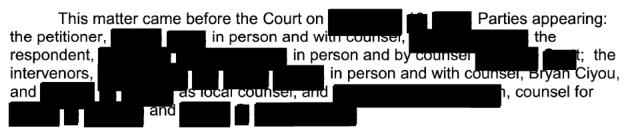
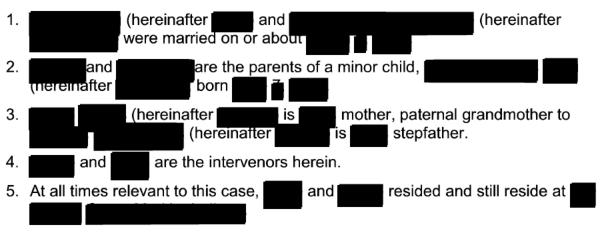


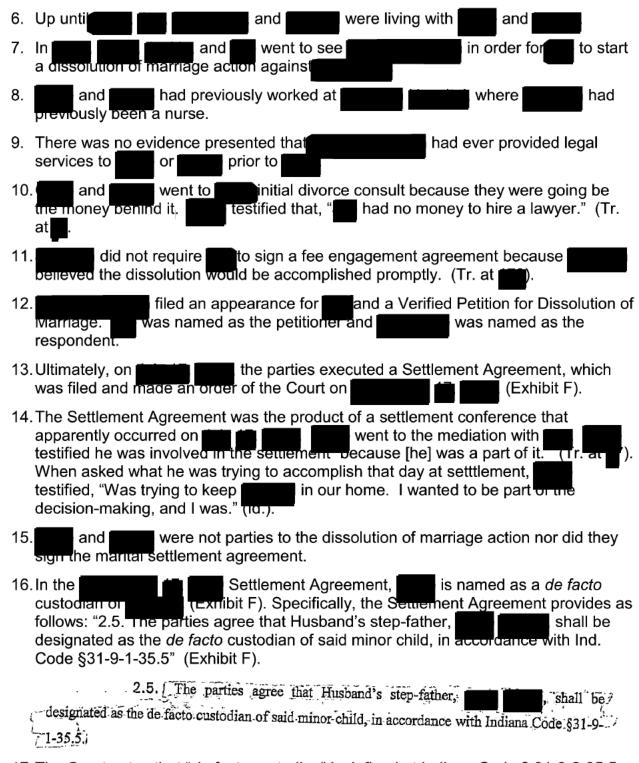
Findings of Fact and Conclusions of Law and Judgment



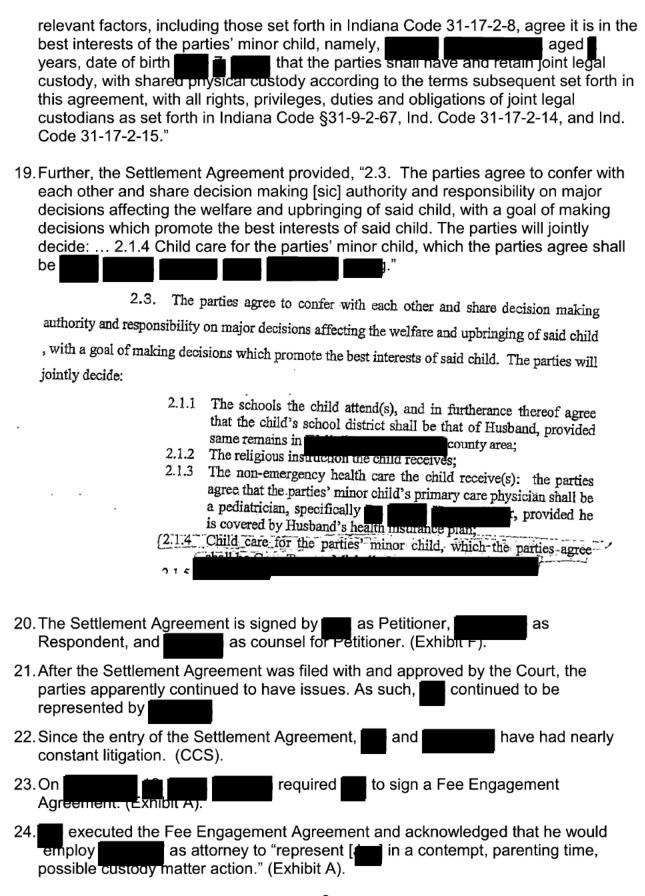
Witnesses were sworn, and evidence was heard and received. Pursuant to Indiana Trial Rule 52(a), the intervenors timely made a request for Findings of Fact and Conclusions of Law, and the Court, being duly advised, enters its findings of fact, conclusions of law and judgment as follows:

