

**IN THE INDIANA COURT OF APPEALS**  
**Case No. 19A-DR-01047**

[REDACTED] )  
Appellants, [REDACTED] ) Interlocutory Appeal from the  
vs. [REDACTED] )  
[REDACTED] ) Trial Ct Cause No. [REDACTED]  
Appellee, [REDACTED] )  
and [REDACTED] ) Hon. [REDACTED] Judge  
[REDACTED] )  
Appellee. [REDACTED] )

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**APPELLANTS' BRIEF**

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**STATEMENT OF ISSUES**

**I. Whether the court erred when it denied the Motion to Disqualify as attorney for**

The first issue for review is whether the court erred in determining that did not represent as their attorney in their efforts to obtain custody and care of their grandchild. If this Court finds an attorney-client relationship is established, the Court must decide whether violated Rules 1.7 or 1.9 of the Indiana Rules of Professional Conduct by acting adversely to the interests to decide the issue of disqualification.

**II. Whether the trial court erred when it awarded sanctions against on the basis of frivolous, unreasonable or groundless litigation?**

If this Court affirms the trial court's order denying the motion to disqualify, it must then decide whether the motion to disqualify as their attorney was meritless pursuant to Indiana Code section 34-52-1-1 and Indiana case law. In making a ruling on whether the motion was frivolous, unreasonable or groundless, this Court must review the opinion of expert and determine whether the opinion was based upon an accurate review of the facts at issue in the record and relevant law, and whether or not opinion is a sufficient basis to support the trial court's ruling that is entitled to sanctions based upon frivolous, unreasonable or groundless litigation.

## STATEMENT OF CASE

### **I. Nature of the Case.**

Pursuant to Indiana Rule of Appellate Procedure 14, the nature of this case is an interlocutory appeal as a matter of right because the [REDACTED] have been ordered to pay money to [REDACTED] Appellants' App. [REDACTED]. The trial court has granted the [REDACTED] motion to stay and the [REDACTED] have posted the amount of the fee award with the Clerk. Appellants' App. p. [REDACTED]

The [REDACTED] are appealing the trial court's order denying [REDACTED] and [REDACTED] (collectively, "Towns") Verified Motion to Disqualify Counsel of Record and Request for Sanctions ("Motion"). Appellants' [REDACTED]. In their Motion, the [REDACTED] contend that the court was required to disqualify attorney [REDACTED] ([REDACTED] from acting as counsel to [REDACTED] [REDACTED] ("[REDACTED]" pursuant to Rules 1.7 and 1.9 of the Rules of Professional Conduct, which prevents an attorney from representing one client whose interest is adverse to a current client or acting adversely to a former client in the same or similar matter. *Id.*

Additionally, the [REDACTED] are appealing the court's ruling granting [REDACTED] request for sanctions ("Sanctions Request") on the basis that the Motion was frivolous, unreasonable and groundless litigation. Appellants' App. [REDACTED].

### **II. Course of Proceedings Relevant to the Issues Presented for Review.**

On [REDACTED] the [REDACTED] filed the Motion. [REDACTED]. On [REDACTED] the court held an evidentiary hearing on the Motion and the Sanctions Request. Tr. at [REDACTED]. The parties each submitted proposed findings of fact and conclusions of law to the court for consideration. Appellants' [REDACTED]. On [REDACTED] the court issued its findings of fact and conclusions of law resulting in an Order denying the Motion and granting [REDACTED] Sanctions Request (the "Order"). Appellants' [REDACTED].

### **III. Disposition of the Issues by the Trial Court.**

On [REDACTED] the court issued the Order denying the Motion and granting the Sanctions Request. Appellants' [REDACTED]. The trial court found in its Order that [REDACTED] did not provide the [REDACTED] legal advice about the custody of [REDACTED] Appellants' App. [REDACTED]. The court relied almost exclusively on the opinion of [REDACTED] in deciding to grant the sanctions request. Appellants' App. p. [REDACTED]. Subsequent to the issuance of the Order, the [REDACTED] timely filed their Notice of Appeal. Appellants' [REDACTED]. The trial court granted the

Brief of Appellants, [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] motion to stay execution of the Order, and the [REDACTED] posted the bond amount of the fee award with the clerk. Appellants' [REDACTED] [REDACTED]

### STATEMENT OF FACTS

[REDACTED] and [REDACTED] (“[REDACTED]” [REDACTED] were married on or about [REDACTED] [REDACTED] Appellants’ App. [REDACTED] [REDACTED] and [REDACTED] are the parents of a minor child, [REDACTED] Charles [REDACTED] (“[REDACTED]” born [REDACTED] [REDACTED] Appellants’ [REDACTED] [REDACTED] [REDACTED] (“[REDACTED]” is [REDACTED] mother, and paternal grandmother to [REDACTED] Appellants’ [REDACTED] [REDACTED] [REDACTED] (“[REDACTED]” is [REDACTED] stepfather, and [REDACTED] paternal step-grandfather. Id.

