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Advanced Civil Mediation

Indiana Continuing Legal Education Forum (ICLEF)

Advanced Civil Mediation
July 27-28, 2023

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ADVANCED CIVIL MEDIATION

July 27-28, 2023

www.ICLEF.org

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ADVANCED
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Agenda

July 27, 2023

1:30 P.M. Registration - Event Center, French Lick Resort

2:00 P.M. Program Begins

3:30 P.M. Refreshment Break

3:45 P.M. Program Resumes

5:15 P.M. Program Adjourns for the Day

5:30 P.M. Hosted Reception – Clifton Ballroom and Foyer Area (Guests are Welcome)

7:30 P.M. Free Time

July 28, 2023

8:15 A.M. Continental Breakfast - French Lick Event Center Foyer

9:00 A.M. Program Begins - Day 2

10:30 A.M. Coffee Break

10:45 A.M. Program Resumes

12:15 P.M. Adjourn

ADVANCED
CIVIL MEDIATION
Faculty

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Teresa L. Todd, Seminar Chair, Attorney at Law, Indianapolis

Teresa L. Todd is a trial attorney and mediator practicing in Indianapolis. She has over forty years of experience representing plaintiffs in personal injury litigation. She has been a civil mediator since 1995; and is a member of the National Academy of Distinguished Neutrals.

Terri has served on the Board of Directors of the Indiana Trial Lawyers Association (ITLA) since 1992; and she is a Past President of the Association. She is a member of ITLA's College of Fellows and served as the Editor of ITLA's quarterly publication, Verdict, from 2003 until 2010. Terri has served on ITLA's amicus committee for several years. She is also the recipient of ITLA's 2023 Lifetime Achievement Award.

Terri is a Past President of the Indiana chapter of the American Board of Trial Advocates (ABOTA) – which is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the right to jury trial in civil cases. Terri has also served as a member of the Executive Committee of the Litigation Section of the Indianapolis Bar Association.

Terri is a current member of the Indiana Continuing Legal Education Forum (ICLEF)'s Board of Directors. She is also a Past President of the ICLEF Board.

Terri is the co-author of the Indiana Tort Digest – which is a three-volume treatise on Indiana tort law. Terri has authored many articles which have been published in ITLA's quarterly publication, Verdict, as well as authoring written materials for numerous continuing legal education programs. Throughout her career, Terri has been a frequent speaker and chairperson of ITLA and ICLEF's continuing legal education programs, including programs relative to civil litigation and trial practice, as well as mediation. Terri has been a member of the faculty of ICLEF's annual trial skills program since its inception over 20 years ago; and she is a past member of the faculty of the National Institute for Trial Advocacy (NITA) trial skills programs.

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Kyle M. Baker, The Mediation Group

Kyle began full-time dispute resolution in 2019, after 20 years of practice as a civil litigator. Prior to joining The Mediation Group Kyle litigated over 1400 civil matters, representing both plaintiffs and defendants.

Kyle's broad range of civil experience includes: wrongful death, fire losses, environmental claims, products liability, auto accidents, trucking accidents, medical malpractice, premises liability, construction defects, insurance disputes, and business disputes.

Kyle brings his litigation experience, which includes 40 jury trials, to his mediation practice. Kyle began mediating in 2018 and quickly developed a passion for helping litigants, attorneys, and insurance companies resolve their cases.

Kyle is a graduate of the Indiana University Kelley School of Business and received his J.D. from the Indiana University School of Law.

Kyle has served as City Attorney for the city of Shelbyville, Indiana. He is the former Shelby County Bar President, Board Member of Girls Inc. of Shelby County, and has served on the Shelby County Election Board.

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BISHOP
MEDIATION
& ARBITRATION

Michael P. Bishop

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Michael has been recognized by Best Lawyers in America in Alternate Dispute Resolution and Arbitration since 2006. In 2008 he was selected as a Panelist for the American Arbitration Association National Roster of Neutrals, where he serves on the Commercial, Employment, and Large Complex Case panels. He is a member of the Indiana Supreme Court Diversity in ADR Committee. Michael has an AV Peer Rating from Martindale-Hubbell.

Michael received his Juris Doctorate from Indiana University Robert H. McKinney School of Law in 1980. Following graduation, he served as Law Clerk to the Honorable James E. Noland, United States District Court, Southern District of Indiana. Michael is a Distinguished Fellow of the International Academy of Mediators, Diplomate of the National Academy of Distinguished Neutrals and Member of The Academy of Court Appointed Neutrals.

Michael is Chair of the annual Advanced Civil Mediator Training course in Indiana. Michael was a founding member of the IBA Settlement Week in 1986. He served as Chair of the ISBA ADR Section, was a member of the Board of Directors for Indiana Continuing Legal Education Forum, and is Past President to the Board of Directors for the Indiana Bar Foundation. Michael received the "Excellence in Continuing Legal Education Award" from ICLEF, its highest award of achievement for commitment to continuing legal education. Michael is also past President of the Sagamore American Inn of Court, where he continues to serve as one of the founding Benchers of the Inn.

Joy L. Colwell, Director of Graduate Studies

Joy L. Colwell is a mediator in Lake County, Indiana, trained in both civil and family mediation. In addition to writing the manual used in ICLEF's 40-hour Civil Mediation training seminar, she has been a primary mediation trainer with Thomas R. Lemon from 1994 to 2018 and currently serves as primary trainer with Wm. Douglas Lemon. Her background also includes general legal practice as well as litigation experience. Ms. Colwell was admitted to the Indiana Bar in 1984 and the Illinois Bar in 1988. She is a graduate of Indiana University, B.A., 1980; Indiana University School of Law, Bloomington, J.D., 1984 (cum laude). She is a Professor of Organizational Leadership and Supervision at Purdue University Northwest (PNW), where she has taught such subjects as Dispute Resolution and Negotiations.

Joy L Colwell

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Robert J. Dignam, Partner, O'Neill McFadden & Willett LLC

Robert J. Dignam has been recognized in 2022 and 2023 as a Top 50 Indiana Super Lawyer.
Mr. Dignam is an experienced and effective civil mediator. Over the past decade, he has successfully mediated hundreds of cases for attorneys and their clients around the State of Indiana. As a result of his extensive service as a civil mediator, Mr. Dignam, in 2020, was inducted into the National Academy of Distinguished Neutrals, and he conducts mediations in a wide variety of matters in a pre-litigation setting and in cases pending in state and federal courts. He also serves as arbitrator to resolve civil litigation disputes. Mr. Dignam has been named as an Indiana Super Lawyer for Alternative Dispute Resolution.
Mr. Dignam is also an experienced civil litigation and appellate lawyer. He represents clients in the areas of employment and labor law, as well as in many other areas of law. Mr. Dignam has attained an AV Preeminent Rating from Martindale-Hubbell, the highest available designation for ethics and legal ability. Mr. Dignam has been named to Best Lawyers in America in the area of Employment Law. He has also been recognized as an Indiana Super Lawyer in the areas of Employment and Labor Law.
Mr. Dignam has represented employers in state and federal courts in Indiana, in federal courts in Illinois, and before the Equal Employment Opportunity Commission, the National Labor Relations Board, and other employment law agencies. He has argued cases for employers before the Seventh Circuit U.S. Court of Appeals and has represented an employment law client before the United States Supreme Court.
Mr. Dignam also serves as lead negotiator in labor negotiations. In this role, he has assists employer clients in reaching collective bargaining agreements with the representative union. In addition, Mr. Dignam has assisted clients with labor arbitration matters.
Mr. Dignam has presented multiple continuing legal education seminars about the mediation process, including the nuances of mediating employment law disputes. He has helped teach future mediators at Indiana University Robert H. McKinney School of Law, and for many years, Mr. Dignam served as an adjunct professor at Purdue University Northwest, teaching students conflict resolution techniques.

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For the past 30 years, Mark A. Scott has distinguished himself as a leader among trial lawyers and mediators, and he's earned the respect of his colleagues in and out of the courtroom. Mr. Scott has been a frequent author and lecturer on subjects involving tort law, trial practice and mediation. For many years he presented the Tort Law Update for the Indiana Continuing Legal Education Forum and the Indiana Trial Lawyers Association, and he also served as the Chair of ITLA's *Amicus Curiae* Committee. In 2004, Mr. Scott was a recipient of ITLA's Trial Lawyer of the Year Award, and he served as the President of ITLA from 2012-13.

Mr. Scott has been recognized as a *Super Lawyer* in the field of personal injury law since 2018, and he has been inducted into the National Academy for Distinguished Neutrals.

Mr. Scott was born and raised in Logansport, Indiana. He graduated from Logansport High School in 1985, and was selected as one of two students from the State of Indiana to be a United States Senate Youth Scholar. Mr. Scott was awarded a Lilly Scholarship to attend Wabash College, where he majored in English and graduated with honors in 1989. While at Wabash, Mr. Scott attended the Centre for Medieval and Renaissance Studies in Oxford, England. Following college, Mr. Scott was awarded a Jump Scholarship to attend Indiana University Robert H. McKinney School of Law in Indianapolis, from which he graduated in 1993. While in law school, Mr. Scott was a member of the Order of the Barristers, and an Associate Justice of the Moot Court Society.

Since law school, Mr. Scott has limited his legal practice exclusively to serious personal injury and wrongful death cases. In addition to his work as a trial lawyer, Mr. Scott became a certified civil mediator in 2004. As a mediator, he is honored to be frequently selected by leading plaintiff and defense lawyers to serve as their mediator in cases of all variety, complexity and value. Mr. Scott mediates approximately 100 cases each year, so he limits the number of cases he takes as a litigator to meet the demand for his mediation services. Although striking this balance is sometimes difficult, Mr. Scott believes he is a better mediator because he still litigates, and he believes he is a better litigator because he mediates.

Outside of the office, Mr. Scott and his wife, Jan, keep busy raising their young grandchildren, whom they adopted in 2017. Additionally, Mr. Scott is an accomplished drummer and multi-percussionist who regularly plays professionally on weekends, and he loves writing haiku poetry. An outdoor enthusiast, Mr. Scott enjoys fishing, mushroom hunting, bonfires and just about anything in, on or around the water.