Findings of Fact



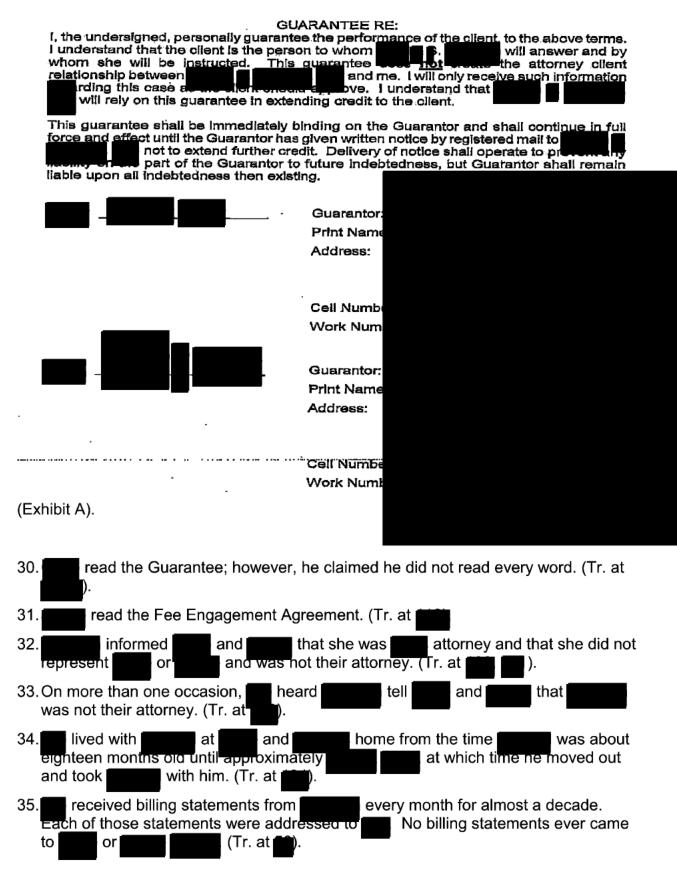


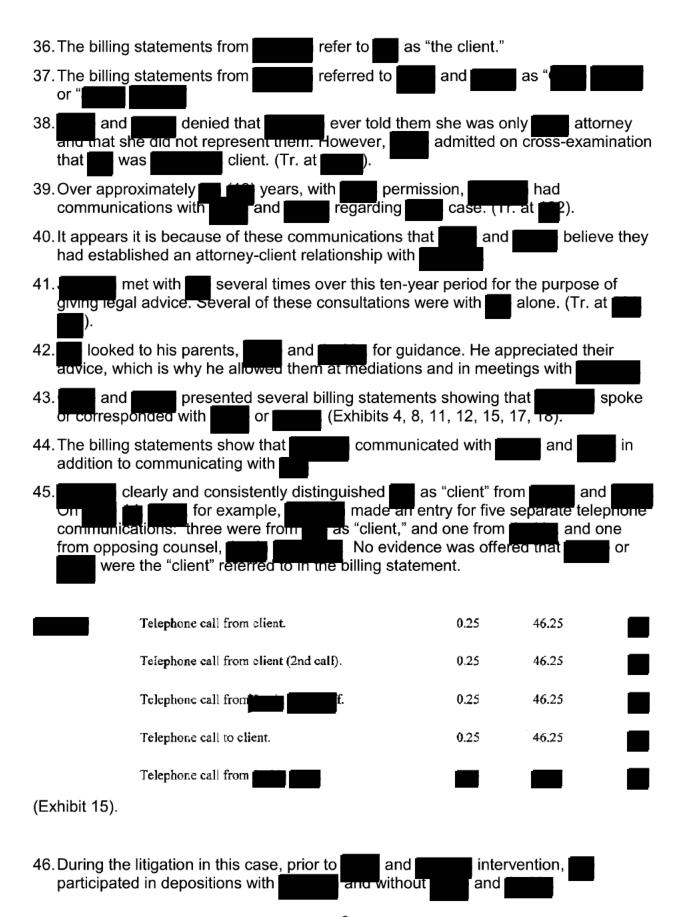
- 17. The Court notes that "de facto custodian" is defined at Indiana Code § 31-9-2-35.5. The citation given in Exhibit F is likely a typographical error and is not necessary to the Court's determination of the facts at issue.
- 18. Despite being named a *de facto* custodian, regarding the issue of custody, the Settlement Agreement provides, "The parties, after giving due consideration to all

