged that neither side cited *Debry* to him.

both a sword and a shield. Once *Sorensen I* was issued and the gray area removed, Ms. Bott promptly wrote a letter to Dr. Boyer, advising him that their meetings were not permitted.

Based upon the foregoing, the Court concludes that Ms. Bott certainly recognized that her view of *Debry* was not universally held, and was even controversial. The issue of ex parte contact with treating physicians was the subject of repeated meetings with legal practitioners, hearings before the Committee, and motions in court. This would include the motion heard by Judge Stott, where Ms. Bott was counsel of record. While the Court cannot conclude that Ms. Bott intended to violate ethical rules by meeting with a treating physician, it appears she intended to maintain a defensible position and come as close to the line as she could without crossing over it. While this does not present a strong argument in favor of sanctions, neither is it a persuasive argument against them.

However, IHC's argument on this point focuses only on the propriety of the ex parte meeting itself, without considering the *content* of the meeting.⁴ Even considering the facts in a light most favorable to IHC, 99-03 and 99-03R authorized ex parte meetings in order to provide access to treating physicians outside of a costly deposition. This access would allow defense counsel an opportunity to understand and prepare for medical testimony at future hearings. There is nothing to suggest that 99-03 was put into place to open the door to litigation strategy meetings with treating physicians in order to encourage them to alter their opinions and testify against their patients. Yet that is precisely what occurred here. Ms. Bott met with Dr. Boyer on multiple occasions, and Dr. Boyer's notes from those meetings confirm that, from the very beginning, Ms. Bott was going well beyond a routine inquiry into his medical opinion. Ms. Bott was advocating IHC's legal position and views, even bringing along IHC's risk manager in tow. While there are no admissions that Ms. Bott expressly pressured Dr. Boyer to change his opinion, certainly the

⁴ IHC emphasizes that, when objections to Ms. Bott's conduct were previously raised, both in this case and the Butterfield Case, the trial court concluded that Ms. Bott's conduct was within ethical boundaries as they were understood at the time. However, those previous trial court judges did not have the opportunity to hear evidence regarding the content of Ms. Bott's meetings. It is this Court's conclusion that, while the meetings themselves were not sanctionable, the content of them most certainly is.

repeated meetings, the topics discussed, and the presence of a risk manager support the conclusion that such pressure was implied and intended.

Given the totality of these circumstances, this factor weighs in favor of sanctions.

3. *Evidence or Testimony was Altered as a Result of the Ms. Bott's Ex Parte Meetings with Dr. Boyer*

Evidence was altered as a result of both the 2001 Meeting and the 2003 Meeting. Dr. Boyer conceded that certain aspects of IHC's theory of the case were conveyed to him by Ms. Bott, and that some of those points then found their way into to medical record.

For example, Dr. Boyer's note from the 2001 Meeting reflects that Ms. Bott told him that Jared was 24 weeks gestational age. This was not an undisputed medical fact. Indeed, numerous medical records stated that Jared was at 27 weeks. Placing Jared at 24 weeks was part of IHC's theory of the case. Ms. Bott made her argument to Dr. Boyer, and Dr. Boyer's impressions thereafter place Jared accordingly.

Other IHC theories are also front and center in Dr. Boyer's note from the 2001 Meeting. Among them are the arguments that Mrs. Wilson refused a transfusion, that "you don't need infection" to explain Jared's injury, and the Wilsons were "wealthy." There is no medical reason for Ms. Bott to have discussed the Wilsons finances with Dr. Boyer at all, and both Dr. Boyer and Ms. Bott struggled unsuccessfully in their testimony to explain the relevance of this topic. However, it clearly dovetails with the persistent "collateral source" argument used extensively by IHC at trial. This argument may have fallen on fertile soil with Dr. Boyer, a physician who is openly hostile to the tort system. All things considered, it appears that the first person Ms. Bott argued her case to was, in fact, Dr. Boyer.

The 2003 Meeting also resulted in a change to Dr. Boyer's testimony, and a change to the medical records at issue in the case. The Addendum was without dispute a modification or addition to the medical record which was made because Dr. Boyer changed his opinion after meeting with Ms. Bott and the IHC risk manager. Before the 2003 Meeting, cortical dysplasia had received

a mere mention in two imaging studies. After the 2003 Meeting, it was a definite diagnosis.

The change in evidence and testimony as a result of Ms. Bott's improper ex parte meeting weighs in favor of sanctions.

4. *The Wilsons were Prejudiced by the Improper Conduct*

The alteration in Dr. Boyer's opinion transformed Dr. Boyer into an IHC retained expert, but one who required no retainer at all. Indeed, IHC did not ultimately call the experts it had retained for use at trial, instead relying upon Dr. Boyer's testimony to persuade the jury that Jared had a congenital condition rather than a birth injury. The Wilsons did call a retained expert in an attempt to rebut Dr. Boyer's testimony, but IHC succeeded in diminishing the weight of his opinion with the tried-and-true "hired gun" argument. The record confirms that IHC repeatedly emphasized that the Wilson's expert witness did not see cortical dysplasia because he was paid not to see it.