CURRICULUM VITAE FOR MARK A. SCOTT

Personal Information:

- Born October 19, 1966, in Logansport, IN
- Founding Member, Scott Law Office, LLC, Kokomo, IN
- Admitted to practice law, State of Indiana and U.S. District Court, Northern and Southern Districts of Indiana, 1993
- Indiana State Bar License Number: 17541-49

Education:

- Indiana University School of Law – Indianapolis, JD (1993)
- Wabash College, AB *cum laude* in English (1989)
- Centre for Medieval and Renaissance Studies, Oxford, England (1988)

Work Experience:

- Founding Member, Scott Law Office, LLC, Kokomo, IN (2012 – present)
- Partner, King & Scott, LLP, Kokomo, IN (2004 – 2012)
- Partner, King, McCann & Scott, Kokomo, IN (2000 – 2004)
- Partner, Bayliff, Harrigan, Cord & Maugans, P.C., Kokomo, IN (1996 – 2000)
- Associate, Bayliff, Harrigan, Cord & Maugans, P.C., Kokomo, IN (1993 – 1996)
- Law Clerk, Wilson, Kehoe & Winingham, Indianapolis, IN (1991 – 1993)
- Intern, Miller, Tolbert, Muehlhausen & Muehlhausen, Logansport, IN (1985 –1990)
- Adjunct Instructor: Paralegal Studies, Indiana University at Kokomo (1996)

Honors and Awards:

- Selected as an Indiana *Super Lawyer* in Personal Injury Law (2018 – present)
- Inducted into the National Academy of Distinguished Neutrals (2022 – present)
- Indiana Trial Lawyers Association (ITLA) Trial Lawyer of the Year Award (2004)
- Order of the Barristers (1992 – 1993)
- Associate Justice, Moot Court Society (1993)
- Recipient, American Jurisprudence Awards in Insurance Law and Administrative Law (1992 – 1993)
- Jump Scholar (1990 – 1991)
- *Cum Laude* graduation honors, Wabash College (1989)
- Lilly Scholar (1985 – 1989)
- United States Senate Youth Scholar, State of Indiana (1985)

Publications and Lectures:

- *Qualified Offers of Settlement: A Two-Edged Sword,* ITLA Seminar (April 1999)
- *Benton v. City of Oakland and its Impact Upon Tort Claims Cases*, ITLA Seminar (March 2000)
- *Making the Dog Hunt: Holding Landlords Responsible for Injuries Cause by Their Tenants' Dogs*, ITLA Seminar (March 2001)
- *The Right to Make Inquiries During Voir Dire Regarding Potential Jurors' Relationships with the Defending Insurance Company*, ITLA Seminar (March 2003), also published in Indiana Lawyer, Vol. 12, No. 15 (October 2001), and Verdict, Vol. 24, No. 1 (March 2002)
- *Visibility Issues in Motor Vehicle Collision Cases*, ITLA Seminar (August 2003)
- *Apples and Oranges: The Inapplicability of the Wrongful Death Act to Death Claims Under the Medical Malpractice Act*, Verdict, Vol. 25, No. 3 (September 2003)
- *Time is on My Side: The Temporal Distinction in the Failure to Mitigate Damages Defense*, ITLA Seminar (February 2004)
- *Recent Developments in Tort Law*, ICLEF Indiana Law Update Seminar (September 2004 – 2008)
- *Tort Law Update*, ITLA Seminar (November 2004– 2009)
- *Defending Plaintiff's Expert Against Challenges Under Indiana Evidence Rule 702*, ICLEF Seminar (January 2005)
- *Relationship of the Medical Malpractice Act and the Wrongful Death Act*, ITLA Seminar (March 2005)
- *The Top Five in 2005: Five Cases That Will Change Your Practice*, ITLA Seminar (February 2006)
- *Preliminary Procedural Considerations and Recent Case Law Developments in the Law of Medical Malpractice* ICLEF Seminar (June 2006)
- *The Inadmissibility of Collateral Source Write-Offs or Discounts*, Verdict, Vol. 29, No. 1 (June 2007)
- *Wrongful Death Law in Indiana*, ICLEF Seminar (September 2010)
- *Harm Without Recourse: An Analysis of Taele v. State Farm*, ITLA Seminar (April 2011)
- *The Best Case I Ever Lost*, ITLA Seminar (January 2013)
- *Applied Professionalism*, ITLA Seminar (March 2013)
- *Mediation and Settlement*, ITLA Seminar (August 2015)
- *Advanced Civil Mediation*, ITLA Seminar (April 2017, April 2019, April 2023 as Chair)
- *Maximizing Damages by Using Surgical Videos at Trial* (ITLA Seminar, May 2019)
- *Valuing & Proving Pain in Personal Injury Cases*, ICLEF Seminar (October 2019)
- *Avoiding Zoom Gloom: Common Mistakes in Remote Mediation* (ITLA Seminar, May 2021)
- *Behind the Mediation Curtain*, (ITLA Webinar, April 2022)

Professional Associations

- Indiana Trial Lawyers Association
  - ◊ President (2012-13)
  - ◊ President Elect (2011)
  - ◊ Vice President (2010)
  - ◊ Secretary (2009)
  - ◊ Treasurer (2008)
  - ◊ Treasurer Elect (2007)
  - ◊ Board of Directors (2003 – 2013; *Emeritus* 2014 – present)
  - ◊ Executive Committee (2004 – 2013)
  - ◊ *Amicus Curiae* Committee (2003 – 2012; Chair, 2005 – 2012)
- American Association for Justice
- Howard County Bar Association
  - ◊ President (1997)
  - ◊ Vice-President (1996)
  - ◊ Secretary/Treasurer (1995)

Reported Cases:

- Bagko Development Co. v. Damitz, 640 N.E.2d 67 (Ind. Ct. App. 1994)
- Green v. Estate of Green, 724 N.E.2d 260 (Ind. Ct. App. 2000)
- Reed Sign Service v. Reid, 755 N.E.2d 690 (Ind. Ct. App. 2001)
- Fulton County Comm'rs v. Miller, 788 N.E.2d 1284 (Ind. Ct. App. 2003)
- McCarty v. Sanders, 805 N.E.2d 894 (Ind. Ct. App. 2004)
- *amicus curiae* in Chamberlain v. Walpole, 822 N.E.2d 959 (Ind. 2005)
- *amicus curiae* in Kocher v. Getz, 824 N.E.2d 671 (Ind. 2005)
- *amicus curiae* in Vasquez v. Phillips, 843 N.E.2d 61 (Ind. Ct. App. 2006)
- *amicus curiae* in Indiana Patient's Comp. Fund v. Winkle, 863 N.E.2d 1 (Ind. Ct. App. 2007)
- *amicus curiae* in Butler v. Indiana Dept. of Insurance, 904 N.E.2d 198 (Ind. 2009)
- *amicus curiae* in Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009)

Practice Areas:

- Claims Involving Serious Personal Injury and Wrongful Death
- Civil Mediation

Jerome L. Withered

A native Hoosier and practicing lawyer in Lafayette since 1980, Jerry serves clients in personal injury cases and litigation of all types, represents small businesses, and works with individuals on estate planning. He has tried numerous jury trials and bench trials in personal injury, wrongful death, medical malpractice, contract, real estate, business, estate, and other cases. In his appeal work, he has argued cases before the U.S. Court of Appeals (7th Circuit), the Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court.

Jerry is a Board-certified Civil Trial Advocate (National Board of Trial Advocacy, 1995-present), is rated AV by Martindale-Hubbell, selected for inclusion in Indiana Super Lawyers® (2005, 2007-Present), and is a member of the American Board of Trial Advocates and Senior Fellow, Litigation Counsel of America.

Jerry is also a Registered Civil Mediator and has mediated numerous cases over the past 15 years.

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Michael P. Bishop

Indiana Rules of Court
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Including Amendments Received Through January 1, 2021
Find alternative dispute resolution forms at courts.in.gov

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Preamble

These rules are adopted in order to bring some uniformity into **alternative dispute resolution** with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method.

RULE 1. GENERAL PROVISIONS

Rule 1.1. Recognized Alternative Dispute Resolution Methods

Alternative dispute resolution methods which are recognized include settlement negotiations, non-binding arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and negotiated rulemaking.

Rule 1.2. Scope of These Rules

Alternative dispute resolution methods which are governed by these rules are (1) Mediation, (2) Arbitration, (3) Mini-Trials, (4) Summary Jury Trials, and (5) Private Judges.

Rule 1.3. Alternative Dispute Resolution Methods Described

(A) Mediation. This is a process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties. This is an informal and nonadversarial process. The objective is to help the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the issues in dispute. Decision-making authority rests with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities.

(B) Arbitration. This is a process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision. The decision may be binding or nonbinding. Only non-binding arbitration is governed by these rules.

(C) Mini-Trials. A mini-trial is a settlement process in which each side presents a highly abbreviated summary of its case to senior officials who are authorized to settle the case. A neutral advisor may preside over the proceeding and give advisory opinions or rulings if invited to do so. Following the presentation, the officials seek a negotiated settlement of the dispute.

(D) Summary Jury Trials. This is an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a neutral who acts as a presiding official who sits as if a judge. After an advisory verdict from the jury, the presiding official may assist the litigants in a negotiated settlement of their controversy.

(E) Private Judges. This is a process in which litigants employ a private judge, who is a former judge, to resolve a pending lawsuit. The parties are responsible for all expenses involved in these matters, and they may agree upon their allocation.

Rule 1.4. Application of Alternative Dispute Resolution

These rules shall apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state.

Rule 1.5. Immunity for Persons Acting Under This Rule
A registered or court approved mediator; arbitrator; person acting as an advisor or conducting, directing, or assisting in a mini-trial; a presiding person conducting a summary jury trial and the members of its advisory jury; and a private judge; shall each have immunity in the same manner and to the same extent as a judge in the State of Indiana.

Rule 1.6. Discretion in Use of Rules
Except as herein provided, a presiding judge may order any civil or domestic relations proceeding or selected issues in such proceedings referred to mediation, non-binding arbitration or mini-trial. The selection criteria which should be used by the court are defined under these rules. Binding arbitration and a summary jury trial may be ordered only upon the agreement of the parties as consistent with provisions in these rules which address each method.

Rule 1.7. Jurisdiction of Proceeding
At all times during the course of any alternative dispute resolution proceeding, the case remains within the jurisdiction of the court which referred the litigation to the process. For good cause shown and upon hearing on this issue, the court at any time may terminate the alternative dispute resolution process.