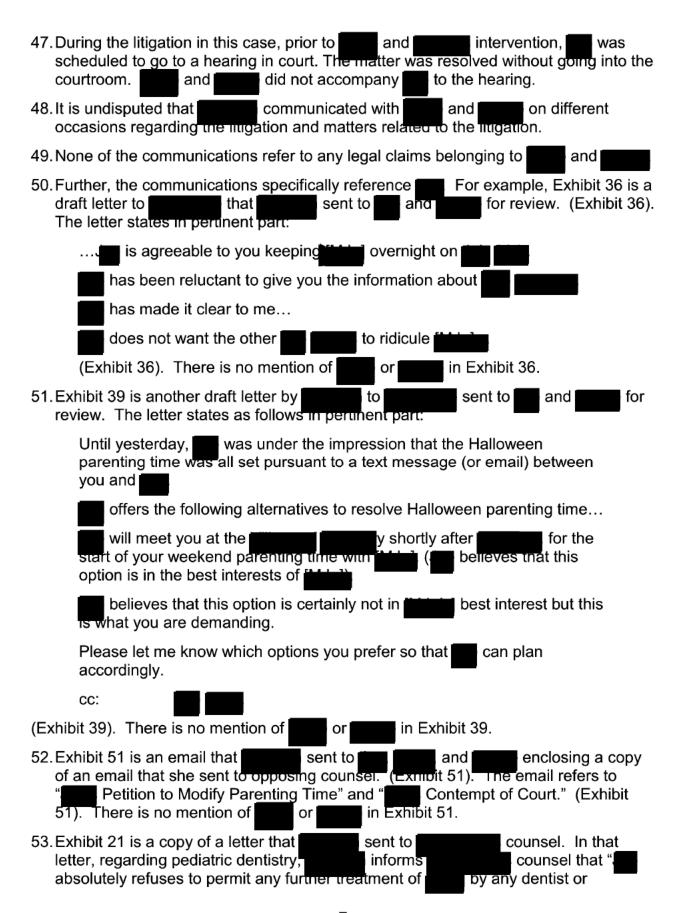


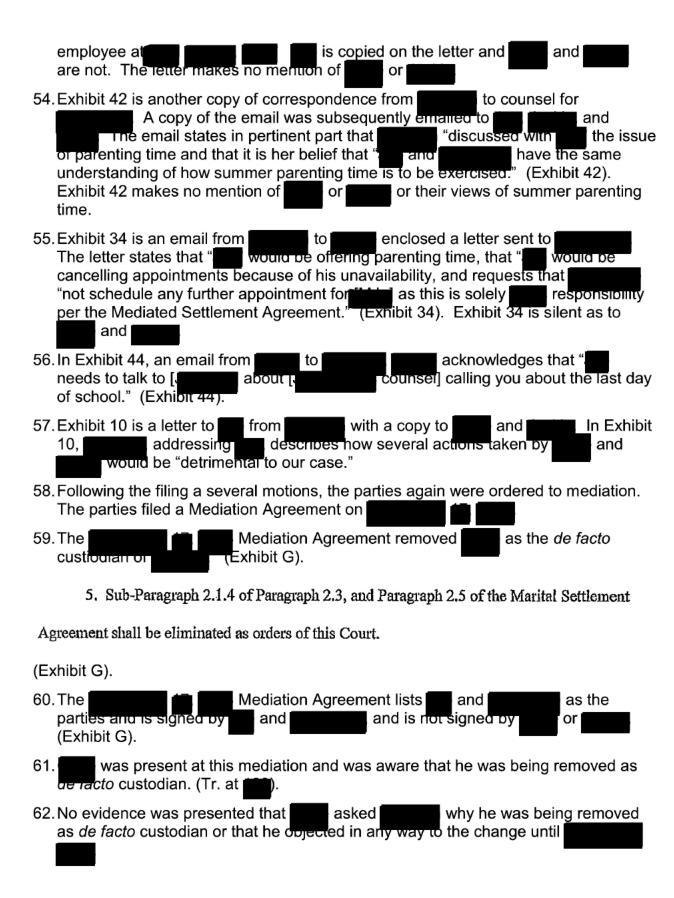
FEE ENGAGEMENT AGREEMENT

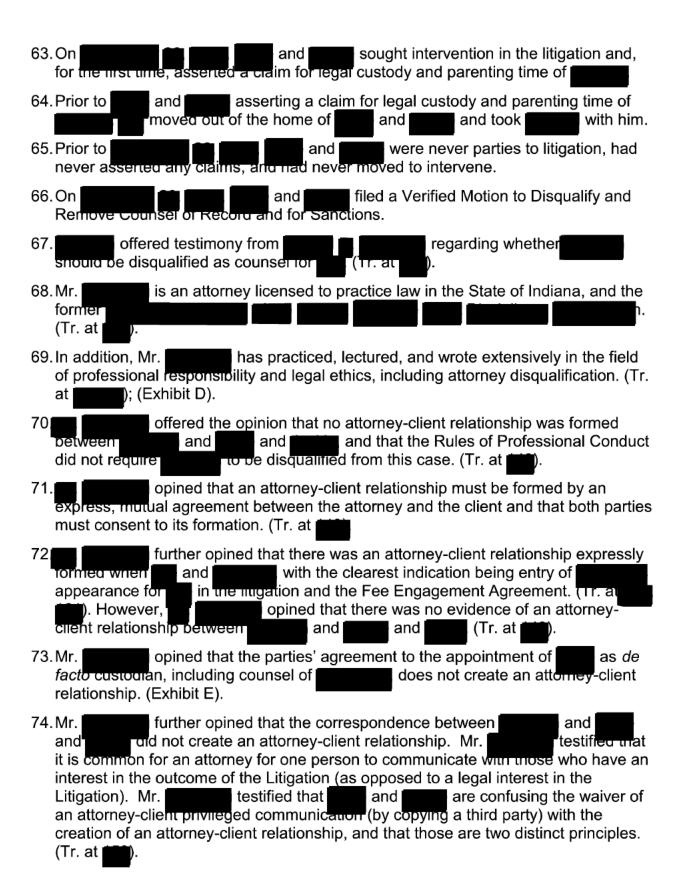
As acknowledged by this Fee Engagement Agreement (hereinafter "Agreement"), I employ the contempt (hereinafter "my attorney") of the law firm the contempt (hereinafter "hereinafter"), and such of the Firm's agents and employees as it may use to take such action as the Firm deems necessary, to represent me in a contempt parenting time, possible custody matter action. Accordingly, I agree as follows:
25. The Fee Engagement Agreement was executed by as the "client":
22. I understand this Agreement and that it is a binding legal contract.
26. is the only "client" provided for on the Fee Engagement Agreement.
27. On the last page of the Fee Engagement Agreement, "Guarantors". (Exhibit A).