[REDACTED] and [REDACTED] lived together with the [REDACTED] until 2009. Appellants’ [REDACTED] [REDACTED] [REDACTED] During that time, [REDACTED] resided in the [REDACTED] home. Id. In 2009, [REDACTED] and the [REDACTED] jointly went to see [REDACTED] about a dissolution of marriage action against [REDACTED] and about obtaining custody and care of [REDACTED] Tr. at 13, 73. At the initial meeting, the [REDACTED] instructed [REDACTED] to “keep [REDACTED] at our house and keep him away from [REDACTED] that was what our plan was. And to keep custody.” Tr. at 13. At the time of the initial engagement, [REDACTED] did not have [REDACTED] or the [REDACTED] sign an engagement agreement/contract. Tr. at 13, 180.

[REDACTED] then filed an appearance for [REDACTED] and a Verified Petition for Dissolution of Marriage. Appellants’ App. p. [REDACTED] [REDACTED] On [REDACTED] [REDACTED] [REDACTED] and the [REDACTED] jointly went to a mediation session with [REDACTED] Tr. at 16. This mediation session ultimately resulted in a settlement agreement that was made an order of the court on [REDACTED] [REDACTED] (the “Settlement Agreement”) that divorced the parties and resolved all issues of the case. [REDACTED] [REDACTED] Appellants’ [REDACTED] [REDACTED]

[REDACTED] testified that he was present at the 2009 mediation and helped [REDACTED] and [REDACTED] negotiate the terms of the Settlement Agreement “because he was part of it.” Tr. at 18. [REDACTED] testified his purpose in the negotiations “[w]as trying to keep [REDACTED] in our home. I wanted to be part of the decision making, and I was.” Id. [REDACTED] attended part of the mediation session by phone. During a phone call between [REDACTED] and [REDACTED] [REDACTED] instructed [REDACTED] to make sure that [REDACTED] was listed as a *de facto* custodian of [REDACTED] Tr. at 75-76.

Pursuant to [REDACTED] instruction, [REDACTED] negotiated to ensure that [REDACTED] was designated as the *de facto* custodian of [REDACTED] in the Settlement Agreement, all in accordance with Indiana Code section 31-9-2-35.5.<sup>1</sup> Tr. at 76; Appellants’ [REDACTED] [REDACTED] [REDACTED] Additionally, as part of the Settlement Agreement, [REDACTED] [REDACTED] was specifically identified as one of Micheael’s caregivers.

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<sup>1</sup> The Settlement Agreement, due to a typographical error, incorrectly cites the statute as Indiana Code section 31-9-1-35.5.



Brief of Appellants, [REDACTED]

Appellants' App. [REDACTED]. The Settlement Agreement also states that [REDACTED] and [REDACTED] shall retain joint legal custody pursuant to Indiana Code Section 31-9-2-67, § 31-17-2-14, and § 31-17-2-15. Appellants' [REDACTED]

Subsequent to entering into the Settlement Agreement and dissolving the marriage, [REDACTED] and [REDACTED] had numerous disputes about the care of [REDACTED] that resulted in protracted litigation. See CCS. On [REDACTED] [REDACTED] signed a fee engagement agreement ("Fee Agreement") employing [REDACTED] as his attorney to "represent [REDACTED] in a contempt, parenting time, possible custody matter action". Appellants' [REDACTED] [REDACTED] signed a page attached to the Fee Agreement labeled as "Guarantee". Appellants' [REDACTED] [REDACTED]. The Guarantee states: "This guarantee does not create the attorney client relationship between [REDACTED] [REDACTED] LLC and me." Id.

After the parties' execution of the Fee Agreement and Guarantee, the [REDACTED] claim that [REDACTED] again represented their legal interests, and that [REDACTED] never informed the [REDACTED] that she was only representing [REDACTED] and not also representing the [REDACTED]. Tr. at 14, 22, 38, 66-68, 77, 81, 112-113, 132-134. Subsequent to the 2009 mediation, the parties attended two additional mediation sessions to resolve disputes relating to custody, childcare and parenting time. Tr. at 44. [REDACTED] routinely corresponded with the [REDACTED] regarding legal strategy including how to best prepare for the mediation session. Appellants' App. p. [REDACTED] [REDACTED] also provided legal advice to [REDACTED] on how to obtain and preserve evidence relating to the custody and care of [REDACTED]. Appellants' App. [REDACTED]

[REDACTED] continued to reside with the [REDACTED] until [REDACTED] September 2018. Tr. at 195. After [REDACTED] did not return to the [REDACTED] from parenting time with [REDACTED] in [REDACTED] 18, the [REDACTED] moved to intervene in the trial court on [REDACTED] [REDACTED]. Appellant's [REDACTED]. It was not until this time that [REDACTED] first learned that [REDACTED] claimed she was only [REDACTED] attorney. [REDACTED] [REDACTED]. The [REDACTED] then filed their Motion on [REDACTED] [REDACTED]. Appellants' [REDACTED]