Rule 1.8. Recordkeeping
When a case has been referred for alternative dispute resolution, the Clerk of the court shall note the referral and subsequent entries of record in the Chronological Case Summary under the case number initially assigned. The case file maintained under the case number initially assigned shall serve as the repository for papers and other materials submitted for consideration during the alternative dispute resolution process. The court shall report on the Quarterly Case Status Report the number of cases resolved through alternative dispute resolution processes.

Rule 1.9. Service of Papers and Orders
The parties shall comply with Trial Rule 5 of the Rules of Trial Procedure in serving papers and other pleadings on parties during the course of the alternative dispute resolution process. The Clerk of the Circuit Court shall serve all orders, notices, and rulings under the procedure set forth in Trial Rule 72(D).

Rule 1.10. Other Methods of Dispute Resolution
These rules shall not preclude a court from ordering any other reasonable method or technique to resolve disputes.

Rule 1.11. Alternative Dispute Resolution Plans.
A county desiring to participate in an alternative dispute resolution program pursuant to IC 33-23-6 must develop and submit a plan to the Indiana Judicial Conference, and receive approval of said plan from the Chief Administrative Officer (CAO) of the Indiana Office of Judicial Administration.

RULE 2. MEDIATION

Rule 2.1. Purpose
Mediation under this section involves the confidential process by which a neutral, acting as a mediator, selected by the parties or appointed by the court, assists the litigants in reaching a mutually acceptable agreement. The role of the mediator is to assist in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise, and finding points of agreement as well as legitimate points of disagreement. Any agreement reached by the parties is to be based on the autonomous decisions of the parties and not the decisions of the mediator. It is anticipated that an agreement may not resolve all of the disputed issues, but the process can reduce points of contention. Parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement.

Rule 2.2. Case Selection/Objection
At any time fifteen (15) days or more after the period allowed for peremptory change of judge under Trial Rule 76(B) has expired, a court may on its own motion or upon motion of any party refer a civil or domestic relations case to mediation. After a motion referring a case to mediation is granted, a party may object by filing a written objection within seven (7) days in a domestic relations case or fifteen (15) days in a civil case. The party must specify the grounds for objection. The court shall promptly consider the objection and any response and determine whether the litigation should then be mediated or not. In this decision, the court shall consider the willingness of the parties to mutually resolve their dispute, the ability of the parties to participate in the mediation process, the need for discovery and the extent to which it has been conducted, and any other factors which affect the potential for fair resolution of the dispute through the mediation process. If a case is ordered for mediation, the case shall remain on the court docket and the trial calendar.

Rule 2.3. Listing of Mediators: Commission Registry of Mediators
Any person who wishes to serve as a registered mediator pursuant to these rules must register with the Indiana Supreme Court Commission for Continuing Legal Education (hereinafter "Commission") on forms supplied by the Commission. The registrants must meet qualifications as required in counties or court districts (as set out in Ind. Administrative Rule 3(A)) in which they desire to mediate and identify the types of litigation which they desire to mediate. All professional licenses must be disclosed and identified in the form which the Commission requires.

The registration form shall be accompanied by a fee of $50.00 for each registered area (Civil or Domestic). An annual fee of $50.00 shall be due the second December 31st following initial registration. Registered mediators will be billed at the time their annual statements are sent. No fee shall be required of a full-time, sitting judge.

The Commission shall maintain a list of registered mediators including the following information: (1) whether the person qualified under A.D.R. Rule 2.5 to mediate domestic relations and/or civil cases; (2) the counties or court districts in which the person desires to mediate; (3) the type of litigation the person desires to mediate; and (4) whether the person is a full-time judge.

The Commission may remove a registered mediator from its registry for failure to meet or to maintain the requirements of A.D.R. Rule 2.5 for non-payment of fees. A registered mediator must maintain a current business and residential address and telephone number with the Commission. Failure to maintain current information required by these rules may result in removal from the registry.

For the billing of calendar year 2011, when this Rule becomes effective, registered mediators must pay the $50.00 annual fee and a one-time fee of $25.00 for the time period July 1, 2011-December 31, 2011, for a total of $75.00 per registration area. The annual fee shall be $50.00 per calendar year per registration area thereafter.

On or before October 31 of each year, each registered mediator will be sent an annual statement showing the mediator's educational activities that have been approved for mediator credit by the Commission.

Rule 2.4. Selection of Mediators

Upon an order referring a case to mediation, the parties may within seven (7) days in a domestic relations case or within fifteen (15) days in a civil case: (1) choose a mediator from the Commission's registry, or (2) agree upon a non-registered mediator, who must be approved by the trial court and who serves with leave of court. In the event a mediator is not selected by agreement, the court will designate three (3) registered mediators from the Commission's registry who are willing to mediate within the Court's district as set out in Admin. R. 3 (A). Alternately, each side shall strike the name of one mediator. The side initiating the lawsuit will strike first. The mediator remaining after the striking process will be deemed the selected mediator.

A person selected to serve as a mediator under this rule may choose not to serve for any reason. At any time, a party may request the court to replace the mediator for good cause shown. In the event a mediator chooses not to serve or the court decides to replace a mediator, the selection process will be repeated.

Rule 2.5. Qualifications of Mediators

(A) Civil Cases: Educational Qualifications.

(1) Subject to approval by the court in which the case is pending, the parties may agree upon any person to serve as a mediator.

(2) In civil cases, a registered mediator must be an attorney in good standing with the Supreme Court of Indiana.

(3) To register as a civil mediator, a person must meet all the requirements of this rule and must have either: (1) taken at least forty (40) hours of Commission approved civil mediation training in the three (3) years immediately prior to submission of the registration application, or (2) completed forty (40) hours of Commission approved civil mediation training at any time and taken at least six (6) hours of approved Continuing Mediation Education in the three (3) years immediately prior to submission of the registration application.

(4) However, a person who has met the requirements of A.D.R. Rule 2.5(B)(2)(a), is registered as a domestic relations mediator, and by December 31 of the second full year after meeting those requirements completes a Commission approved civil crossover mediation training program may register as a civil mediator.

(5) As part of a judge's judicial service, a judicial officer may serve as a mediator in a case pending before another judicial officer.

(B) Domestic Relations Cases: Educational Qualifications.

(1) Subject to approval of the court, in which the case is pending, the parties may agree upon any person to serve as a mediator.

(2) In domestic relations cases, a registered mediator must be either: (a) an attorney, in good standing with the Supreme Court of Indiana; (b) a person who has a bachelor's degree or advanced degree from an institution recognized by a U.S. Department of Education approved accreditation organization, e.g. The Higher Learning Commission of the North Central Association of Colleges and Schools. Notwithstanding the provisions of (2)(a) and (b) above, any licensed professional whose professional license is currently suspended or revoked by the respective licensing agency, or has been relinquished voluntarily while a disciplinary action is pending, shall not be a registered mediator.

(3) To register as a domestic relations mediator, a person must meet all the requirements of this rule and must have either: (1) taken at least forty (40) hours of Commission approved domestic relations mediation training in the

three (3) years immediately prior to submission of the registration application, or (2) taken at least forty (40) hours of Commission approved domestic relations mediation training at any time, and taken at least six (6) hours of approved Continuing Mediation Education in the three (3) years immediately prior to submission of the registration application.

(4) However, if a person is registered as a civil mediator and by December 31 of the second full year after meeting those requirements completes a Commission approved domestic relations crossover mediation training program (s)he may register as a domestic relations mediator.

(5) As part of a judicial service, a judicial officer may serve as a mediator in a case pending before another judicial officer.

(C) Reasons to Delay or Deny Registration. The Commission may delay (pending investigation) or deny registration of any applicant seeking to register as a mediator pursuant to A.D.R. 2.5(A) or 2.5(B) based on any of the grounds listed in A.D.R. Rule 7.1.

(D) Continuing Mediation Education ("CME") Requirements for All Registered Mediators. A registered mediator must complete a minimum of six hours of Commission approved continuing mediation education anytime during a three-year educational period. A mediator's initial educational period commences January 1 of the first full year of registration and ends December 31 of the third full year. Educational periods shall be sequential, in that once a mediator's particular three-year period terminates, a new three-year period and six hour minimum shall commence. Mediators registered before the effective date of this rule shall begin their first three-year educational period January 1, 2004.

(E) Basic and Continuing Mediation Education Reporting Requirements. Subsequent to presenting a Commission approved basic or continuing mediation education training course, the sponsor of that course must forward a list of attendees to the Commission. An attendance report received more than thirty (30) days after a program is concluded must include a late processing fee as approved by the Indiana Supreme Court. Received, in the context of an application, document(s), and/or other item(s) which is or are requested by or submitted to the Commission, means delivery to the Commission; mailed to the Commission by registered, certified or express mail return receipt requested or deposited with any third-party commercial carrier for delivery to the Commission within three (3) calendar days, cost prepaid, properly addressed. Sending by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit. This list shall include for each attendee: full name; attorney number (if applicable); residence and business addresses and phone numbers; and the number of mediation hours attended. A course approved for CME may also qualify for CLE credit, so long as the course meets the requirements of Admission and Discipline Rule 29. For courses approved for both continuing legal education and continuing mediation education, the sponsor must additionally report continuing legal education, speaking and professional responsibility hours attended.

(F) Accreditation Policies and Procedures for CME.

(1) *Approval of courses*. Applications must be accompanied by an application fee as approved by the Indiana Supreme Court. An "application" means a completed application form, with all required attachments and fees, signed and dated by the Applicant. Applications received more than thirty (30) days after the conclusion of a course must include a late processing fee. The Commission shall approve the course, including law school classes, if it determines that the course will make a significant contribution to the professional competency of mediators who attend. In determining if a course, including law school classes, meets this standard the Commission shall consider whether:

(a) the course has substantial content dealing with alternative dispute resolution process;

(b) the course deals with matters related directly to the practice of alternative dispute resolution and the professional responsibilities of neutrals;

(c) the course deals with reinforcing and enhancing alternative dispute resolution and negotiation concepts and skills of neutrals;

(d) the course teaches ethical issues associated with the practice of alternative dispute resolution;

(e) the course deals with other professional matters related to alternative dispute resolution and the relationship and application of alternative dispute resolution principles;

(f) the course deals with the application of alternative dispute resolution skills to conflicts or issues that arise in settings other than litigation, such as workplace, business, commercial transactions, securities, intergovernmental, administrative, public policy, family, guardianship and environmental; and,

(g) in the case of law school classes, in addition to the standard set forth above the class must be a regularly conducted class at a law school accredited by the American Bar Association.