28. The Fee Engagement Agreement clearly and succinctly provides that is the "client" and that and are the "Guarantors." The portion of the Fee Engagement Agreement signed by and specifically provides that the Guarantee "does <u>not</u> create the attorney-client relationship". (Exhibit A).
29. Further, the Guarantee provides that the [guarantors] understand that the client is the person to whom will answer and by whom she will be instructed. (Exhibit A)

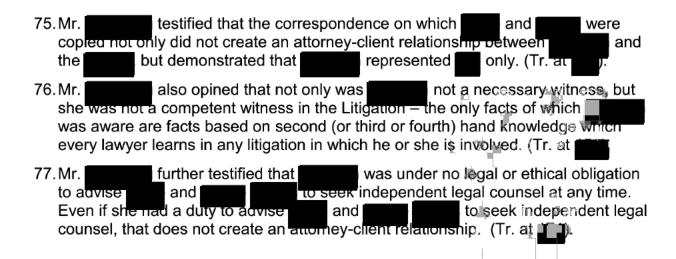












Conclusions of Law

- 1. A trial court may disqualify an attorney for a violation of the Rules of Professional Conduct that arises from the attorney's representation before the court. *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 154 (Ind. 1999).
- 2. Ind. R. Prof. Conduct 1.7 provides that:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

