STATE OF INDIANA)
) SS:
[redacted])

IN THE [redacted]

CAUSE NO. [redacted]

[redacted]
Petitioner,

v.

[redacted]
Respondent,

and

[redacted]
Intervenors.

Findings of Fact and Conclusions of Law and Judgment

This matter came before the Court on [redacted] Parties appearing: the petitioner, [redacted] in person and with counsel, [redacted] the respondent, [redacted] in person and by counsel [redacted]; the intervenors, [redacted] in person and with counsel, Bryan Ciyou, and [redacted] as local counsel, and [redacted], counsel for [redacted] and [redacted].

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

1. [redacted] (hereinafter [redacted] and [redacted] (hereinafter [redacted] were married on or about [redacted].
2. [redacted] and [redacted] are the parents of a minor child, [redacted] (hereinafter [redacted] born [redacted].
3. [redacted] (hereinafter [redacted] is [redacted] mother, paternal grandmother to [redacted] (hereinafter [redacted] is [redacted] stepfather.
4. [redacted] and [redacted] are the intervenors herein.
5. At all times relevant to this case, [redacted] and [redacted] resided and still reside at [redacted].

6. Up until [redacted] and [redacted] were living with [redacted] and [redacted]

7. In [redacted] and [redacted] went to see [redacted] in order for [redacted] to start a dissolution of marriage action against [redacted]

8. [redacted] and [redacted] had previously worked at [redacted] where [redacted] had previously been a nurse.

9. There was no evidence presented that [redacted] had ever provided legal services to [redacted] or [redacted] prior to [redacted]

10. [redacted] and [redacted] went to [redacted] initial divorce consult because they were going be the money behind it. [redacted] testified that, "[redacted] had no money to hire a lawyer." (Tr. at [redacted].

11. [redacted] did not require [redacted] to sign a fee engagement agreement because [redacted] believed the dissolution would be accomplished promptly. (Tr. at [redacted]).

12. [redacted] filed an appearance for [redacted] and a Verified Petition for Dissolution of Marriage. [redacted] was named as the petitioner and [redacted] was named as the respondent.

13. Ultimately, on [redacted] the parties executed a Settlement Agreement, which was filed and made an order of the Court on [redacted] (Exhibit F).

14. The Settlement Agreement was the product of a settlement conference that apparently occurred on [redacted] went to the mediation with [redacted] testified he was involved in the settlement "because [he] was a part of it." (Tr. at [redacted]). When asked what he was trying to accomplish that day at setttlement, [redacted] testified, "Was trying to keep [redacted] in our home. I wanted to be part of the decision-making, and I was." (Id.).

15. [redacted] and [redacted] were not parties to the dissolution of marriage action nor did they sign the marital settlement agreement.

16. In the [redacted] Settlement Agreement, [redacted] is named as a *de facto* custodian of [redacted] (Exhibit F). Specifically, the Settlement Agreement provides as follows: "2.5. The parties agree that Husband's step-father, [redacted] shall be designated as the *de facto* custodian of said minor child, in accordance with Ind. Code §31-9-1-35.5" (Exhibit F).

> 2.5. The parties agree that Husband's step-father, [redacted], shall be designated as the de facto custodian of said minor child, in accordance with Indiana Code §31-9-1-35.5.

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

relevant factors, including those set forth in Indiana Code 31-17-2-8, agree it is in the best interests of the parties' minor child, namely, [redacted] aged [redacted] years, date of birth [redacted] that the parties shall have and retain joint legal custody, with shared physical custody according to the terms subsequent set forth in this agreement, with all rights, privileges, duties and obligations of joint legal custodians as set forth in Indiana Code §31-9-2-67, Ind. Code 31-17-2-14, and Ind. Code 31-17-2-15."

19. Further, the Settlement Agreement provided, "2.3. The parties agree to confer with each other and share decision making [sic] authority and responsibility on major decisions affecting the welfare and upbringing of said child, with a goal of making decisions which promote the best interests of said child. The parties will jointly decide: … 2.1.4 Child care for the parties' minor child, which the parties agree shall be [redacted]."