The court held an evidentiary hearing on their Motion on [REDACTED] [REDACTED] (the "Hearing"). [REDACTED] [REDACTED]. At the Hearing, [REDACTED] [REDACTED] both testified about numerous times that they sought legal advice from [REDACTED] and that they considered [REDACTED] to be their attorney who was acting to help ensure that [REDACTED] had legal rights relating to the custody and care of [REDACTED]. [REDACTED] [REDACTED]. They also testified that [REDACTED] was an attorney for [REDACTED] and that they considered her to be representing both [REDACTED] and the [REDACTED] interests. Tr. at 19. [REDACTED]

Brief of Appellants, [REDACTED]

[REDACTED] testified as an expert and opined that no attorney-client relationship was established between [REDACTED] and [REDACTED] Appellants' App. p. 1 [REDACTED]; [REDACTED] On [REDACTED] the trial court entered the Order denying the [REDACTED] Motion and granting [REDACTED] Sanctions Request. Appellants' [REDACTED]

## SUMMARY OF ARGUMENT

### **I. CONFLICT OF INTEREST.**

The trial court erred when it denied the [REDACTED] Motion. The [REDACTED] produced sufficient evidence proving that an attorney-client relationship was established between the [REDACTED] and [REDACTED]. [REDACTED] repeatedly communicated with [REDACTED] regarding legal advice to protect their legal interests. [REDACTED] frequently communicated with [REDACTED] regarding the custody and care of [REDACTED] without [REDACTED] being involved in the communications. [REDACTED] never informed the [REDACTED] that she was not their attorney. [REDACTED] and [REDACTED] both testified that [REDACTED] instructed [REDACTED] to include [REDACTED] as a “*de facto*” custodian of [REDACTED] in the settlement agreement reached in 2009, and [REDACTED] followed this instruction, which was agreed to by [REDACTED] and ordered by the trial court.

Significantly, the trial court’s findings completely ignore the testimony of the [REDACTED] relating to seeking legal advice from [REDACTED] about custody for [REDACTED] in 2017. [REDACTED] testified that he specifically asked [REDACTED] about the likelihood of the [REDACTED] (not [REDACTED] receiving custody of [REDACTED] and [REDACTED] advised “not good”. The fact that the Order ignores multiple facts demonstrates that the court’s decision denying the Motion was against the logic and effect of the facts presented in this case.

[REDACTED] was not violating any ethical duties in representing both [REDACTED] and the [REDACTED] while their interests were aligned. Until 2018, the goal of both [REDACTED] and the [REDACTED] was to have [REDACTED] reside in the [REDACTED] home and for the [REDACTED] to provide a substantial amount of the care for [REDACTED]. However, once [REDACTED] indicated to [REDACTED] that he wanted the [REDACTED] excluded from the custody and care of [REDACTED], [REDACTED] was placed in a clear conflict of interest. Rule 1.7 of the Indiana Rules of Professional Conduct prohibits an attorney from acting adversely against a current client’s interest in favor of another client. Rule 1.9 of the Indiana Rules of Professional Conduct prohibits an attorney from acting adversely to a former client in the same matter where she previously represented them.

Unfortunately, [REDACTED] violated both Rule 1.7 and 1.9 when she acted to exclude the [REDACTED] from the custody and care of [REDACTED] after concurrently and previously acting as the [REDACTED] attorney and advancing their interests. The [REDACTED] intend to continue to seek custody and care of [REDACTED] in the trial court, and having [REDACTED] continue as [REDACTED] attorney after she acted as

Brief of Appellants, [REDACTED]

attorney for the [REDACTED] is prohibited by Rule 1.7 and harmful and directly adverse to the [REDACTED] interests. Therefore, the court erred when it denied the [REDACTED] motion to disqualify.

## **II. SANCTIONS.**

Regarding the fee awarded as sanctions against the [REDACTED] the fact that [REDACTED] regularly provided the [REDACTED] legal advice demonstrates that the [REDACTED] Motion was not frivolous, unreasonable or groundless pursuant to Indiana Code section 34-52-1-1. Additionally, Indiana law is well settled that a party should not be sanctioned solely because they lose on the merits. Finally, it is without question that a party may challenge an expert's opinion with evidence other than contradictory expert testimony, and a party should not be sanctioned solely for challenging an expert's opinion with admissible evidence. As the argument demonstrates, [REDACTED] opinion did not account for most of the evidence, presumably because [REDACTED] did not provide it to him to consider.