3. Ind. R. Prof. Conduct 1.9(a) provides, in part, that:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

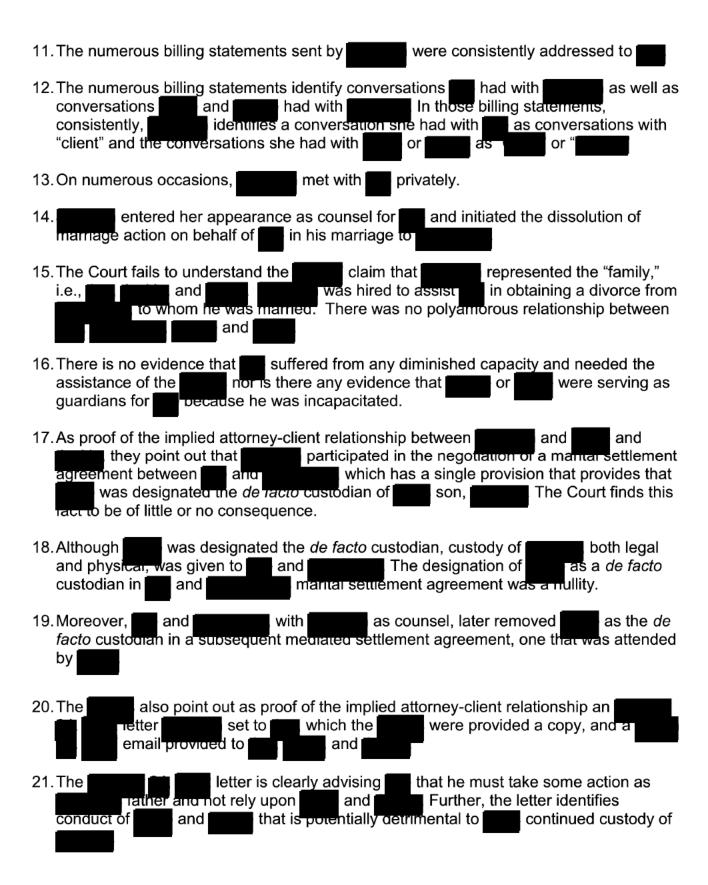
4. "Creation of an attorney-client relationship is not dependent upon the formal signing of an employment agreement or upon the payment of attorney fees. An attorney-client

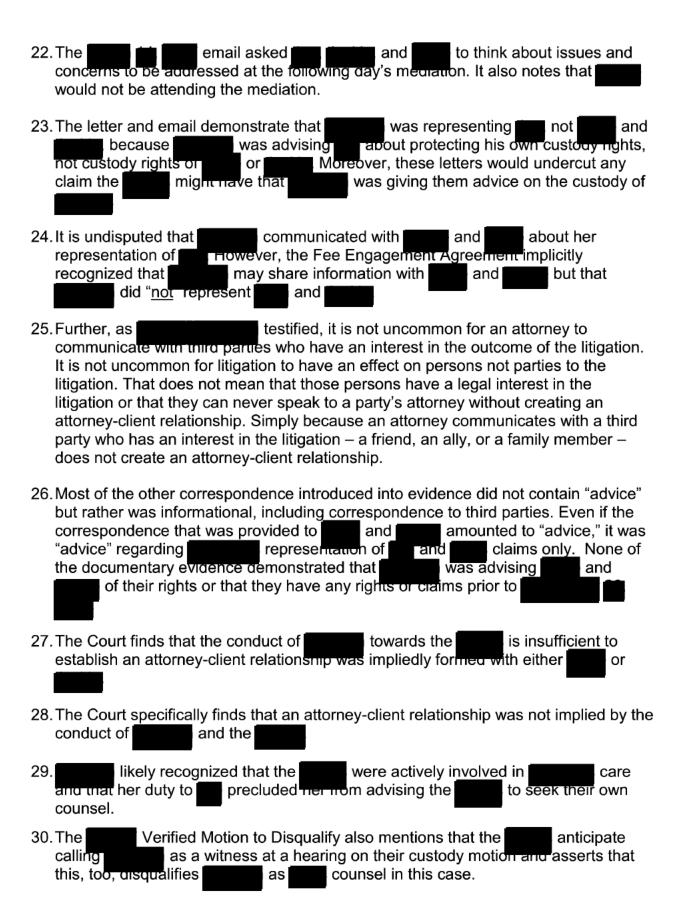
relationship need not be express, but may be implied by the conduct of the parties. Such a relationship exists only after both attorney and client have consented to its formation." *In re Anonymous*, 655 N.E.2d 67, 68 (Ind. 1995).