2.3. The parties agree to confer with each other and share decision making authority and responsibility on major decisions affecting the welfare and upbringing of said child , with a goal of making decisions which promote the best interests of said child. The parties will jointly decide:

2.1.1 The schools the child attend(s), and in furtherance thereof agree that the child's school district shall be that of Husband, provided same remains in [redacted] county area;
2.1.2 The religious instruction the child receives;
2.1.3 The non-emergency health care the child receive(s): the parties agree that the parties' minor child's primary care physician shall be a pediatrician, specifically [redacted], provided he is covered by Husband's health insurance plan;
2.1.4 Child care for the parties' minor child, which the parties agree [redacted]
2.1.5 [redacted]

20. The Settlement Agreement is signed by [redacted] as Petitioner, [redacted] as Respondent, and [redacted] as counsel for Petitioner. (Exhibit F).
21. After the Settlement Agreement was filed with and approved by the Court, the parties apparently continued to have issues. As such, [redacted] continued to be represented by [redacted]
22. Since the entry of the Settlement Agreement, [redacted] and [redacted] have had nearly constant litigation. (CCS).
23. On [redacted] required [redacted] to sign a Fee Engagement Agreement. (Exhibit A).
24. [redacted] executed the Fee Engagement Agreement and acknowledged that he would employ [redacted] as attorney to "represent [redacted] in a contempt, parenting time, possible custody matter action." (Exhibit A).

FEE ENGAGEMENT AGREEMENT

As acknowledged by this Fee Engagement Agreement (hereinafter "Agreement"), I employ [redacted] (hereinafter "my attorney") of the law firm [redacted] (hereinafter "Firm"), 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 [redacted] as the "client":

~~22. I understand this Agreement and that it is a binding legal contract.~~

[redacted]

[redacted]

26. [redacted] is the only "client" provided for on the Fee Engagement Agreement.
27. On the last page of the Fee Engagement Agreement, [redacted] and [redacted] signed as "Guarantors". (Exhibit A).
28. The Fee Engagement Agreement clearly and succinctly provides that [redacted] is the "client" and that [redacted] and [redacted] are the "Guarantors." The portion of the Fee Engagement Agreement signed by [redacted] and [redacted] specifically provides that the Guarantee "does **not** create the attorney-client relationship". (Exhibit A).
29. Further, the Guarantee provides that the [guarantors] understand that the client is the person to whom [redacted] will answer and by whom she will be instructed. (Exhibit A)

GUARANTEE RE:

I, the undersigned, personally guarantee the performance of the client, to the above terms. I understand that the client is the person to whom [redacted] will answer and by whom she will be instructed. This guarantee does not create the attorney client relationship between [redacted] and me. I will only receive such information [redacted] rding this case a[redacted]ove. I understand that [redacted] will rely on this guarantee in extending credit to the client.

This guarantee shall be immediately binding on the Guarantor and shall continue in full force and effect until the Guarantor has given written notice by registered mail to [redacted] not to extend further credit. Delivery of notice shall operate to pr[redacted] part of the Guarantor to future indebtedness, but Guarantor shall remain liable upon all indebtedness then existing.

[redacted]

Guarantor:
Print Name
Address:

Cell Numb
Work Num

Guarantor:
Print Name
Address:

Cell Numbe
Work Numb

(Exhibit A).

30. [redacted] read the Guarantee; however, he claimed he did not read every word. (Tr. at [redacted]).

31. [redacted] read the Fee Engagement Agreement. (Tr. at [redacted]

32. [redacted] informed [redacted] and [redacted] that she was [redacted] attorney and that she did not represent [redacted] or [redacted] and was not their attorney. (Tr. at [redacted]).

33. On more than one occasion, [redacted] heard [redacted] tell [redacted] and [redacted] that [redacted] was not their attorney. (Tr. at [redacted]).