## ARGUMENT

### **I. The trial court erred in denying the [REDACTED] motion to disqualify [REDACTED] from representing [REDACTED]**

#### **A. Standard of review.**

A trial court may disqualify an attorney for a violation of the Indiana Rules of Professional Conduct ("IRPC"). *Gerald v. Turnock Plumbing, Heating, & Cooling, LLC*, 768 N.E.2d 498, 501 (Ind.Ct. App. 2002) (citing *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 154 (Ind.1999)). A trial court's decision whether or not to disqualify an attorney is reviewed for an abuse of discretion. *Id.* (citing *Robertson v. Wittenmyer*, 736 N.E.2d 804, 806 (Ind. Ct. App. 2000)). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if it has misinterpreted the law. *State v. Willits*, 773 N.E.2d 808, 811 (Ind. 2002).

#### **B. The facts demonstrate that an attorney-client relationship was established between the [REDACTED] and [REDACTED]**

##### **1. [REDACTED] jointly represented [REDACTED] and the [REDACTED] beginning in February 2009 through at least the [REDACTED] settlement agreement.**

An agreement to establish an attorney-client relationship need not be in writing and may be formed by the conduct of the parties. *Querry & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 724-25 (Ind. Ct. App. 2007). In order to establish a valid attorney-client relationship, there must be evidence that both the attorney and client have consented to its formation. *Id.*

Attorney-client relationships have been implied where a person seeks legal 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 legal advice or assistance. *Matter of Anonymous*, 655 NE 2d 67, 70 (Ind. 1995). Here, the [REDACTED] sought the advice and assistance of [REDACTED] in obtaining custody and care of [REDACTED] and [REDACTED] a qualified and competent family attorney, gave them advice and followed their instructions until at least 2018 to help [REDACTED] remain in their home and have the [REDACTED] act as caregivers. Tr. at 13, 73, 75-76, 88.

Specifically, the [REDACTED] and [REDACTED] met with [REDACTED] in February 2009 to help [REDACTED] with the divorce and to ensure that the [REDACTED] kept custody of [REDACTED] Tr. at 13, 73. Significantly, it was [REDACTED] who did the research and selected [REDACTED] to assist with the joint representation. Tr. at 73. [REDACTED] testified as follows regarding [REDACTED] representation of the [REDACTED]

Q: Ma'am, ex - tell me exactly what you relayed to Ms. [REDACTED] about what you were trying to accomplish, and what you and [REDACTED] - what you and [REDACTED] - did for [REDACTED]

A: I mean, initial meeting, we told- we talked to [REDACTED] about- um- [REDACTED] and I being caregivers- [REDACTED] primarily because I was working- um - a great deal away from home at that time; that's- and [REDACTED] was the person providing care for [REDACTED]

Q: And it was your expectation through this representation that was going to continue?

A: Yes.

Q: And that was clearly conveyed to Ms. [REDACTED] by you?

A: Yes. Tr. at 74.

[REDACTED] also provided legal advice to the [REDACTED] regarding custody of [REDACTED] Tr. at 130, 203. Understandably, the [REDACTED] reasonably relied on [REDACTED] legal advice and considered her to be their attorney who was helping them obtain and maintain legal rights relating to the custody and care of [REDACTED] Tr. at 18. An attorney-client relationship can be established through "proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it." See *Hacker v. Holland*, 570 NE 2d 951, 956 (Ind. Ct. App. 1991), quoting *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977). Thus, the [REDACTED] clear indication to [REDACTED] that she was being hired to help the [REDACTED] retain custody and care of [REDACTED] and [REDACTED] often providing advice on this issue, [REDACTED] consented to be their attorney because she never informed the [REDACTED] that they should obtain separate counsel from [REDACTED] *Id.*, Tr. at 76.

Further, after the initial filing of the case, the parties arranged to have a mediation session on [REDACTED] Tr. at 16. The [REDACTED] met and spoke with [REDACTED] frequently in preparation for the mediation. Tr. at 16-17. [REDACTED] attended the mediation in person and [REDACTED] attend by phone. Tr. at 16, 75-76. Significantly, [REDACTED] directly instructed [REDACTED] to include [REDACTED] as a *de facto* custodian of [REDACTED] in the written settlement agreement. Tr. at 76. [REDACTED] pursuant to the [REDACTED] instruction, negotiated the inclusion of [REDACTED] as *de facto* custodian in the Settlement Agreement. *Id.* This was agreed to by [REDACTED] and ordered by the trial court. Appellants' App

[REDACTED]

A *de facto* custodian is defined as: “a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:

- (1) six (6) months if the child is less than three (3) years of age; or
- (2) one (1) year if the child is at least three (3) years of age. Ind. Code § 31-9-2-35.5

The inclusion of [REDACTED] as a *de facto* custodian provided a substantial legal benefit to the [REDACTED]. In making custody determinations, a court should consider the wishes of a *de facto* custodian. Ind. Code § 31-17-2-8, and § 31-17-2-8.5. Thus, the inclusion of [REDACTED] as a *de facto* custodian gave [REDACTED] a statutory right to argue before the court about where [REDACTED] should live and who should be his authorized caregivers.