5.	There is not an express agreement to create an attorney-client relationship between			
	and the	To the contrary, the fee agreement signed by and		
	and the	as guarantors, expressly identifies as the client,		
	as the attorney, and the	only as guarantors.		

- 6. Nonetheless, the attorney-client relationship "may be implied by the conduct of the parties." Id.
- 7. "Attorney-client relationships have been implied where a person seeks advice or assistance from an attorney, where the advice sought pertains to matters within the attorney's professional competence, and where the attorney gives the desired advice or assistance." Bays v. Theran (1994), 418 Mass. 685, 639 N.E.2d 720; McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim (1991), 237 Neb. 451, 466 N.W.2d 499; Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Wunschel (1990), Iowa, 461 N.W.2d 840. See also People v. Morley (1986), Colo., 725 P.2d 510 (the relationship may be established when it is shown that the client seeks and receives the advice of the attorney on the legal consequences of the client's past or contemplated actions). "An important factor is the putative client's subjective belief that he is consulting a lawyer in his professional capacity and on his intent to seek professional advice." Dalrymple v. National Bank & Trust Co. of Traverse City (1985), D.C. Mich., 615 F. Supp. 979, citing Westinghouse Electric Corp. v. Kerr-McGee Corp. (1978), 7th Cir., 580 F.2d 1311, cert. denied, 439 U.S. 955, 99 S. Ct. 353, 58 L. Ed. 2d 346. See also People v. Bennett (1991), Colo., 810 P.2d 661 (the proper test is subjective; an important factor is whether the client believed the relationship existed); State v. Hansen (1993), 122 Wash. 2d 712, 720, 862 P.2d 117 (client's belief will control where it is reasonably formed based on attending circumstances, including attorney's words and actions); In re Johore Investment Co. (U.S.A.), Inc. (1985), D.Hawaii, 157 Bankr. 671 (in the preliminary consultation context, the existence of the relationship rests upon the client's belief that he is consulting the lawyer in a professional capacity and his manifested intention to seek legal advice). In re Anonymous, 655 N.E.2d 67, 70 (Ind. 1995).
- 8. However, while an attorney-client relationship may be implied, it must be consensual, existing only after both attorney and client have consented to its formation. *Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991).
- Overwhelmingly in this case, the evidence of the conduct of the parties is contrary to the formation of an implied attorney-client relationship.

10. signed the Fee	Engagement Agree	ment as the client,	signed as the
aπorney, and	and signed a	as the guarantors. The	guarantee portion of the
Fee Engagem ent /	greement clearly sta	ates that they were not	clients of