34. [redacted] lived with [redacted] at [redacted] and [redacted] home from the time [redacted] was about eighteen months old until approximately [redacted] at which time he moved out and took [redacted] with him. (Tr. at [redacted]).

35. [redacted] received billing statements from [redacted] every month for almost a decade. Each of those statements were addressed to [redacted] No billing statements ever came to [redacted] or [redacted] (Tr. at [redacted]).

36. The billing statements from [redacted] refer to [redacted] as "the client."

37. The billing statements from [redacted] referred to [redacted] and [redacted] as "[redacted]" or "[redacted]"

38. [redacted] and [redacted] denied that [redacted] ever told them she was only [redacted] attorney and that she did not represent them. However, [redacted] admitted on cross-examination that [redacted] was [redacted] client. (Tr. at [redacted]).

39. Over approximately [redacted] years, with [redacted] permission, [redacted] had communications with [redacted] and [redacted] regarding [redacted] case. (Tr. at [redacted]).

40. It appears it is because of these communications that [redacted] and [redacted] believe they had established an attorney-client relationship with [redacted]

41. [redacted] met with [redacted] several times over this ten-year period for the purpose of giving legal advice. Several of these consultations were with [redacted] alone. (Tr. at [redacted]).

42. [redacted] looked to his parents, [redacted] and [redacted] for guidance. He appreciated their advice, which is why he allowed them at mediations and in meetings with [redacted]

43. [redacted] and [redacted] presented several billing statements showing that [redacted] spoke or corresponded with [redacted] or [redacted] (Exhibits 4, 8, 11, 12, 15, 17, 18).

44. The billing statements show that [redacted] communicated with [redacted] and [redacted] in addition to communicating with [redacted]

45. [redacted] clearly and consistently distinguished [redacted] as "client" from [redacted] and [redacted] On [redacted] for example, [redacted] made an entry for five separate telephone communications: three were from [redacted] as "client," and one from [redacted] and one from opposing counsel, [redacted] No evidence was offered that [redacted] or [redacted] were the "client" referred to in the billing statement.

[redacted]	Telephone call from client.	0.25	46.25	[redacted]
	Telephone call from client (2nd call).	0.25	46.25	[redacted]
	Telephone call from [redacted].	0.25	46.25	[redacted]
	Telephone call to client.	0.25	46.25	[redacted]
	Telephone call from [redacted]	[redacted]	[redacted]	[redacted]

(Exhibit 15).

46. During the litigation in this case, prior to [redacted] and [redacted] intervention, [redacted] participated in depositions with [redacted] and without [redacted] and [redacted]

47. During the litigation in this case, prior to [redacted] and [redacted] intervention, [redacted] was scheduled to go to a hearing in court. The matter was resolved without going into the courtroom. [redacted] and [redacted] did not accompany [redacted] to the hearing.

48. It is undisputed that [redacted] communicated with [redacted] and [redacted] on different occasions regarding the litigation and matters related to the litigation.

49. None of the communications refer to any legal claims belonging to [redacted] and [redacted]

50. Further, the communications specifically reference [redacted] For example, Exhibit 36 is a draft letter to [redacted] that [redacted] sent to [redacted] and [redacted] for review. (Exhibit 36). The letter states in pertinent part:

> …[redacted] is agreeable to you keeping [redacted] overnight on [redacted]
>
> [redacted] has been reluctant to give you the information about [redacted]
>
> [redacted] has made it clear to me…
>
> [redacted] does not want the other [redacted] to ridicule [redacted]

(Exhibit 36). There is no mention of [redacted] or [redacted] in Exhibit 36.