(2) Credit will be denied for the following activities:

(a) Legislative, lobbying or other law-making activities.

(b) In-house program. The Commission shall not approve programs which it determines are primarily designed for the exclusive benefit of mediators employed by a private organization or mediation firm. Mediators within related companies will be considered to be employed by the same organization or law firm for purposes of this rule. However, governmental entities may sponsor programs for the exclusive benefit of their mediator employees.

(c) [Reserved].

(d) Courses or activities completed by self-study.

(e) Programs directed to elementary, high school or college student level neutrals.

(3) *Procedures for Sponsors*. Any sponsor may apply to the Commission for approval of a course. The application must:

(a) be received by the Commission at least thirty (30) days before the first date on which the course is to be offered;

(b) Include the nonrefundable application fee in order for the application to be reviewed by the Commission. Courses presented by non-profit sponsors which do not require a registration fee are eligible for an application fee waiver.

Courses presented by bar associations, Indiana Continuing Legal Education Forum (ICLEF) and government or academic entities will not be assessed an application fee, but are subject to late processing fees.

Applications received less than thirty (30) days before a course is presented must also include a late processing fee in order to be processed by the Commission.

Either the provider or the attendee must pay all application and late fees before a mediator may receive credit.

Fees may be waived in the discretion of the Commission upon a showing of good cause.

(c) contain the information required by and be in the form set forth in the application approved by the Commission and available upon request;

(d) be accompanied by the written course outline and brochure used by the Sponsor to furnish information about the course to mediators; and

(e) be accompanied by an affidavit of the mediator attesting that the mediator attended the course together with a certification of the course Sponsor as to the mediator's attendance. If the application for course approval is made before attendance, this affidavit and certification requirement shall be fulfilled within 5 thirty (30) days after course attendance. Attendance reports received more than thirty (30) days after the conclusion of a course must include a late processing fee.

Course applications received more than (1) one year after a course is presented may be denied as untimely.

(4) *Procedure for Mediators*. A mediator may apply for credit of a live course either before or after the date on which it is offered. The application must:

(a) be received by the Commission at least thirty (30) days before the date on which the course is to be offered if they are seeking approval before the course is to be presented. If the applicant is seeking accreditation, the Sponsor must apply within thirty (30) days of the conclusion of the course.

(b) include the nonrefundable application fee in order for the application to be reviewed by the Commission. Courses presented by non-profit sponsors which do not require a registration fee are eligible for an application fee waiver.

Either the provider or the attendee must pay all application and late fees before a mediator may receive credit.

Fees may be waived in the discretion of the Commission upon a showing of good cause.

(c) contain the information required by and be in the form set forth in the application approved by the Commission and available upon request;

(d) be accompanied by the written course outline and brochure used by the Sponsor to furnish information about the course to mediators; and

(e) be accompanied by an affidavit of mediator attesting that the mediator attended the course together with a certification of the course Sponsor as to the mediator's attendance. If the application for course approval is made before attendance, this affidavit and certification must be received by the Commission within thirty (30) days after course attendance. An attendance report received more than thirty (30) days after the conclusion of a course must include a late processing fee.

Course applications received more than one (1) year after a course is presented may be denied as untimely.

(G) Procedure for Resolving Disputes. Any person who disagrees with a decision of the Commission and is unable to resolve the disagreement informally, may petition the Commission for a resolution of the dispute. Petitions must be received by the Commission within thirty (30) days of notification by the Commission of the Commission's decision and shall be considered by the Commission at its next regular meeting, provided that the petition is received by the Commission at least ten (10) business days before such meeting. The person filing the petition shall have the right to attend the Commission meeting at which the petition is considered and to present relevant evidence and arguments to the Commission. The rules of pleading and practice in civil cases shall not apply, and the proceedings shall be informal as directed by the Chair. The determination of the Commission shall be final subject to appeal directly to the Supreme Court.

(H) Confidentiality. Filings with the Commission shall be confidential. These filings shall not be disclosed except in furtherance of the duties of the Commission or upon the request, by the mediator involved, or as directed by the Supreme Court.

(I) Rules for Determining Education Completed.

(1) *Formula*. The number of hours of continuing mediation education completed in any course by a mediator shall be computed by:

(a) Determining the total instruction time expressed in minutes;

(b) Dividing the total instruction time by sixty (60); and

(c) Rounding the quotient up to the nearest one-tenth (1/10).

Stated in an equation the formula is:

$$\frac{\text{Total Instruction time (in minutes)}}{\text{Sixty (60)}} = \text{Hours completed (rounded up the nearest 1/10)}$$

(2) *Instruction Time Defined*. Instruction time is the amount of time when a course is in session and presentations or other educational activities are in progress. Instruction time does not include time spent on:

(a) Introductory remarks;

(b) Breaks; or

(c) Business meetings

(3) A registered mediator who participates as a teacher, lecturer, panelist or author in an approved continuing mediation education course will receive credit for:

(a) Four (4) hours of approved continuing mediation education for every hour spent in presentation.

(b) One (1) hour of approved continuing mediation education for every four (4) hours of preparation time for a contributing author who does not make a presentation relating to the materials prepared.

(c) One (1) hour of approved continuing mediation education for every hour the mediator spends in attendance at sessions of a course other than those in which the mediator participates as a teacher, lecturer or panel member.

(d) Mediators will not receive credit for acting as a speaker, lecturer or panelist on a program directed to elementary, high school or college student level neutrals, or for a program that is not approved under Alternative Dispute Resolution Rule 2.5(E).

Rule 2.6. Mediation Costs

Absent an agreement by the parties, including any guardian ad litem, court appointed special advocate, or other person properly appointed by the court to represent the interests of any child involved in a domestic relations case, the court may set an hourly rate for mediation and determine the division of such costs by the parties. The costs should be predicated on the complexity of the litigation, the skill levels needed to mediate the litigation, and the litigants' ability to pay. Unless otherwise agreed, the parties shall pay their mediation costs within thirty (30) days after the close of each mediation session.

Rule 2.7. Mediation Procedure

(A) Advisement of Participants. The mediator shall:

(1) advise the parties of all persons whose presence at mediation might facilitate settlement; and

(2) in child related matters, ensure that the parties consider fully the best interests of the children and that the parties understand the consequences of any decision they reach concerning the children; and

(3) inform all parties that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot determine how the court would apply the law or rule in the parties' case, or what the outcome of the case would be if the dispute were to go before the court, and (d) recommends that the parties seek or consult with their own legal counsel if they desire, or believe they need legal advice; and

(4) explain the difference between a mediator's role and a lawyer's role when a mediator knows or reasonably should know that a party does not understand the mediator's role in the matter; and

(5) not advise any party (i) what that party should do in the specific case, or (ii) whether a party should accept an offer; and

(6) advise a party who self-identifies or who the mediator identifies as a victim after screening for domestic or family violence, also known as intimate partner violence or abuse, or coercive control (hereinafter, "domestic violence") that the party will only be required to be present at mediation sessions in accordance with Rule 2.7(B)(1) below.

(B) Mediation Conferences.

(1) The parties and their attorneys shall be present at all mediation sessions involving domestic relations proceedings unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present. A party who self-identifies or who the mediator identifies as a victim after screening for domestic violence shall be permitted to have a support person present at all mediation sessions. The mediator may terminate the mediation at any time when a participant becomes disruptive to the mediation process.

(2) All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.

(3) A child involved in a domestic relations proceeding, by agreement of the parties or by order of the court, may be interviewed by the mediator out of the presence of the parties or attorneys.

(4) Mediation sessions are not open to the public.

(5) The mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. The mediator shall advise the parties that the mediator's evaluation is not legal advice.

(C) Confidential Statement of Case. Each side may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, prior to a mediation conference, which shall include:

(1) the legal and factual contentions of the respective parties as to both liability and damages;

(2) the factors considered in arriving at the current settlement posture; and

(3) the status of the settlement negotiations to date.

A confidential statement of the case may be supplemented by damage brochures, videos, and other exhibits or evidence. The confidential statement of the case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator.

(D) Termination of Mediation.

(1) The mediator shall terminate or decline mediation whenever the mediator believes:

(a) that of the meditation process would harm or prejudice one or more of the parties or the children;

(b) the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely;

(c) due to conflict of interest or bias on the part of the mediator;

(d) or mediation is inappropriate for other reasons

(2) At any time after two (2) sessions have been completed, any party may terminate mediation.

(3) The mediator shall not state the reason for terminating or declining mediation except to report to the court, without further comment, that the mediator is terminating or declining mediation.

(E) Report of Mediation: Status.

(1) Within ten (10) days after the mediation, the mediator shall submit to the court, without comment or recommendation, a report of mediation status. The report shall indicate that an agreement was or was not reached in whole or in part or that the mediation was extended by the parties. If the parties do not reach any agreement as to any matter as a result of the mediation, the mediator shall report the lack of any agreement to

the court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(2) If an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. In domestic relations matters, the agreement shall then be filed with the court. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the agreement shall be filed with the court only by agreement of the parties.

(3) In the event of any breach or failure to perform under the agreement, upon motion, and after hearing, the court may impose sanctions, including entry of judgment on the agreement.

(F) Mediator's Preparation and Filing of Documents in Domestic Relations Cases.

At the request and with the permission of all parties in a domestic relations case, a Mediator may prepare or assist in the preparation of documents as set forth in this paragraph (F).

The Mediator shall inform an unrepresented party that he or she may have an attorney of his or her choosing (1) be present at the mediation and/or (2) review any documents prepared during the mediation. The Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.

The Mediator may prepare or assist in the preparation of only the following documents:

(1) A written mediated agreement reflecting the parties' actual agreement, with or without the caption in the case and "so ordered" language for the judge presiding over the parties' case;

(2) An order approving a mediated agreement, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(3) A summary decree of dissolution, with the caption in the case, so long as the decree is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the summary decree reflects the terms of the mediated agreement;

(4) A verified waiver of final hearing, with the caption in the case, so long as the waiver is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(5) A child support calculation, including a child support worksheet and any other required worksheets pursuant to the Indiana Child Support Guidelines or Parenting Time Guidelines, so long as the parties are in agreement on all the entries included in the calculations;

(6) An income withholding order, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the order reflects the terms of the mediated agreement.