Conversely, the inclusion of [REDACTED] as a *de facto* custodian provided no benefit to [REDACTED]. It also created a future potential conflict of interest for representing joint clients that is the basis of this appeal. The fact that [REDACTED] negotiated the *de facto* custody provision in the Settlement Agreement when it provided a substantial benefit to the [REDACTED] and no benefit to [REDACTED] demonstrates that [REDACTED] consented to be the [REDACTED] attorney.

The facts above unequivocally show that the [REDACTED] sought the legal advice and assistance of [REDACTED] to maintain the custody and care of [REDACTED] that [REDACTED] was capable of providing this legal assistance, and that [REDACTED] acted to ensure that the [REDACTED] maintained the custody and care of [REDACTED]. Pursuant to *Matter of Anonymous*, 655 NE 2d 67, 70 (Ind. 1995), this Court should find that an attorney-client relationship was established between the [REDACTED] and [REDACTED].

**2. For a brief period of time in 2010 and early 2011, [REDACTED] acted only as [REDACTED] attorney and not as attorney for the [REDACTED]**

Following the court’s conversion of the settlement agreement into the [REDACTED] order dissolving the marriage and resolving all pending issues, the [REDACTED] and [REDACTED] all expected that there would not be a need for continued legal representation. Tr. at 180. In fact, there was a period where little to no legal activity occurred. See CCS. However, disputes arose regarding parenting time between [REDACTED] and [REDACTED]. Tr. at 180. As [REDACTED] had been named *de facto* custodian and that issue was not in dispute in 2010, [REDACTED] had [REDACTED] execute a written fee agreement with [REDACTED]. Tr. [REDACTED] Appellants’ App. [REDACTED]

The written fee agreement states that [REDACTED] is the client and [REDACTED] is the attorney. Appellants’ App [REDACTED]. The [REDACTED] also executed a written payment guarantee to fulfill the obligation of paying [REDACTED] fees if [REDACTED] did not. Appellants’ [REDACTED]. The guarantee

Brief of Appellants, [REDACTED]

specifically stated that the [REDACTED] were not clients (at that time) of [REDACTED] Id. The fact that [REDACTED] was not representing the [REDACTED] in 2010 when their interests were aligned with [REDACTED] did not preclude her representation of [REDACTED] in the future. Additionally, the fact that [REDACTED] had previously consented to represent [REDACTED] precluded [REDACTED] from acting adversely to [REDACTED] interests as a former attorney pursuant to Rule 1.9 of the Indiana Rules of Professional Conduct.

**3. [REDACTED] and the [REDACTED] actions in 2011 through 2018 demonstrate that an attorney client relationship was established subsequent to the [REDACTED] signing the guarantee.**

The evidence shows that both the [REDACTED] and [REDACTED] consented to an attorney-client relationship from 2011 through 2018 through their express actions. [REDACTED] together and separately, routinely communicated with [REDACTED] about legal matters.

The following dispositive facts were not included in the trial court's order:

1. The [REDACTED] asked [REDACTED] about custody of [REDACTED] and to ensure that the [REDACTED] remained the caregiver for [REDACTED] Tr. at 13.
2. [REDACTED] communicated with the [REDACTED] about [REDACTED] custody and care verbally and in writing outside of [REDACTED] presence. Tr. [REDACTED] Appellants' [REDACTED]
3. [REDACTED] asked the [REDACTED] to obtain and preserve evidence in communications. Appellants' [REDACTED]
4. [REDACTED] sought the [REDACTED] review and strategic considerations on how to approach mediation regarding the custody and care of [REDACTED] [REDACTED]
5. [REDACTED] sent attorney-client privileged communications to the [REDACTED] Appellants' App. p. [REDACTED]
6. [REDACTED] consulted with [REDACTED] in 2017 about their chances for obtaining custody, and [REDACTED] advised "not good." Tr. at 203.
7. At no point during the [REDACTED] continued communications about [REDACTED] custody and care did [REDACTED] ever inform the [REDACTED] that she was not acting as their attorney or could not act as their attorney. Tr. at 14, 22, 38, 67, 77, 81, 112, 133.

These facts demonstrate that the [REDACTED] sought the legal advice and assistance of [REDACTED] and [REDACTED] provided them legal advice and assistance, thereby establishing an attorney-client

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<sup>2</sup>The fact that [REDACTED] specifically disclaims that the [REDACTED] were her clients in 2010 implies that she considered them her clients from 2009 through the period of the Settlement Agreement.



relationship. *Matter of Anonymous*, 655 N.E.2d at 70. The exclusion of these facts from the Order was against the logic and effect of the facts of this case and resulted in a misapplication of the law when evaluating whether [REDACTED] must be disqualified. Therefore, this Court should reverse the trial court and disqualify [REDACTED]. *State v. Willits*, 773 N.E.2d 808, 811 (Ind. 2002).