51. Exhibit 39 is another draft letter by [redacted] to [redacted] sent to [redacted] and [redacted] for review. The letter states as follows in pertinent part:

> Until yesterday, [redacted] was under the impression that the Halloween parenting time was all set pursuant to a text message (or email) between you and [redacted]
>
> [redacted] offers the following alternatives to resolve Halloween parenting time…
>
> [redacted] will meet you at the [redacted] shortly after [redacted] for the start of your weekend parenting time with [redacted] ([redacted] believes that this option is in the best interests of [redacted]
>
> [redacted] believes that this option is certainly not in [redacted] best interest but this is what you are demanding.
>
> Please let me know which options you prefer so that [redacted] can plan accordingly.
>
> cc: [redacted]

(Exhibit 39). There is no mention of [redacted] or [redacted] in Exhibit 39.

52. Exhibit 51 is an email that [redacted] sent to [redacted] and [redacted] enclosing a copy of an email that she sent to opposing counsel. (Exhibit 51). The email refers to "[redacted] Petition to Modify Parenting Time" and "[redacted] Contempt of Court." (Exhibit 51). There is no mention of [redacted] or [redacted] in Exhibit 51.

53. Exhibit 21 is a copy of a letter that [redacted] sent to [redacted] counsel. In that letter, regarding pediatric dentistry, [redacted] informs [redacted] counsel that "[redacted] absolutely refuses to permit any further treatment of [redacted] by any dentist or

employee at [redacted] is copied on the letter and [redacted] and [redacted] are not. The letter makes no mention of [redacted] or [redacted]

54. Exhibit 42 is another copy of correspondence from [redacted] to counsel for [redacted] A copy of the email was subsequently emailed to [redacted] and [redacted] The email states in pertinent part that [redacted] "discussed with [redacted] the issue of parenting time and that it is her belief that "[redacted] and [redacted] have the same understanding of how summer parenting time is to be exercised." (Exhibit 42). Exhibit 42 makes no mention of [redacted] or [redacted] or their views of summer parenting time.

55. Exhibit 34 is an email from [redacted] to [redacted] enclosed a letter sent to [redacted] The letter states that "[redacted] would be offering parenting time, that "[redacted] would be cancelling appointments because of his unavailability, and requests that [redacted] "not schedule any further appointment for [redacted] as this is solely [redacted] responsibility per the Mediated Settlement Agreement." (Exhibit 34). Exhibit 34 is silent as to [redacted] and [redacted]

56. In Exhibit 44, an email from [redacted] to [redacted] acknowledges that "[redacted] needs to talk to [redacted] about [redacted] counsel] calling you about the last day of school." (Exhibit 44).

57. Exhibit 10 is a letter to [redacted] from [redacted] with a copy to [redacted] and [redacted] In Exhibit 10, [redacted] addressing [redacted] describes how several actions taken by [redacted] and [redacted] would be "detrimental to our case."

58. Following the filing a several motions, the parties again were ordered to mediation. The parties filed a Mediation Agreement on [redacted]

59. The [redacted] Mediation Agreement removed [redacted] as the *de facto* custodian of [redacted] (Exhibit G).

5. Sub-Paragraph 2.1.4 of Paragraph 2.3, and Paragraph 2.5 of the Marital Settlement Agreement shall be eliminated as orders of this Court.

(Exhibit G).

60. The [redacted] Mediation Agreement lists [redacted] and [redacted] as the parties and is signed by [redacted] and [redacted] and is not signed by [redacted] or [redacted] (Exhibit G).

61. [redacted] was present at this mediation and was aware that he was being removed as *de facto* custodian. (Tr. at [redacted]).

62. No evidence was presented that [redacted] asked [redacted] why he was being removed as *de facto* custodian or that he objected in any way to the change until [redacted]

63. On [redacted] and [redacted] sought intervention in the litigation and, for the first time, asserted a claim for legal custody and parenting time of [redacted]

64. Prior to [redacted] and [redacted] asserting a claim for legal custody and parenting time of [redacted] moved out of the home of [redacted] and [redacted] and took [redacted] with him.

65. Prior to [redacted] and [redacted] were never parties to litigation, had never asserted any claims, and had never moved to intervene.