Rule 2.8. Rules of Evidence

With the exception of privileged communications, the rules of evidence do not apply in mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.

Rule 2.9. Discovery

Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process. Upon stipulation by the parties or as ordered by the court, discovery may be deferred during mediation pursuant to Indiana Rules of Procedure, Trial Rule 26(C).

Rule 2.10. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against any attorney, or party representative who fails to comply with these mediation rules, limited to assessment of mediation costs and/or attorney fees relevant to the process.

Rule 2.11. Confidentiality and Admissibility

(A) Confidentiality.

(1) Mediation sessions shall be confidential and closed to all persons other than the parties of record, their legal representatives, and persons invited or permitted by the mediator.

(2) The confidentiality of mediation may not be waived.

(3) A mediator shall not be subject to process requiring the disclosure of any matter occurring during the mediation except in a separate matter as required by law.

(4) This Rule shall not prohibit the disclosure of information authorized or required by law.

(B) Admissibility.

(1) Mediation shall be regarded as settlement negotiations governed by Indiana Evidence Rule 408.

(2) Evidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation.

RULE 3. ARBITRATION

Rule 3.1. Agreement to Arbitrate

At any time fifteen (15) days or more after the period allowed for a peremptory change of venue under Trial Rule 76(B) has expired, the parties may file with the court an agreement to arbitrate wherein they stipulate whether arbitration is to be binding or nonbinding, whether the agreement extends to all of the case or is limited as to the issues subject to arbitration, and the procedural rules to be followed during the arbitration process. Upon approval, the agreement to arbitrate shall be noted on the Chronological Case Summary of the Case and placed in the Record of Judgments and Orders for the court.

Rule 3.2. Case Status During Arbitration

During arbitration, the case shall remain on the regular docket and trial calendar of the court. In the event the parties agree to be bound by the arbitration decision on all issues, the case shall be removed from the trial calendar. During arbitration the court shall remain available to rule and assist in any discovery or pre-arbitration matters or motions.

Rule 3.3. Assignment of Arbitrators

Each court shall maintain a listing of lawyers engaged in the practice of law in the State of Indiana who are willing to serve as arbitrators. Upon assignment of a case to arbitration, the plaintiff and the defendant shall, pursuant to their stipulation, select one or more arbitrators from the court listing or the listing of another court in the state. If the parties agree that the case should be presented to one arbitrator and the parties do not agree on the arbitrator, then the court shall designate three (3) arbitrators for alternate striking by each side. The party initiating the lawsuit shall strike first. If the parties agree to an arbitration panel, it shall be limited to three (3) persons.

If the parties fail to agree on who should serve as members of the panel, then each side shall select one arbitrator and the court shall select a third. When there is more than one arbitrator, the arbitrators shall select among themselves a Chair of the arbitration panel. Unless otherwise agreed between the parties, and the arbitrators selected under this provision, the Court shall set the rate of compensation for the arbitrator. Costs of arbitration are to be divided equally between the parties and paid within thirty (30) days after the arbitration evaluation, regardless of the outcome. Any arbitrator selected may refuse to serve without showing cause for such refusal.

Rule 3.4. Arbitration Procedure

(A) Notice of Hearing. Upon accepting the appointment to serve, the arbitrator or the Chair of an arbitration panel shall meet with all attorneys of record to set a time and place for an arbitration hearing. (Courts are encouraged to provide the use of facilities on a regular basis during times when use is not anticipated, i.e. jury deliberation room every Friday morning.)

(B) Submission of Materials. Unless otherwise agreed, all documents the parties desire to be considered in the arbitration process shall be filed with the arbitrator or Chair and exchanged among all attorneys of record no later than fifteen (15) days prior to any hearing relating to the matters set forth in the submission. Documents may include medical records, bills, records, photographs, and other material supporting the claim of a party. In the event of binding arbitration, any party may object to the admissibility of these documentary matters under traditional rules of evidence; however, the parties are encouraged to waive such objections and, unless objection is filed at least five (5) days prior to hearing, objections shall be deemed waived. In addition, no later than five (5) days prior to hearing, each party may file with the arbitrator or Chair a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated; if filed, pre-arbitration briefs shall be served upon the opposing party or parties. The parties may in their Arbitration Agreement alter the filing deadlines. They are encouraged to use the provisions of Indiana's Arbitration Act (IC 34-57-1-1 et seq.) and the Uniform Arbitration Act (IC 34-57-2-1 et seq.) to the extent possible and appropriate under the circumstances.

(C) Discovery. Rules of discovery shall apply. Thirty (30) days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall be binding upon the parties for purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report.

(D) Hearing. Traditional rules of evidence need not apply with regard to the presentation of testimony. As permitted by the arbitrator or arbitrators, witnesses may be called. Attorneys may make oral presentation of the facts supporting a party's position and arbitrators are permitted to engage in critical questioning or dialogue with representatives of the parties. In this presentation, the representatives of the respective parties must be able to substantiate their statements or representations to the arbitrator or arbitrators as required by the Rules of Professional Conduct. The parties may be

permitted to demonstrate scars, disfigurement, or other evidence of physical disability. Arbitration proceedings shall not be open to the public.

(E) Confidentiality. Arbitration proceedings shall be considered as settlement negotiations as governed by Ind. Evidence Rule 408. For purposes of reference, Evid.R. 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

(F) Arbitration Determination. Within twenty (20) days after the hearing, the arbitrator or Chair shall file a written determination of the arbitration proceeding in the pending litigation and serve a copy of this determination on all parties participating in the arbitration. If the parties had submitted this matter to binding arbitration on all issues, the court shall enter judgment on the determination. If the parties had submitted this matter to binding arbitration on fewer than all issues, the court shall accept the determination as a joint stipulation by the parties and proceed with the litigation. If the parties had submitted the matter to nonbinding arbitration on any or all issues, they shall have twenty (20) days from the filing of the written determination to affirmatively reject in writing the arbitration determination. If a nonbinding arbitration determination is not rejected, the determination shall be entered as the judgment or accepted as a joint stipulation as appropriate. In the event a nonbinding arbitration determination is rejected, all documentary evidence will be returned to the parties and the determination and all acceptances and rejections shall be sealed and placed in the case file.

Rule 3.5. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against any party or attorney who fails to comply with the arbitration rules, limited to the assessment of arbitration costs and/or attorney fees relevant to the arbitration process.

RULE 4. MINI-TRIALS

Rule 4.1. Purpose

A mini-trial is a case resolution technique applicable in litigation where extensive court time could reasonably be anticipated. This process should be employed only when there is reason to believe that it will enhance the expeditious resolution of disputes and preserve judicial resources.

Rule 4.2. Case Selection/Objection

At any time fifteen (15) days or more after the period allowed for peremptory change of venue under Trial Rule 76(B) has expired, a court may, on its own motion or upon motion of any party, select a civil case for a mini-trial. Within fifteen (15) days after notice of selection for a mini-trial, a party may object by filing a written objection specifying the grounds. The court shall promptly hear the objection and determine whether a mini-trial is possible or appropriate in view of the objection.

Rule 4.3. Case Status Pending Mini-Trial

When a case has been assigned for a mini-trial, it shall remain on the regular docket and trial calendar of the court. The court shall remain available to rule and assist in any discovery or pre-mini-trial matter or motion.

Rule 4.4. Mini-Trial Procedure

(A) Mini-Trial. The court will set a time and place for hearing and direct representatives with settlement authority to meet and allow attorneys for the parties to present their respective positions with regard to the litigation in an effort to settle the litigation. The parties may fashion the procedure by agreement prior to the mini-trial as they deem appropriate.

(B) Report of Mini-Trial. At a time set by the court, the parties, or their attorneys of record, shall report to the court. Unless otherwise agreed by the parties, the results of the hearing shall not be binding.

(1) The report shall indicate that a settlement was or was not reached in whole or in part as a result of the mini-trial. If the parties did not reach any settlement as to any matter as a result of the mini-trial, the parties shall report the lack of any agreement to the court without comment or recommendation. By mutual agreement of the parties the report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolve or completed, would facilitate the possibility of a settlement.

(2) If a settlement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the settlement shall be filed with the court only by agreement of the parties.

(C) Confidentiality. Mini-trials shall be regarded as settlement negotiations as governed by Ind.Evidence Rule 408. Mini-trials shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons. The participants in a mini-trial shall not be subject to process requiring the disclosure of any matter discussed during the mini-trial, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by or on behalf of the parties.

(D) Employment of Neutral Advisor. The parties may agree to employ a neutral acting as an advisor. The advisor shall preside over the proceeding and, upon request, give advisory opinions and rulings. Selection of the advisor shall be based upon the education, training and experience necessary to assist the parties in resolving their dispute. If the parties cannot by agreement select an advisor, each party shall submit to the court the names of two individuals qualified to serve in the particular dispute. Each side shall strike one name from the other party's list. The court shall then select an advisor from the remaining names. Unless otherwise agreed between the parties and the advisor, the court shall set the rate of compensation for the advisor. Costs of the mini-trial are to be divided equally between the parties and paid within thirty (30) days after conclusion of the mini-trial.

Rule 4.5. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against a party or attorney who intentionally fails to comply with these mini-trial rules, limited to the assessment of costs and/or attorney fees relevant to the process.

RULE 5. SUMMARY JURY TRIALS

Rule 5.1. Purpose

The summary jury trial is a method for resolving cases in litigation when extensive court and trial time may be anticipated. This is a settlement process, and it should be employed only when there is reason to believe that a limited jury presentation may create an opportunity to quickly resolve the dispute and conserve judicial resources.

Rule 5.2. Case Selection

After completion of discovery, the resolution of dispositive motions, and the clarification of issues for determination at trial, upon written stipulation of the parties, the court may select any civil case for summary jury trial consideration.

Rule 5.3. Agreement of Parties

A summary jury trial proceeding will be conducted in accordance with the agreement of the parties or their attorneys of record as approved by the court. At a minimum, this agreement will include the elements set forth in this rule.

(A) Completion Dates. The agreement shall specify the completion dates for:

(1) providing notice to opposing party of witnesses whose testimony will be summarized and/or introduced at the summary jury trial, proposed issues for consideration at summary jury trial, proposed jury instructions, and verdict forms;

(2) hearing pre-trial motions; and

(3) conducting a final pre-summary jury trial conference.