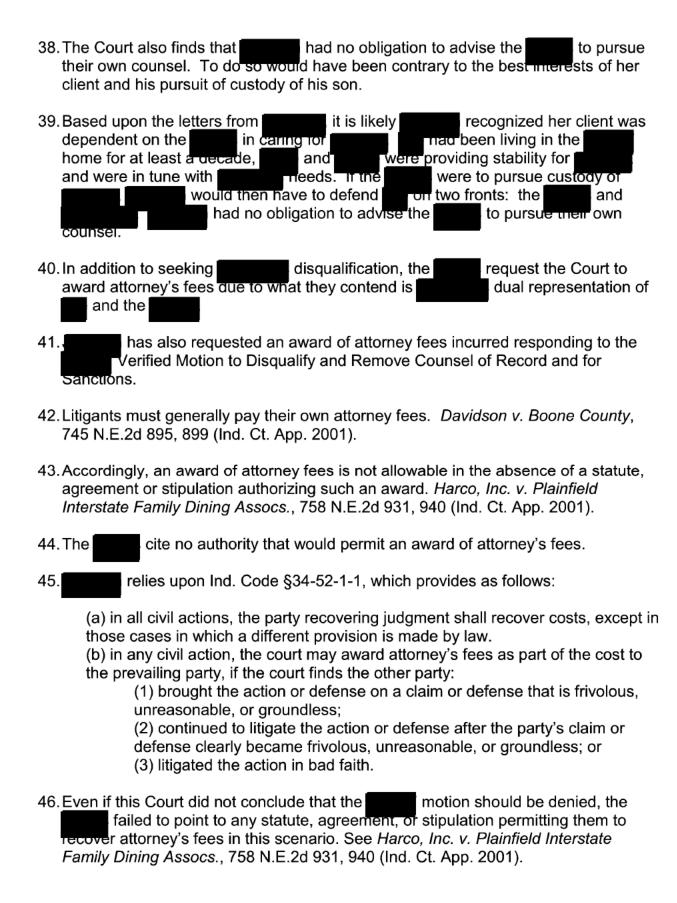


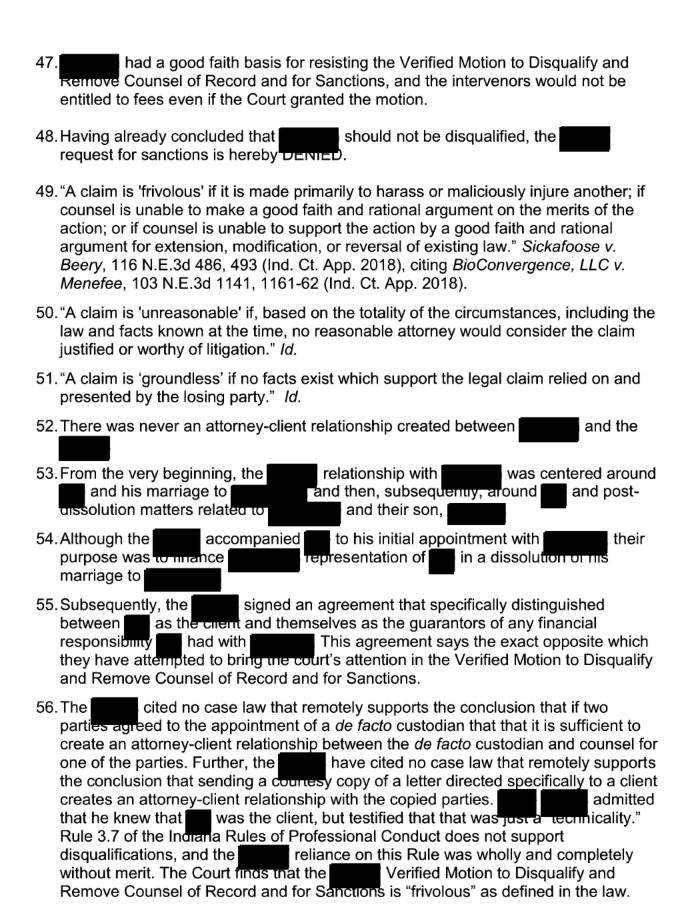
31.	Indiana	Rule of	Professional	Conduct 3.7	provides	that:
•					p	