**C. [REDACTED] violated Rule 1.7 of the Indiana Rules of Professional Conduct by acting adversely to the [REDACTED] rights as a current client, or alternatively, as a former client under Rule 1.9.**

**1. The [REDACTED] were a current client in 2018 and [REDACTED] was prohibited from acting adversely to their interests.**

There is nothing inherently improper with an attorney representing multiple clients when their interests are aligned. *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 161 (Ind. 1999). However, an attorney may not continue that joint representation if a conflict of interest arises. *Id.* It is axiomatic that an attorney representing multiple clients may not act adversely to one client for the benefit of another. *Id.*

Ind. Professional Conduct Rule 1.7, states:

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

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In determining whether [REDACTED] violated Rule 1.7, this Court must determine whether the [REDACTED] were [REDACTED] clients. As shown in the preceding section, there were numerous facts establishing that the [REDACTED] were a current client in 2009, and from 2011 to 2018.

These facts establish that [REDACTED] was acting as the [REDACTED] attorney and had an obligation not to harm their interests pursuant to Rule 1.7. Once [REDACTED] informed [REDACTED] that he wanted to exclude the [REDACTED] from [REDACTED] custody and care, [REDACTED] was required to explain to both clients that she could not act contrary to either of their interests. Unfortunately, [REDACTED] chose to breach her ethical duties and continue representing [REDACTED] while acting directly against the interests of the [REDACTED].

The [REDACTED] cannot expect to have a fair chance seeking custody of [REDACTED] when their former attorney, to whom the [REDACTED] provided confidential information, is working against them in the custody litigation of [REDACTED]. Rule 1.7 states in relevant part “a lawyer **shall not** represent a client if the representation involves a concurrent conflict of interest. A disqualification of [REDACTED] is required pursuant to Rule 1.7 of the Indiana Rules of Professional Conduct. (emphasis added) *Reed v. Hoosier Health Systems, Inc.*, 825 NE 2d 408, 413 (Ind. Ct. App. 2005).

**2. Alternatively, the [REDACTED] were former clients of [REDACTED] and [REDACTED] owes a duty to them not to act contrary to their interests.**

[REDACTED] consented to represent the [REDACTED] in 2009 when she actively negotiated settlement terms regarding *de facto* custody, and directly followed the [REDACTED] instruction to list [REDACTED] as a *de facto* custodian in the Settlement Agreement. Even if this Court were to accept [REDACTED] argument that she did not act as the [REDACTED] attorney from 2011 through 2018, [REDACTED] still must be disqualified pursuant to Rule 1.9(a) of the Rules of Professional Conduct.

Rule 1.9(a) states:

**Duties to Former Clients**

(a) 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 gives informed consent, confirmed in writing.

Here, [REDACTED] represented the [REDACTED] in this same matter in 2009 by negotiating a term in the Settlement Agreement, at the express instruction of the [REDACTED] where [REDACTED] was listed as *de facto* custodian of [REDACTED]. Tr. at 16-17, 75-76; Appellants’ App. [REDACTED]. [REDACTED] was provided joint legal custody pursuant to the Settlement Agreement. Appellants’ App. [REDACTED]. As legal

custody and *de facto* custody are distinct, the *de facto* provision in the Settlement Agreement provided no benefit to [REDACTED] and was clearly a provision of legal services for the benefit of the [REDACTED]. See *In re Adoption of BCH*, 7 N.E. 3d 1000, 1007 (Ind. Ct. App. 2014).

Once [REDACTED] informed [REDACTED] that he did not want the [REDACTED] to be involved in the custody and care of [REDACTED], [REDACTED] had an obligation to withdraw from representing [REDACTED] as she was now being asked to act directly against the interests of the [REDACTED] as former clients, in the same case.<sup>3</sup> *In re Estate [REDACTED]* 855 N.E.2d 686, 700 (Ind. Ct. App. 2006). Unfortunately, [REDACTED] did not withdraw, and she should now be disqualified from representing [REDACTED] by this Court.

## **II. The Trial Court Erred in Awarding Sanctions against the [REDACTED] on the basis that the Motion to Disqualify was Frivolous, Unreasonable and Groundless pursuant to Indiana Code section 34-52-1-1.**

### **A. Standard of Review.**

The trial court's decision to award attorney fees under Indiana Code section 34-52-1-1 is subject to a multi-level review: the trial court's findings of fact are reviewed under the clearly erroneous standard, and legal conclusions regarding whether the litigant's claim was frivolous, unreasonable, or groundless are reviewed de novo. *Purcell v. Old Nat'l. Bank*, 972 N.E.2d 835, 843 (Ind. 2012).