(B) Procedures for Pre-summary Jury Trial Conference. The agreement will specify the matters to be resolved at pre-summary jury trial conference, including:

(1) matters not resolved by stipulation of parties or their attorneys of record necessary to conduct a summary jury trial without numerous objections or delays for rulings on law;

(2) a final pre-summary jury trial order establishing procedures for summary jury trial, issues to be considered, jury instructions to be given, form of jury verdict to be rendered, and guidelines for presentation of evidence; and

(3) the firmly fixed time for the summary jury trial.

(C) Procedure/Presentation of Case. The agreement shall specify the procedure to be followed in the presentation of a case in the summary jury trial, including:

(1) abbreviated opening statements;

(2) summarization of anticipated testimony by counsel;

(3) the presentation of documents and demonstrative evidence;

(4) the requisite base upon which the parties can assert evidence; and

(5) abbreviated closing statements.

(D) Verdict and Records. All verdicts in a summary jury trial shall be advisory in nature. However, the parties may stipulate, prior to the commencement of the summary jury trial that a unanimous verdict or a consensus verdict shall be deemed a final determination on the merits. In the event of such a stipulation, the verdict and the record of the trial shall be filed with the court and the court shall enter judgment accordingly.

Rule 5.4. Jury
Jurors for a summary jury trial will be summoned and compensated in normal fashion. Six (6) jurors will be selected in an expedited fashion. The jurors will be advised on the importance of their decision and their participation in an expedited proceeding. Following instruction, the jurors will retire and may be requested to return either a unanimous verdict, a consensus verdict, or separate and individual verdicts which list each juror's opinion about liability and damages. If a unanimous verdict or a consensus verdict is not reached in a period of time not to exceed two (2) hours, then the jurors shall be instructed to return separate and individual verdicts in a period of time not to exceed one (1) hour.

Rule 5.5. Post Determination Questioning
After the verdict has been rendered, the jury will be advised of the advisory nature of the decision and counsel for each side will be permitted to ask general questions to the jury regarding the decisions reached which would aid in the settlement of the controversy. Counsel shall not be permitted to ask specific questions of the jury relative to the persuasiveness of the form of evidence which would be offered by particular witnesses at trial, the effectiveness of particular exhibits, or other inquiries as could convert summary jury trials from a settlement procedure to a trial rehearsal.

Rule 5.6. Confidentiality
Summary jury trials which are advisory shall be regarded as settlement negotiations as governed by Ind.Evidence Rule 408.

Summary jury trials shall be closed to all persons other than the parties of record, their legal representatives, the jurors, and other invited persons. The participants in a summary jury trial shall not be subject to process requiring the disclosure of any matter discussed during the summary jury trial, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by or on behalf of the parties.

Rule 5.7. Employment Of Presiding Official
A neutral acting as a presiding official shall be an attorney in good standing licensed to practice in the state of Indiana. The parties by agreement may select a presiding official. However, unless otherwise agreed, the court shall provide to the parties a panel of three (3) individuals. Each party shall strike the name of one (1) individual from the panel list. The party initiating the lawsuit shall strike first. The remaining individual shall be named by the court as the presiding official. Unless otherwise agreed between the parties and the presiding official, the court shall set the rate of compensation for the presiding official. Costs of the summary jury trial are to be divided equally between the parties and are to be paid within thirty (30) days after the conclusion of the summary jury trial.

RULE 6. PRIVATE JUDGES

Rule 6.1. Case Selection
Pursuant to IC 33-38-10-3(c), upon the filing of a written joint petition and the written consent of a registered private judge, a civil case founded on contract, tort, or a combination of contract and tort, or involving a domestic relations matter shall be assigned to a private judge for disposition.

Rule 6.2. Compensation of Private Judge and County
As required by IC 33-38-10-8, the parties shall be responsible for the compensation of the private judge, court personnel involved in the resolution of the dispute, and the costs of facilities and materials. At the time the petition for appointment of a private judge is filed, the parties shall file their written agreement as required by this provision.

Rule 6.3. Trial By Private Judge/Authority
(A) All trials conducted by a private judge shall be conducted without a jury. The trial shall be open to the public, unless otherwise provided by Supreme Court rule or statute.

(B) A person who serves as a private judge has, for each case heard, the same powers as the judge of a circuit court in relation to court procedures, in deciding the outcome of the case, in mandating the attendance of witnesses, in the punishment of contempt, in the enforcement of orders, in administering oaths, and in giving of all necessary certificates for the authentication of the record and proceedings.

Rule 6.4. Place Of Trial Or Hearing
As provided by IC 33-38-10-7, a trial or hearing in a case referred to a private judge may be conducted in any location agreeable to the parties, provided the location is posted in the Clerk's office at least three (3) days in advance of the hearing date.

Rule 6.5. Recordkeeping
All records in cases assigned to a private judge shall be maintained as any other public record in the court where the case was filed, including the Chronological Case Summary under the case number initially assigned to this case. Any judgment or designated order under Trial Rule 77 shall be entered in the Record of Judgments and Orders for the court where the case was filed and recorded in the Judgment Record for the Court as required by law.

Rule 7.0. Purpose

This rule establishes standards of conduct for persons conducting an alternative dispute resolution ("ADR") process governed pursuant to ADR Rule 1.2, hereinafter referred to as "neutrals."

Rule 7.1. Accountability And Discipline

A person who serves with leave of court or registers with the Commission pursuant to ADR Rule 2.3 consents to the jurisdiction of the Indiana Supreme Court Disciplinary Commission in the enforcement of these standards. The Disciplinary Commission, any court or the Continuing Legal Education Commission may recommend to the Indiana Supreme Court that a registered mediator be removed from its registry as a sanction for violation of these rules, or for other good cause shown, including but not limited to any current or past suspension or revocation of a professional license by the respective licensing agency; any relinquishment of a professional license while a disciplinary action is pending; any current or past disbarment; any conviction of, plea of nolo contendere to, or any diversion or deferred prosecution to any state or federal criminal charges (felonies, misdemeanors, and/or infractions), juvenile charges, or violation of military law (unless the conviction, nolo plea, diversion, or deferred prosecution has been expunged pursuant to law).

Rule 7.2. Competence

A neutral shall decline appointment, request technical assistance, or withdraw from a dispute beyond the neutral's competence.

Rule 7.3. Disclosure and Other Communications

(A) A neutral has a continuing duty to communicate with the parties and their attorneys as follows:

(1) notify participants of the date, time, and location for the process, at least ten (10) days in advance, unless a shorter time period is agreed by the parties;

(2) describe the applicable ADR process or, when multiple processes are contemplated, each of the processes, including the possibility in nonbinding processes that the neutral may conduct private sessions;

(3) in domestic relations matters, distinguish the ADR process from therapy or marriage counseling;

(4) disclose the anticipated cost of the process;

(5) advise that the neutral does not represent any of the parties;

(6) disclose any past, present or known future

(a) professional, business, or personal relationship with any party, insurer, or attorney involved in the process, and

(b) other circumstances bearing on the perception of the neutral's impartiality;

(7) advise parties of their right to obtain independent legal counsel;

(8) advise that any agreement signed by the parties constitutes evidence that may be introduced in litigation; and

(9) disclose the extent and limitations of the confidentiality of the process consistent with the other provisions of these rules.

(B) A neutral may not misrepresent any material fact or circumstance nor promise a specific result or imply partiality.

(C) A neutral shall preserve the confidentiality of all proceedings, except where otherwise provided.

Rule 7.4. Duties

(A) A neutral shall observe all applicable statutes, administrative policies, and rules of court.

(B) A neutral shall perform in a timely and expeditious fashion.

(C) A neutral shall be impartial and shall utilize an effective system to identify potential conflicts of interest at the time of appointment. After disclosure pursuant to ADR Rule 7.3(A)(6), a neutral may serve with the consent of the parties, unless there is a conflict of interest or the neutral believes the neutral can no longer be impartial, in which case a neutral shall withdraw.

(D) A neutral shall avoid the appearance of impropriety.

(E) A neutral may not have an interest in the outcome of the dispute, may not be an employee of any of the parties or attorneys involved in the dispute, and may not be related to any of the parties or attorneys in the dispute.

(F) A neutral shall promote mutual respect among the participants throughout the process.

Rule 7.5. Fair, Reasonable and Voluntary Agreements

(A) A neutral shall not coerce any party.

(B) A neutral shall withdraw whenever a proposed resolution is unconscionable.

(C) A neutral shall not make any substantive decision for any party except as otherwise provided for by these rules.

Rule 7.6. Subsequent Proceedings

(A) An individual may not serve as a neutral in any dispute on which another neutral has already been serving without first ascertaining that the current neutral has been notified of the desired change.

(B) A person who has served as a mediator in a proceeding may act as a neutral in subsequent disputes between the parties, and the parties may provide for a review of the agreement with the neutral on a periodic basis. However, the neutral shall decline to act in any capacity except as a neutral unless the subsequent association is clearly distinct from the issues involved in the alternative dispute resolution process. The neutral is required to utilize an effective system to identify potential conflict of interest at the time of appointment. The neutral may not subsequently act as an investigator for any court-ordered report or make any recommendations to the Court regarding the mediated litigation.

(C) When multiple ADR processes are contemplated, a neutral must afford the parties an opportunity to select another neutral for the subsequent procedures.

Rule 7.7 Remuneration

(A) A neutral may not charge a contingency fee or base the fee in any manner on the outcome of the ADR process.

(B) A neutral may not give or receive any commission, rebate, or similar remuneration for referring any person for ADR services.

RULE 8. OPTIONAL EARLY MEDIATION

Preamble.

The voluntary resolution of disputes in advance of litigation is a laudatory goal. Persons desiring the orderly mediation of disputes not in litigation may elect to proceed under this Rule.

Rule 8.1. Who May Use Optional Early Mediation.

By mutual agreement, persons may use the provisions of this Rule to mediate a dispute not in litigation. Persons may participate in dispute resolution under this Rule with or without counsel.

Rule 8.2. Choice of Mediator.

Persons participating in mediation under this Rule shall choose their own mediator and agree on the method of compensating the mediator. Mediation fees will be shared equally unless otherwise agreed. The mediator is governed by the standards of conduct provided in Alternative Dispute Resolution Rule 7.

Rule 8.3. Agreement to Mediate.