66. On [redacted] and [redacted] filed a Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions.

67. [redacted] offered testimony from [redacted] regarding whether [redacted] should be disqualified as counsel for [redacted] (Tr. at [redacted]).

68. Mr. [redacted] is an attorney licensed to practice law in the State of Indiana, and the former [redacted]. (Tr. at [redacted]).

69. In addition, Mr. [redacted] has practiced, lectured, and wrote extensively in the field of professional responsibility and legal ethics, including attorney disqualification. (Tr. at [redacted]); (Exhibit D).

70. [redacted] offered the opinion that no attorney-client relationship was formed between [redacted] and [redacted] and [redacted] and that the Rules of Professional Conduct did not require [redacted] to be disqualified from this case. (Tr. at [redacted]).

71. [redacted] opined that an attorney-client relationship must be formed by an express, mutual agreement between the attorney and the client and that both parties must consent to its formation. (Tr. at [redacted])

72. [redacted] further opined that there was an attorney-client relationship expressly formed when [redacted] and [redacted] with the clearest indication being entry of [redacted] appearance for [redacted] in the litigation and the Fee Engagement Agreement. (Tr. at [redacted]). However, [redacted] opined that there was no evidence of an attorney-client relationship between [redacted] and [redacted] and [redacted] (Tr. at [redacted]).

73. Mr. [redacted] opined that the parties' agreement to the appointment of [redacted] as *de facto* custodian, including counsel of [redacted] does not create an attorney-client relationship. (Exhibit E).

74. Mr. [redacted] further opined that the correspondence between [redacted] and [redacted] and [redacted] did not create an attorney-client relationship. Mr. [redacted] testified that it is common for an attorney for one person to communicate with those who have an interest in the outcome of the Litigation (as opposed to a legal interest in the Litigation). Mr. [redacted] testified that [redacted] and [redacted] are confusing the waiver of an attorney-client privileged communication (by copying a third party) with the creation of an attorney-client relationship, and that those are two distinct principles. (Tr. at [redacted]).

75. Mr. [redacted] testified that the correspondence on which [redacted] and [redacted] were copied not only did not create an attorney-client relationship between [redacted] and the [redacted] but demonstrated that [redacted] represented [redacted] only. (Tr. at [redacted]).

76. Mr. [redacted] also opined that not only was [redacted] not a necessary witness, but she was not a competent witness in the Litigation – the only facts of which [redacted] was aware are facts based on second (or third or fourth) hand knowledge which every lawyer learns in any litigation in which he or she is involved. (Tr. at [redacted]

77. Mr. [redacted] further testified that [redacted] was under no legal or ethical obligation to advise [redacted] and [redacted] to seek independent legal counsel at any time. Even if she had a duty to advise [redacted] and [redacted] to seek independent legal counsel, that does not create an attorney-client relationship. (Tr. at [redacted]).

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 [redacted] and the [redacted] To the contrary, the fee agreement signed by [redacted] and [redacted] and the [redacted] as guarantors, expressly identifies [redacted] as the client, [redacted] as the attorney, and the [redacted] 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).

9. Overwhelmingly in this case, the evidence of the conduct of the parties is contrary to the formation of an implied attorney-client relationship.

10. [redacted] signed the Fee Engagement Agreement as the client, [redacted] signed as the attorney, and [redacted] and [redacted] signed as the guarantors. The guarantee portion of the Fee Engagement Agreement clearly states that they were not clients of [redacted]

11. The numerous billing statements sent by [redacted] were consistently addressed to [redacted]

12. The numerous billing statements identify conversations [redacted] had with [redacted] as well as conversations [redacted] and [redacted] had with [redacted] In those billing statements, consistently, [redacted] identifies a conversation she had with [redacted] as conversations with "client" and the conversations she had with [redacted] or [redacted] as [redacted] or "[redacted]