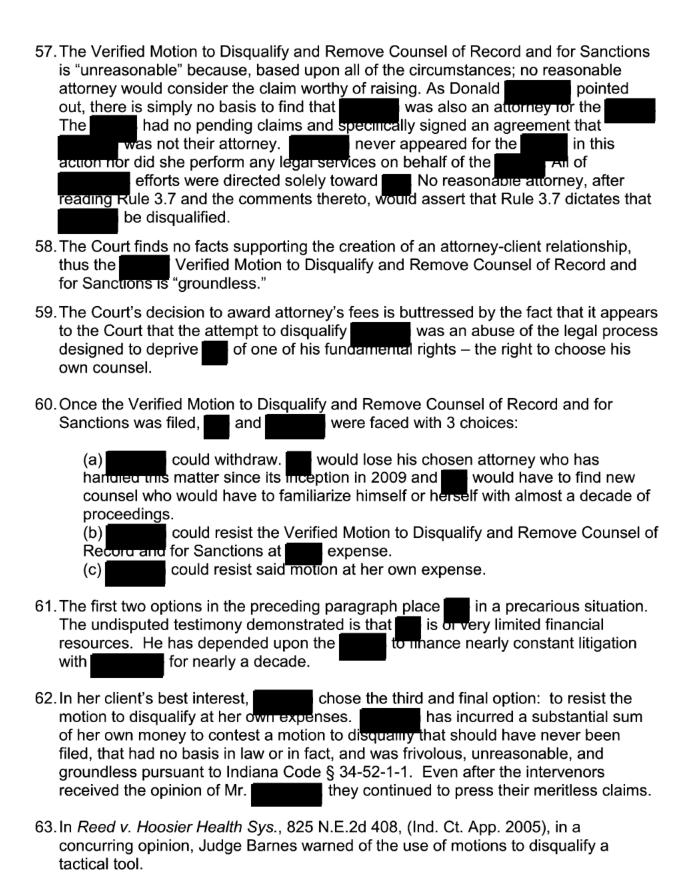
- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
- 32. Rule 3.7(a) does not disqualify a lawyer from acting as a lawyer in a case. It only prohibits a lawyer from acting simultaneously as an advocate and a witness at trial. Thus, there are no grounds for disqualification until the prohibited event actually occurs.

33. To be disqualified f	rom simultaneously being a lav	wyer and advo	cate at trial, the
lawyer must be a "i	necessary" witness. The	Verified Moti	ion to Disqualify
asserts that	will be called to testify that	and	were raising
Thi s doe s	not make a necessar	y witness.	•
34.No evidence was p	resented that has ind	ependent obse	ervations of

- and interaction with would only know what she has been told. Not only is not a necessary witness, she is not a competent witness. If called as a witness, ner testimony would be prohibited under the Indiana Rules of Evidence.
- 35. Rule 3.7 allows a lawyer to act as an advocate if the disqualification of the lawyer would work a substantial hardship on the client. Here, since the inception of the divorce and the many years of contentious litigation. Finding replacement counsel to represent himself in further litigation between himself and the who are seeking custody, would be a hardship for Therefore, it would appear the exception provided in Rule 3.7 would be invoked.
- 36. Finally, Rule 3.7(b) provides that a personal disqualification by one lawyer is not imputed to any other associated lawyer. Thus, assuming would not be able to try the case because of Rule 3.7(a), she may arrange for other counsel to handle the trial of this case.
- 37. The Court finds that six is not disqualified as a lawyer under Indiana Rule of Professional Conduct 3.7.







I write separately to emphasize that this circumstance is one in which we must be wary. The disqualification of attorneys on conflict of interest grounds is a matter that is increasingly being done by members of the bar as a tactical device, in some instances with little to do with our professional ethics. In my opinion, allowing advocates to utilize motions to disqualify as purely strategic tools minimizes the importance of Indiana Rule of Professional Conduct 1.7(a) and it warnings, which are essential to the ability of lawyers to represent the best interests of clients.

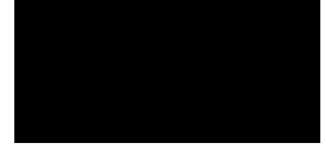
- 64. It is unfortunate the have elected to pursue a motion to disqualify, using resources and court time, which could have been better spent resolving the custody motion on the merits. Their choice of action has only further prolonged this matter and caused uncertainty for all parties, including the minor child.
- 65. Even at those close of the evidence, the Court, having heard all of the evidence, offered to rule on the Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions immediately, and supplement its decision with written findings of fact so that the pending deposition and hearing on the custody motion could proceed in a timely manner. Counsel for the chose to vacate the agreed discovery and litigation schedule in order to prepare and file proposed findings of fact.
- 66. The Court orders that request for fees and expenses is GRANTED in the amount of \$27,614.78.

<u>Judgment</u>

WHEREFORE the Court ORDERS, ADJUDGES, AND DECREES AS FOLLOWS:

- 1. The Verified Motion to Disqualify and Remove Counsel of Record is DENIED;
- 2. The Request for Sanctions is DENIED; and
- 3. Request for Sanctions is GRANTED in the amount of \$27,614.78.

So ORDERED:



Distribution:

Bryan L. Ciyou