Before beginning a mediation under this Rule, participants must sign a written Agreement To Mediate substantially similar to the one shown as Form A to these rules. This agreement must provide for confidentiality in accordance with Alternative Dispute Resolution Rule 2.11; it must acknowledge judicial immunity of the mediator equivalent to that provided in Alternative Dispute Resolution Rule 1.5; and it must require that all provisions of any resulting mediation settlement agreement must be written and signed by each person and any attorneys participating in the mediation.

Persons participating in mediation under this Rule shall have the same ability afforded litigants under Trial Rule 26(B)(2) of the Rules of Trial Procedure to obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a settlement under this Rule or to indemnify or reimburse for payments made to satisfy a settlement under this Rule.

Rule 8.4. Preliminary Considerations.

The mediator and participating persons should schedule the mediation promptly. Before beginning the mediation session, each participating person is encouraged to provide the mediator with a written confidential summary of the nature of the dispute, as outlined in Alternative Dispute Resolution Rule 2.7(c).

Rule 8.5. Good Faith.

In mediating their dispute, persons should participate in good faith. Information sharing is encouraged. However, the participants are not required to reach agreement.

Rule 8.6. Settlement Agreement.

(A) In all matters not involving the care and/or support of children, if an agreement is reached, to be enforceable, all agreed provisions must be put in writing and signed by each participant. This should be done promptly as the mediation concludes. A copy of the written agreement shall be provided to each participant.

(B) Notwithstanding the other provisions of this Rule 8, in matters involving the care and/or support of children, mediated agreements put in writing and signed by all participants may be binding on the participants, but are only enforceable after review and approval by the appropriate court that would have jurisdiction over the care and/or support of the children.

Rule 8.7. Subsequent ADR and Litigation.
If no settlement agreement is reached, put in writing, and signed by the participants, the participants may thereafter engage in litigation and/or further alternative dispute resolution.

Rule 8.8. Deadlines Not Changed.
WARNING: Participation in optional early mediation under this Rule does not change the deadlines for beginning a legal action as provided in any applicable statute of limitations or in any requirement for advance notice of intent to make a claim (for example, for claims against government units under the Indiana Tort Claims Act).

Section One

Indiana Continuing Legal Education Forum

ADVANCED CIVIL MEDIATION
July 27-28, 2023

Beginning the Mediation

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Section One

Beginning the Mediation.....Jerome L. Withered

Before the Mediation

Confirmation Letter. In the mediator's written confirmation of the mediation (or at the outset of the mediation), the mediator should cover a number of topics: the items required by the Indiana ADR Rule 2.7 (A) (see appendix to this paper), such as the mediator does not provide legal advice, does not represent any party, cannot determine how a court would apply the law in this case or the expected outcome of the case, and other circumstantial requirements covered by the rule, plus your fees. and who is responsible for payment of the fees. Suggest to the attorneys to get their submissions to you as early as possible, as that makes for better preparation.

Who pays the Fees? Avoid contention here by being clear about who pays what percentage. For instance, with multiple parties, if there is one plaintiff and three defendants, are the fees split ¼ to plaintiff, and ¼ to each defendant? Or are the fees split ½ to plaintiff and ½ to the defendants (or 1/6 each defendant)? Or, if there are two plaintiffs and three defendants – – – will that be split equally five ways, or ½ to plaintiffs and ½ to defendants? You don't want a dispute after the mediation, so in a mediation with more than two opposing parties, just clarify the point.

Settlement Authority. ADR Rule 2.7(B)(2) requires that "attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present" at the mediation unless excused by the court. But if the insurance adjuster on the case does not want to travel to the mediation site, what do you do? From my experience, not much, especially if plaintiff's attorney agrees (and if that's the only way a carrier will agree to mediate the case, you are stuck with an adjuster on the phone, or Zoom).

Medical expenses and liens, including Medicare liens. Finally, in a personal injury case, the mediator might consider the advisability of asking the parties to attempt to reach agreement before the mediation on medical expenses and wage loss, or at minimum, each side should know the other side's position. A surprise of new medical expenses being produced for the first time at mediation is not conducive to settlement negotiations. If there are liens of any kind that have to be negotiated and satisfied, it is best to have the plaintiff's attorney connect with the lienholder in advance of the mediation.

The same goes for unpaid medical bills. Plaintiffs and their counsel will have to decide what to do about those issues, but if possible, it is best to deal with them at the time of the mediation.

Pre-mediation preparation

There are many things a mediator must think about at the beginning of a mediation. Most of them are just common sense and courtesy items, but they are very important. The most important is: Be Prepared, fully and completely. There is no substitute for thorough preparation. Lawyers and parties can tell if the mediator just skimmed through the submissions at breakfast that morning, or worse, is just getting through them as everyone is arriving. If you come in ill-prepared or in a rush, it will be easier for the participants to call it quits early.

Study the parties' submissions thoroughly, gaining an understanding of the issues in the case. If there are issues that leave you wondering, call both counsel before the mediation and flush out the parties' positions on difficult issues. In a personal injury case, for example, does plaintiff have all the medical expenses properly accounted for? Have expert depositions been taken, and if not, what will each side say their experts will testify to? Have all documents been exchanged in discovery, and are there other pending issues with production of documents?

In a business case, is there discovery that has not been produced to an opponent that might help with settling the case? As mentioned above, usually, it is not helpful for one party to spring a new document or piece of evidence on an opponent in the middle of a mediation.

Written Mediated Settlement Agreement

ADR Rule 27(E)(2)requires that if a settlement is reached, it shall be reduced to writing and signed. A good practice here is to have a draft of a Mediated Settlement Agreement ready to fill in blanks. The parties and attorneys are tired by the end of mediation, and want to leave. It is best to have something in draft that you or your assistant can readily complete, add any new wrinkles, and distribute for signature.

Joint opening session?

Many mediators have a short chat with each room (or with the attorneys only) *about whether to have an opening joint session*. As we all know, the trend of late is to forget the joint session and get started with the first demand. Foregoing the joint session is best when the parties are at loggerheads and a cross comment by an attorney or a party could trigger an argument or an outburst, and other cases where the issues are crystal-clear, and each side knows most or all of the other side's issues and arguments.

But, in today's world, we should not lose sight of the value of direct human interaction. Joint sessions can be eye-opening and enlightening for both sides of a dispute, but only if the parties and the attorneys are suited for open and professional banter between advocates. We have all been through mediations in the past when the joint session was deemed an essential part of the process. Sometimes it is better to have a joint session and other times not. So, a mediator should not automatically discard the joint session, as it might be a benefit.

On the other hand, the mediator should not push hard or try to force one or all parties into a joint session. Just explain your position, and if either side says no, forego the joint session.

Mediator Opening Comments

All mediators have their own preferences and techniques on what to say at the beginning when the mediator meets with the parties and counsel for the first time. Whether you make these comments at a beginning joint session or in a private caucus with each party individually, the mediator needs to say some things to the parties, particularly to individual parties who have not previously been through a mediation. Here are some ideas and examples:

- Explain briefly the process and why we are here
- Differences between mediation and trial
- Confidentiality of the process: each party's demands and offers at mediation are not admissible at trial
- If you really want to settle your case, it will take time. Rome wasn't built in a day. It takes patience and staying power to sit through a long mediation.
- A trial means turning over the decision to 6 persons you likely won't know and who may have views entirely opposite to yours, while mediation is where you decide your own result.
- In a personal injury case, the *Stanley* issue
- The items covered by ADR Rule 2.7(A) --- the mediator is not providing legal advice to any party, whether represented or un-represented, is not representing any party, and cannot predict what a court or jury might do
- Risks and costs of trials
- You can't expect to do as well in mediation as in a trial because you are shedding all your risk and settling on certain terms without the risk of a trial
- The mediator is not the judge, jury, or your lawyer
- Listen to your lawyer

Initial Private Caucuses are for Listening

After the opening joint session (or in each room individually if no joint session) in which you make your own opening mediator comments, take ample time to listen to each party. In every dispute that ends up in court, the plaintiff has a story to tell, and so does the defendant. Listen well. Act interested and be interested. The same thing for the defendant. You'll gain their confidence. You might also get a sense of the sentiment in the room; that is, whether any party is

particularly eager or particularly indifferent about a trial of the case instead of settling at mediation. In other words, try to read the room.

In this first round, you may not want to secure a plaintiff's demand or a defendant's offer, but just spend your time gathering up all the facts of the case. Ask questions, and find out what the hot-button issues and facts are. Get into the details, because every case has its good side and its bad (or not-so-good) side.

Good Facts and Bad Facts (Positives and Negatives)

One technique to use is to gather up all of plaintiff's "bad facts" and "good facts," or "positives" and "negatives," and do the same for the defendants. Make a list of them (you can start that list when reading the submissions pre-mediation, and continue adding to the list in your private caucuses with each party). For example, let's say you are mediating an auto accident case with these facts:

> Patty, a 21-year old female driving a brand new sports car, is travelling westbound on Hwy 4 in a heavily-wooded area. Speed about 45-50 mph in a 45 mph zone. Temperature about 30 degrees. Pavement is patchy wet and dry with some slick spots. As she comes around a bend in the road, a pickup truck comes out of a driveway from a house in the woods and turns in front of her resulting in a violent collision. Both vehicles were totaled. She suffered bruised ribs, fractured femur, and severe knee sprain, which she claims aggravated a high school soccer injury that was getting better, but now will need surgery (but surgery not performed in the 2 years since accident). Other driver not hurt. He is a local high school basketball coach and is widely known and popular. He was going to a fundraiser event for a little boy in town who has brain cancer (Coach was the featured speaker). Patty seeks compensation for her medical expenses, wage loss, and future knee surgery costs. The case was filed and now comes to you for mediation.

As you gather from the parties' submissions the facts and circumstances of the accident and Patty's medical treatment, medical expenses, and likely future treatment costs, consider making a chart with the following information. The chart can be supplemented at mediation as more information emerges.

Patty's good facts/positives:

Coach pulled out in front of her; she had right of way

She was under speed limit

No evidence of cell phone usage

No prior broken bones

Significant injuries and medical expenses

Patty's bad facts/negatives

Was in heavily wooded area, should have slowed down (contributory fault?)

Patchy wet- dry road. Should have slowed down (same?)