13. On numerous occasions, [redacted] met with [redacted] privately.

14. [redacted] entered her appearance as counsel for [redacted] and initiated the dissolution of marriage action on behalf of [redacted] in his marriage to [redacted]

15. The Court fails to understand the [redacted] claim that [redacted] represented the "family," i.e., [redacted] and [redacted] was hired to assist [redacted] in obtaining a divorce from [redacted] to whom he was married. There was no polyamorous relationship between [redacted] and [redacted]

16. There is no evidence that [redacted] suffered from any diminished capacity and needed the assistance of the [redacted] nor is there any evidence that [redacted] or [redacted] were serving as guardians for [redacted] because he was incapacitated.

17. As proof of the implied attorney-client relationship between [redacted] and [redacted] and [redacted] they point out that [redacted] participated in the negotiation of a marital settlement agreement between [redacted] and [redacted] which has a single provision that provides that [redacted] was designated the *de facto* custodian of [redacted] son, [redacted] The Court finds this fact to be of little or no consequence.

18. Although [redacted] was designated the *de facto* custodian, custody of [redacted] both legal and physical, was given to [redacted] and [redacted] The designation of [redacted] as a *de facto* custodian in [redacted] and [redacted] marital settlement agreement was a nullity.

19. Moreover, [redacted] and [redacted] with [redacted] as counsel, later removed [redacted] as the *de facto* custodian in a subsequent mediated settlement agreement, one that was attended by [redacted]

20. The [redacted] also point out as proof of the implied attorney-client relationship an [redacted] letter [redacted] set to [redacted] which the [redacted] were provided a copy, and a [redacted] email provided to [redacted] and [redacted]

21. The [redacted] letter is clearly advising [redacted] that he must take some action as [redacted] father and not rely upon [redacted] and [redacted] Further, the letter identifies conduct of [redacted] and [redacted] that is potentially detrimental to [redacted] continued custody of [redacted]

22. The [redacted] email asked [redacted] and [redacted] to think about issues and concerns to be addressed at the following day's mediation. It also notes that [redacted] would not be attending the mediation.

23. The letter and email demonstrate that [redacted] was representing [redacted] not [redacted] and [redacted] because [redacted] was advising [redacted] about protecting his own custody rights, not custody rights of [redacted] or [redacted]. Moreover, these letters would undercut any claim the [redacted] might have that [redacted] was giving them advice on the custody of [redacted]

24. It is undisputed that [redacted] communicated with [redacted] and [redacted] about her representation of [redacted]. However, the Fee Engagement Agreement implicitly recognized that [redacted] may share information with [redacted] and [redacted] but that [redacted] did "not" represent [redacted] and [redacted]

25. Further, as [redacted] testified, it is not uncommon for an attorney to communicate with third parties who have an interest in the outcome of the litigation. It is not uncommon for litigation to have an effect on persons not parties to the litigation. That does not mean that those persons have a legal interest in the litigation or that they can never speak to a party's attorney without creating an attorney-client relationship. Simply because an attorney communicates with a third party who has an interest in the litigation – a friend, an ally, or a family member – does not create an attorney-client relationship.

26. Most of the other correspondence introduced into evidence did not contain "advice" but rather was informational, including correspondence to third parties. Even if the correspondence that was provided to [redacted] and [redacted] amounted to "advice," it was "advice" regarding [redacted] representation of [redacted] and [redacted] claims only. None of the documentary evidence demonstrated that [redacted] was advising [redacted] and [redacted] of their rights or that they have any rights or claims prior to [redacted]

27. The Court finds that the conduct of [redacted] towards the [redacted] is insufficient to establish an attorney-client relationship was impliedly formed with either [redacted] or [redacted]

28. The Court specifically finds that an attorney-client relationship was not implied by the conduct of [redacted] and the [redacted]

29. [redacted] likely recognized that the [redacted] were actively involved in [redacted] care and that her duty to [redacted] precluded her from advising the [redacted] to seek their own counsel.