This argument was particularly misleading, because IHC was able to successfully argue that Dr. Boyer's opinions were not motivated by ongoing litigation, but rather driven solely by his desire to provide proper medical care for Jared. This of course was not the case, because the Addendum was created for litigation purposes, as Dr. Boyer eventually conceded.

The Wilsons were further prejudiced through IHC's ability to keep the extent of Ms. Bott's ex parte meetings with Dr. Boyer secret. The Wilsons were aware of the 2003 Meeting, and were able to present that information to the jury, but it was not until post-trial discovery that the Wilsons learned that Ms. Bott's coordination with Dr. Boyer began in 2001 and continued long thereafter, and that the same pattern was present in the Butterfield Case. Perhaps if the jury had understood the facts presently known, it would not have viewed Dr. Boyer as simply an altruistic treating physician, looking to protect Jared's interests.

The prejudice suffered by the Wilsons weighs in favor of sanctions.

5. ***Ms. Bott's Improper Conduct had a Detrimental Effect on the Trial and the Judicial Process***

The evidence presented to the Court documents two tragic cases involving babies born with devastating, life-altering complications. Both the Wilsons and the Butterfields believe that these complications are due to negligence. Whether or not that is the case has never been for a judge to decide. Perhaps Jared does suffer from cortical dysplasia. Perhaps Kylie Butterfield experienced a stroke in the days before she was born. A jury should have been permitted to hear untainted facts to decide those issues. Unfortunately, that did not occur here. Instead, the process in this case was tainted by repeated ex parte meetings with a treating physician, which resulted in altered testimony and amended records.

The damage resulting from Ms. Bott's improper conduct is impossible to quantify. One can only speculate about how events may have unfolded had the ex parte meetings not occurred. It is this speculation that taints the judicial process generally. Mr. Young offered moving testimony about how ex parte meetings between Ms. Bott and Dr. Boyer in the Butterfield Case gave him "the most unfair shot at justice I ever had." The Court is confident that the Wilsons would echo that sentiment. No party should walk out of the courtroom door with such a cloud hanging over their proceedings.

The impact on the judicial process weighs in favor of sanctions.

6. ***Ms. Bott's Lack of Remorse Further Supports Sanctions***

In remanding this case for consideration of sanctions, the Supreme Court directed consideration of not only the previous factors, but any other factors this Court deemed relevant. With this directive in mind, the Court concludes that Ms. Bott's lack of remorse during her testimony further supports sanctions. This Court was quite struck by Ms. Bott's continuing insistence that *Debry* did not apply to her conduct, even though Utah's highest court has held otherwise. Moreover, in several testy exchanges Ms. Bott rebuked opposing counsel, remarking that IHC's strategy of introducing collateral source evidence was of no consequence, because that evidence would have only been relevant on damages, and in concluding that IHC was not negligent, the jury never reached that question.

This attitude shows a stunning lack of insight, and it ignores the analysis of the *Wilson* decision, which quite clearly held that “prejudice resulting from collateral source evidence may impact both a jury’s liability and damage determinations.” *Wilson*, 2012 UT 43, at ¶49. It is, however, at least consistent with the attitude IHC demonstrated at trial in “flaunt[ing] the court’s in limine order putting the subject [of collateral source evidence] out of bounds.” *Id.* at ¶58.

This factor further supports sanctions.

B. Sanctions Must be Commensurate to the Level of Harm

In suggesting the type of sanctions which should be awarded, the parties present two extreme positions. IHC contends that it should receive no sanction at all, while the Wilsons assert that liability should be deemed admitted and the new trial should proceed on the issue of damages only. In essence, the Wilsons ask for a terminating sanction.

“It is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy. The choices include—from least harsh to most harsh—further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).” *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp.2d 456, 469 (S.D.N.Y. 2010), abrogated on other grounds by *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir.2012). “[A] terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” *Id.*

In the present case, a terminating sanction is not appropriate. Had there been no ex parte meetings, and had Dr. Boyer’s opinion remained unadulterated, the Wilsons would still have been required to carry their burden of establishing that IHC breached its duty of care. Dr. Boyer’s opinion did not go to that issue. It would thus be overly harsh to deem liability admitted because of the sanctionable conduct which occurred. The most equitable remedy is to thoroughly excise Dr. Boyer’s conclusions from the trial, and allow the jury to carry out its role.

Based upon the foregoing, IHC may not call Dr. Boyer or his colleagues as a witness, and IHC is prohibited from supporting its claim that Jared suffers from cortical dysplasia. IHC is placed on notice that the Court will not tolerate any attempts by IHC to violate this order, as was done previously with Judge Howard's order in limine.

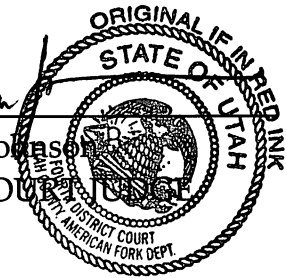
SO ORDERED.

This Ruling shall stand as the Order of the Court. Pursuant to Rule 7, no further order is required.

DATED this 17 day of February, 2016.

BY THE COURT:


Christine S. Johnson
DISTRICT COURT



certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 150100044 by the method and on the date specified.

EMAIL: STEVEN C BEDNAR sbednar@mc2b.com

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02/17/2016

/s/ LEISHA MEDINA

Date: _____

Deputy Court Clerk