In reviewing the findings of fact, appellate courts should neither reweigh the evidence nor judge witness credibility, but rather review only the evidence and reasonable inferences drawn therefrom that support the trial court's findings and decision. *Smyth v. Hester*, 901 N.E.2d 25, 33 (Ind. Ct. App. 2009). Under the clearly erroneous standard, appellate courts will not reverse unless we are left with a definite and firm conviction that a mistake has been made. *Id.*

Finally, the trial court's decision to award attorney fees and any amount thereof is reviewed for an abuse of discretion. *Purcell*, 972 N.E.2d at 843. A trial court abuses its discretion if its decision clearly contravenes the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law. *Id.*

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<sup>3</sup>Any contention by [REDACTED] that the Guarantee acts as informed consent to waive the conflict of interest fails as the Guarantee never mentions a potential conflict of interest or authorizes [REDACTED] to act adversely to the [REDACTED] interests.

In reviewing an award of statutory attorney fees, this Court "must leave breathing room for zealous advocacy and access to the court to vindicate rights," and "be sensitive to these considerations and view claims of frivolous, unreasonable, or groundless claims or defenses with suspicion." *Mitchell v. Mitchell*, 695 N.E.2d 920, 925 (Ind. 1998).

**B. Standard for determining if litigation is frivolous, unreasonable or groundless.**

Indiana common law generally follows the "American Rule" under which each party bears its own legal fees and expenses unless otherwise provided by statute. *Shepherd Properties, Co. v. International Union of Painters and Allied Trades, Dist. Council 91*, 972 N.E.2d 845, 852 (Ind. 2012). Indiana Code section 34-52-1-1(b) provides that a trial court may award attorney's fees if it finds that either party litigated the action in bad faith or continued to litigate after the party's claim clearly became frivolous, unreasonable, or groundless.

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. 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. A claim is groundless if no facts exist which support the legal claim relied on and presented by the losing party. *Id.*, citing *BioConvergence, LLC v. Menifee*, 103 N.E.3d 1141, 1161-62 (Ind. Ct. App. 2018).

A claim or defense is not frivolous, unreasonable or groundless merely because the party loses on the merits. *Smyth v. Hester* 901 N.E.2d 25, 33 (Ind. Ct. App. 2009).

**C. The facts prove that [REDACTED] continually sought, and [REDACTED] continually provided, legal advice to the [REDACTED] demonstrating that the Motion to Disqualify was not frivolous, unreasonable or groundless and sanctions are inappropriate.**

There is substantial evidence that [REDACTED] agreed through her actions that [REDACTED] was the [REDACTED] attorney. Even if this Court were to disagree that an attorney-client relationship was established, there is no question that the [REDACTED] made a rational, good faith argument that [REDACTED] should be disqualified. Additionally, there is no evidence in the record that [REDACTED] made the Motion primarily to harass or injure [REDACTED]. A litigant that provides sufficient facts and cogent legal

argument should not be subjected to sanctions on the basis that the litigation was frivolous. *Orr v. Turco Mfg. Co., Inc.*, 512 N.E. 2d 151, 153 (Ind. 1987).

Likewise, it is apparent from the facts of this matter that it is not unreasonable to contend that an attorney who acted at the instruction of the [REDACTED] and often communicated with them outside of [REDACTED] presence was acting as their attorney. *Matter of Anonymous*, 655 N.E.2d at 70 (Ind. 1995).

Next, a proper ruling that the claim was groundless requires a finding that “no facts” exist supporting the legal claim. *BioConvergence LLC*, 103 N.E.2d at 1161-62. There are multiple facts (omitted from the Order) supporting the claim. Therefore, the trial court’s ruling that the Motion was groundless is in error and must be reversed.

**D. The Opinion of Expert [REDACTED] was based on an incomplete review of the facts, and his opinion is not a basis for an award of Sanctions.**

It is axiomatic that the accuracy, consistency, and credibility of an expert's opinions may properly be challenged by vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 461 (Ind. 2001). Expert witnesses are not oracles whose opinions, once stated, cannot be questioned or refuted by other evidence, even if that evidence does not come in the form of another expert's testimony. *Walker v. Cuppett*, 808 NE 2d 85, 95 (Ind. Ct. App. 2004). This rule would seem to have little meaning if a party cannot contest an expert opinion without being sanctioned if it loses on the merits. A party should not be sanctioned solely because it loses on the merits. *Smyth v. Hester*, 901 N.E.2d 25, 33 (Ind. Ct. App. 2009).

Further, [REDACTED] expert opinion was based on an incomplete review of the record. [REDACTED] retained the services of [REDACTED] to opine on whether or not [REDACTED] should be disqualified pursuant to the Indiana Rules of Professional Conduct. In reaching his conclusion, [REDACTED] reviewed just 13 documents. Appellants' App. p. [REDACTED] (Exhibit E.) Of these 13 documents, 6 were papers filed with the trial court, meaning that [REDACTED] viewed 7 documents related to the parties' communications and actions in this case.