30. The [redacted] Verified Motion to Disqualify also mentions that the [redacted] anticipate calling [redacted] as a witness at a hearing on their custody motion and asserts that this, too, disqualifies [redacted] as [redacted] counsel in this case.

31. Indiana Rule of Professional Conduct 3.7 provides that:

> (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 from simultaneously being a lawyer and advocate at trial, the lawyer must be a "necessary" witness. The [redacted] Verified Motion to Disqualify asserts that [redacted] will be called to testify that [redacted] and [redacted] were raising [redacted] This does not make [redacted] a necessary witness.

34. No evidence was presented that [redacted] has independent observations of [redacted] and [redacted] interaction with [redacted] Like most lawyers, [redacted] would only know what she has been told. Not only is [redacted] not a necessary witness, she is not a competent witness. If called as a witness, her 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, [redacted] has represented [redacted] 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 [redacted] who are seeking custody, would be a hardship for [redacted] 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 [redacted] 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 [redacted] is not disqualified as a lawyer under Indiana Rule of Professional Conduct 3.7.

38. The Court also finds that [redacted] had no obligation to advise the [redacted] to pursue their own counsel. To do so would have been contrary to the best interests of her client and his pursuit of custody of his son.

39. Based upon the letters from [redacted] it is likely [redacted] recognized her client was dependent on the [redacted] in caring for [redacted] had been living in the [redacted] home for at least a decade, [redacted] and [redacted] were providing stability for [redacted] and were in tune with [redacted] needs. If the [redacted] were to pursue custody of [redacted] would then have to defend [redacted] on two fronts: the [redacted] and [redacted] had no obligation to advise the [redacted] to pursue their own counsel.

40. In addition to seeking [redacted] disqualification, the [redacted] request the Court to award attorney's fees due to what they contend is [redacted] dual representation of [redacted] and the [redacted]

41. [redacted] has also requested an award of attorney fees incurred responding to the [redacted] Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions.

42. Litigants must generally pay their own attorney fees. *Davidson v. Boone County*, 745 N.E.2d 895, 899 (Ind. Ct. App. 2001).

43. Accordingly, an award of attorney fees is not allowable in the absence of a statute, agreement or stipulation authorizing such an award. *Harco, Inc. v. Plainfield Interstate Family Dining Assocs.*, 758 N.E.2d 931, 940 (Ind. Ct. App. 2001).

44. The [redacted] cite no authority that would permit an award of attorney's fees.

45. [redacted] relies upon Ind. Code §34-52-1-1, which provides as follows:

> (a) in all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.
> (b) in any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds the other party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

46. Even if this Court did not conclude that the [redacted] motion should be denied, the [redacted] failed to point to any statute, agreement, or stipulation permitting them to recover attorney's fees in this scenario. See *Harco, Inc. v. Plainfield Interstate Family Dining Assocs.*, 758 N.E.2d 931, 940 (Ind. Ct. App. 2001).

47. [redacted] had a good faith basis for resisting the Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions, and the intervenors would not be entitled to fees even if the Court granted the motion.

48. Having already concluded that [redacted] should not be disqualified, the [redacted] request for sanctions is hereby DENIED.

49. "A claim is 'frivolous' if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law." *Sickafoose v. Beery*, 116 N.E.3d 486, 493 (Ind. Ct. App. 2018), citing *BioConvergence, LLC v. Menefee*, 103 N.E.3d 1141, 1161-62 (Ind. Ct. App. 2018).

50. "A claim is 'unreasonable' if, based on the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation." *Id.*

51. "A claim is 'groundless' if no facts exist which support the legal claim relied on and presented by the losing party." *Id.*

52. There was never an attorney-client relationship created between [redacted] and the [redacted]

53. From the very beginning, the [redacted] relationship with [redacted] was centered around [redacted] and his marriage to [redacted] and then, subsequently, around [redacted] and post-dissolution matters related to [redacted] and their son, [redacted]

54. Although the [redacted] accompanied [redacted] to his initial appointment with [redacted] their purpose was to finance [redacted] representation of [redacted] in a dissolution of his marriage to [redacted]

55. Subsequently, the [redacted] signed an agreement that specifically distinguished between [redacted] as the client and themselves as the guarantors of any financial responsibility [redacted] had with [redacted] This agreement says the exact opposite which they have attempted to bring the court's attention in the Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions.