Significantly, the parties introduced nearly 60 exhibits at the Hearing. Tr. at [REDACTED]. Thus, [REDACTED] reviewed less than fifteen percent (15%) of the written evidence submitted at the Hearing. Additionally, [REDACTED] did not speak with [REDACTED] or [REDACTED] about their oral communications with [REDACTED] relating to the custody of [REDACTED]. Appellants' App. p. [REDACTED] (Exhibit

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E.); Tr. at [REDACTED]. Thus, [REDACTED] report and testimony--taken out of the vacuum--does not speak to the actual evidence and issues tried before the court, and the trial court abused its discretion in relying so heavily on [REDACTED] report and testimony in deciding the case.

The court relied almost exclusively on [REDACTED] opinion to determine that the Motion was frivolous, unreasonable and groundless. Appellants' App. [REDACTED]. In paragraph 62 of the Order, the court states that "Even after the [REDACTED] received the opinion of Mr. [REDACTED] they continued to press their meritless claims." Appellants' App. [REDACTED]. The [REDACTED] had the right to contest [REDACTED] opinion without being exposed to sanctions. See *Walker v. Cuppett*, 808 NE 2d 85 (Ind. Ct. App. 2004).

It is key to note the [REDACTED] received [REDACTED] opinion only 2 days before the Hearing. The [REDACTED] asked for a continuance to evaluate the opinion and decide how to proceed. Appellants' App. p. [REDACTED] objected to the requested continuance and the court denied the motion to continue, inviting by [REDACTED] any error that might have come from trying the case. Appellants' App. [REDACTED]. The [REDACTED] were left with no choice but to present contrary evidence at the Hearing. A party should not be sanctioned for electing to challenge evidence when it has asked for more time and been denied. Such a result would be fundamentally unfair. See *City of Mitchell v. Graves*, 612 NE 2d 149, 152 (Ind. Ct. App. 1993).

Tellingly, [REDACTED] opinion contains no analysis of the representation of joint clients by an attorney, or an attorneys' obligations under Rule 1.7 of the Rules of Professional Conduct. Thus, it is clear that [REDACTED] opinion was not based a complete review of the facts and issues present and is not a proper basis for the trial court's ruling that that [REDACTED] never acted as [REDACTED] attorney.

Regardless of whether this Court finds that the trial court correctly ruled that [REDACTED] should not be disqualified, the reliance on [REDACTED] opinion as a basis to award sanctions to [REDACTED] misinterprets the law. *Id.* The [REDACTED] had a fundamental right to contest [REDACTED] legal position and [REDACTED] opinion, and awarding sanctions solely because the [REDACTED] claim did not prevail punishes the [REDACTED] for engaging in good-faith, meritorious litigation. *Smyth*, 901 N.E.2d at 33. Therefore, this misinterpretation of the law requires reversal of the trial court's Order granting the Sanctions Request.

**CONCLUSION AND SIGNATURE BLOCK**

This Court should reverse the trial court's Order, and enter an order directing the trial court to disqualify [REDACTED] from continuing to represent [REDACTED] in this matter. As a matter of law, an order requiring disqualification would require a reversal of the trial court's decision granting the Sanctions Request because [REDACTED] would not be a prevailing party.

Alternatively, if this Court affirms the trial court's decision denying the Motion, this court should nonetheless reverse the Order granting the Sanctions Request. The Motion was not frivolous, unreasonable or groundless pursuant to Indiana Code section 34-52-1-1 and judicial precedent.

Respectfully submitted,

/s/ Bryan L. Ciyou  
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**WORD COUNT CERTIFICATION**

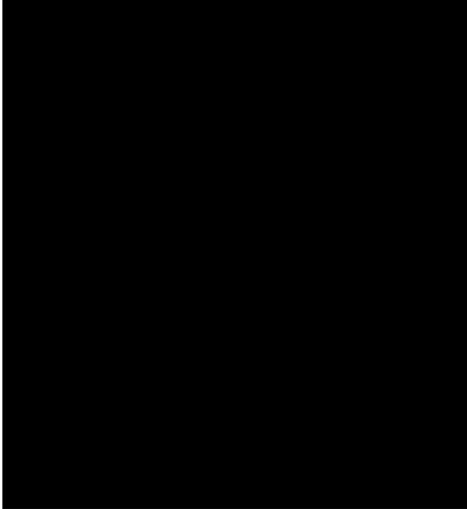
I, Bryan L. Ciyou, verify that this Brief of Appellant contains no more than 14,000 words as allowed under App. Rule 44(E), excluding those items excluded from page length limits under Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Bryan L. Ciyou  
Bryan L. Ciyou, #17906-49



**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing was served upon the following this [REDACTED]  
day of [REDACTED] via the Court's electronic filing system:



Respectfully submitted,

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