56. The [redacted] cited no case law that remotely supports the conclusion that if two parties agreed to the appointment of a *de facto* custodian that that it is sufficient to create an attorney-client relationship between the *de facto* custodian and counsel for one of the parties. Further, the [redacted] have cited no case law that remotely supports the conclusion that sending a courtesy copy of a letter directed specifically to a client creates an attorney-client relationship with the copied parties. [redacted] [redacted] admitted that he knew that [redacted] was the client, but testified that that was just a "technicality." Rule 3.7 of the Indiana Rules of Professional Conduct does not support disqualifications, and the [redacted] reliance on this Rule was wholly and completely without merit. The Court finds that the [redacted] Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions is "frivolous" as defined in the law.

57. The Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions is "unreasonable" because, based upon all of the circumstances; no reasonable attorney would consider the claim worthy of raising. As Donald [redacted] pointed out, there is simply no basis to find that [redacted] was also an attorney for the [redacted] The [redacted] had no pending claims and specifically signed an agreement that [redacted] was not their attorney. [redacted] never appeared for the [redacted] in this action nor did she perform any legal services on behalf of the [redacted] All of [redacted] efforts were directed solely toward [redacted] No reasonable attorney, after reading Rule 3.7 and the comments thereto, would assert that Rule 3.7 dictates that [redacted] be disqualified.

58. The Court finds no facts supporting the creation of an attorney-client relationship, thus the [redacted] Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions is "groundless."

59. The Court's decision to award attorney's fees is buttressed by the fact that it appears to the Court that the attempt to disqualify [redacted] was an abuse of the legal process designed to deprive [redacted] of one of his fundamental rights – the right to choose his own counsel.

60. Once the Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions was filed, [redacted] and [redacted] were faced with 3 choices:

    (a) [redacted] could withdraw. [redacted] would lose his chosen attorney who has handled this matter since its inception in 2009 and [redacted] would have to find new counsel who would have to familiarize himself or herself with almost a decade of proceedings.
    (b) [redacted] could resist the Verified Motion to Disqualify and Remove Counsel of Record and for Sanctions at [redacted] expense.
    (c) [redacted] could resist said motion at her own expense.

61. The first two options in the preceding paragraph place [redacted] in a precarious situation. The undisputed testimony demonstrated is that [redacted] is of very limited financial resources. He has depended upon the [redacted] to finance nearly constant litigation with [redacted] for nearly a decade.

62. In her client's best interest, [redacted] chose the third and final option: to resist the motion to disqualify at her own expenses. [redacted] has incurred a substantial sum of her own money to contest a motion to disqualify that should have never been filed, that had no basis in law or in fact, and was frivolous, unreasonable, and groundless pursuant to Indiana Code § 34-52-1-1. Even after the intervenors received the opinion of Mr. [redacted] they continued to press their meritless claims.

63. In *Reed v. Hoosier Health Sys.*, 825 N.E.2d 408, (Ind. Ct. App. 2005), in a concurring opinion, Judge Barnes warned of the use of motions to disqualify a tactical tool.

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 [redacted] have elected to pursue a motion to disqualify, using resources and court time, which could have been better spent resolving the [redacted] 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 [redacted] chose to vacate the agreed discovery and litigation schedule in order to prepare and file proposed findings of fact.

66. The Court orders that [redacted] request for fees and expenses is GRANTED in the amount of $27,614.78.

Judgment

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

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

So ORDERED: [redacted]

[redacted]

[redacted]

Distribution:

Bryan L. Ciyou

[redacted]