Has seen orthopedic dr. about ACL surgery, but dr. says surgery unneeded at present

Femur healed quickly and well. Back to normal after 2 months

All of Coach's good facts are Patty's bad facts

Coach's good facts/positives:

Well-known and liked in community

This area is known for dense woods, with houses way back from the road, Patty should have been more cautious

He could not see around the curve, but pulled out quickly to avoid an accident

Was going to community fundraiser for 3-year-old boy with cancer

Patty was likely going to have knee surgery someday anyway from her prior soccer injury

Coach's bad facts/negatives:

No question that Patty had the right-of-way

Patty, who is credible, says Coach pulled out slowly

All of Patty's good facts are Coach's bad facts

Once you have the list of good and bad facts for each party, you can use them in discussions with each room to enlighten each room that their case is not foolproof and not a certain winner at a trial. It is monotonous and unproductive for the mediator to repeat the same facts over and again every round, so the idea is to parse out discussion of these good facts and bad facts in each room in each round. Thus, instead of merely being a messenger who delivers offers and demands from room to room, take the good facts and bad facts one or two at a time, and use them as building blocks in the separate plaintiff and defendant rooms to help the parties see the value of coming to an agreement.

APPENDIX

Indiana ADR Rule 2.7

Rule 2.7. Mediation Procedure

(A) Advisement of Participants. The mediator shall:

(1) advise the parties of all persons whose presence at mediation might facilitate settlement; and

(2) in child related matters, ensure that the parties consider fully the best interests of the children and that the parties understand the consequences of any decision they reach concerning the children; and

(3) inform all parties that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot determine how the court would apply the law or rule in the parties' case, or what the outcome of the case would be if the dispute were to go before the court, and (d) recommends that the parties seek or consult with their own legal counsel if they desire, or believe they need legal advice; and

(4) explain the difference between a mediator's role and a lawyer's role when a mediator knows or reasonably should know that a party does not understand the mediator's role in the matter; and

(5) not advise any party (i) what that party should do in the specific case, or (ii) whether a party should accept an offer; and

(6) advise a party who self-identifies or who the mediator identifies as a victim after screening for domestic or family violence, also known as intimate partner violence or abuse, or coercive control (hereinafter, "domestic violence") that the party will only be required to be present at mediation sessions in accordance with Rule 2.7(B)(1) below.

(B) Mediation Conferences.

(1) The parties and their attorneys shall be present at all mediation sessions involving domestic relations proceedings unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present. A party who self-identifies or who the mediator identifies as a victim after screening for domestic violence shall be permitted to have a support person present at all mediation sessions. The mediator may terminate the mediation at any time when a participant becomes disruptive to the mediation process.

(2) All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.

(3) A child involved in a domestic relations proceeding, by agreement of the parties or by order of the court, may be interviewed by the mediator out of the presence of the parties or attorneys.

(4) Mediation sessions are not open to the public.

(5) The mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. The mediator shall advise the parties that the mediator's evaluation is not legal advice.

(C) Confidential Statement of Case. Each side may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, prior to a mediation conference, which shall include:

(1) the legal and factual contentions of the respective parties as to both liability and damages;

(2) the factors considered in arriving at the current settlement posture; and

(3) the status of the settlement negotiations to date.

A confidential statement of the case may be supplemented by damage brochures, videos, and other exhibits or evidence. The confidential statement of the case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator.

(D) Termination of Mediation.

(1) The mediator shall terminate or decline mediation whenever the mediator believes:

(a) that of the meditation process would harm or prejudice one or more of the parties or the children;

(b) the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely;

(c) due to conflict of interest or bias on the part of the mediator;

(d) or mediation is inappropriate for other reasons

(2) At any time after two (2) sessions have been completed, any party may terminate mediation.

(3) The mediator shall not state the reason for terminating or declining mediation except to report to the court, without further comment, that the mediator is terminating or declining mediation.

(E) Report of Mediation: Status.

(1) Within ten (10) days after the mediation, the mediator shall submit to the court, without comment or recommendation, a report of mediation status. The report shall indicate that an agreement was or was not reached in whole or in part or that the mediation was extended by the parties. If the parties do not reach any agreement as to any matter as a result of the mediation, the mediator shall report the lack of any agreement to the court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(2) If an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. In domestic relations matters, the agreement shall then be filed with the court. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the agreement shall be filed with the court only by agreement of the parties.

(3) In the event of any breach or failure to perform under the agreement, upon motion, and after hearing, the court may impose sanctions, including entry of judgment on the agreement.

(F) Mediator's Preparation and Filing of Documents in Domestic Relations Cases.

At the request and with the permission of all parties in a domestic relations case, a Mediator may prepare or assist in the preparation of documents as set forth in this paragraph (F).

The Mediator shall inform an unrepresented party that he or she may have an attorney of his or her choosing (1) be present at the mediation and/or (2) review any documents prepared during the mediation. The Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.

The Mediator may prepare or assist in the preparation of only the following documents:

(1) A written mediated agreement reflecting the parties' actual agreement, with or without the caption in the case and "so ordered" language for the judge presiding over the parties' case;

(2) An order approving a mediated agreement, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(3) A summary decree of dissolution, with the caption in the case, so long as the decree is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the summary decree reflects the terms of the mediated agreement;

(4) A verified waiver of final hearing, with the caption in the case, so long as the waiver is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(5) A child support calculation, including a child support worksheet and any other required worksheets pursuant to the Indiana Child Support Guidelines or Parenting Time Guidelines, so long as the parties are in agreement on all the entries included in the calculations;

(6) An income withholding order, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the order reflects the terms of the mediated agreement.

Section Two

Why Some Mediations "Fail" and How to Prevent It

Michael P. Bishop
Bishop Mediation & Arbitration, LLC
Indianapolis, Indiana

Section Two

Why Some Mediations "Fail"
and How to Prevent It……...… Michael P. Bishop

PowerPoint Presentation

BISHOP
MEDIATION
& ARBITRATION

Why Some Mediations "Fail" and How to Prevent It

ICLEF Advanced Civil Mediation
French Lick Springs Resort
July 27-28, 2023

Michael P. Bishop
mbishop@bishopmediation.com

What is a “failed” mediation?

- Deadlock
- Walk out during conference or before final terms
- Refusal to sign settlement agreement
- Follow up but still no settlement
- One party feels bullied
- One or both parties unhappy

May depend on perspective of the mediator

- Who “settles” the case? The parties or the mediator?
- Only value of mediation is to settle case?
- When case settles, does the mediator congratulate the parties or her or himself?
- How far does a mediator go to reach a settlement?
- Is it true that if both parties are unhappy, it is a good settlement?

The dispute belongs to the parties, not the mediator

- Why did we become mediators in the first place?
- Mediator owns the process, not the outcome
- True master of the mediation process
- Help parties make a fully informed decision on outcome
- Not “deal or no deal” but “deal or informed decision”
- Taking the “me” out of mediator

Mediator needs to understand their market

- Some want a settlement, regardless of what it takes
- Some want mediator to deliver reality of the case to client
- Some want mediator to do the negotiations: “Now, go do your magic and get this done”
- Some want mediator to push, but not too hard
- Some want a marathon mediation session until done, some may want shorter multiple sessions

Mediator Conduct

Mediator not prepared

- Not review and analyze parties' submissions
- "Winging it"
- Insufficient time scheduled for conference
- Not research background of parties and lawyers
- Not review docket of litigated cases
- Distractions
- Physically or emotionally drained

Best practice

- Prepare, prepare, prepare
- Pre-mediation telephone call or Zoom
  - Before or after submissions
  - All lawyers together or separate
    - Sometimes more candor when separate
    - Ask what are roadblocks or impediments?
    - Client issues: personality, relationship, social history, etc.
  - Include the parties?
  - Who should be at mediation and who should not
  - Reduce surprises
  - Build rapport and trust
  - Ask what the mediator can do to help
  - Tell lawyers what you need to see to be better prepared

Mediator knows how case should be settled

- Mediator has an agenda to settle
- Predetermined how it should be settled
- Cookie cutter settlements
- Ignore signals from lawyers and parties

Best practice

- Keep an open mind
- Remember it is parties' case, not yours
- Do not covet they outcome
- Listen more than you talk
- "Read the room:"
  - Who is struggling or resisting settlement?
  - What am I not hearing or seeing?
- Mediator's best friend: <u>information</u>
  - Ask questions
  - Be curious
  - Be open to new ideas
  - Think outside the box
  - Help develop options
    - Party/lawyer blinders
    - Step outside comfort zone
    - Use trial balloons

Mediator gets frustrated with lack of progress or bargaining positions

- Emotional triggers
- Loose appearance of neutrality
- Shut down to developing dynamics
- Loose energy and stamina
- Pessimism
- Party or lawyer insults

Best practice

- Know your triggers-self awareness
- Develop technics to cope
  - Take a walk
  - Meditate
  - Breath, breath, breath
- Patience x 10
- This is not personal
- The “no fly list”

Mediator does not prepare parties for the mediator proposal

- Either at party request or mediator suggestion
- Parties have vague understanding of what it is and why doing it now
- Lawyer may be caught off guard by details of proposal

Best practice

- Mediator should “read the room” before considering it
- Is it the right time? Draw back when either too early or too late
- First, have private talk with lawyer to understand if client ready for alternative view
- Be clear about the mediator proposal process and what is expected from each party

Attorney Conduct

Lawyer not prepared

- Not prepare a mediation statement
- No apparent settlement strategy
- Not understand case
- How calculate or oppose damages
- Insufficient time scheduled for conference
- Real decision maker not present
- Client uninformed on process and participants

Best practice

- Prepare a statement for both big and small cases. Help think through and analyze case
- Develop a settlement strategy and play it out in advance
  - If a financial issue, crunch the numbers and develop scenarios
  - Have important documents and records ready
- Bring the person(s) who can authorize settlement
- Allow enough time to develop settlement options at mediation
  - May take over a half day
  - May take over one session
  - Be flexible
- Ask the mediator for advice
  - Don’t be afraid to ask mediator what she or he thinks
  - Use mediator as sounding board for settlement options
  - Allow mediator to coach: role play through negotiations

Best Practice

- If seeking money, helpful if Plaintiff makes pre-mediation demand
- Defense needs time to process and prepare
- Prepare draft settlement agreement and include with mediation statement

Party Conduct

A party is not prepared

- Not understand the mediation process and role of mediator
- No sense of a settlement strategy
- Inflated and unrealistic expectations
- Not prepared emotionally
- Not prepared for physical demands
- Scheduling issues with family, work, travel, etc.

Best practice

- Meet with client before the mediation and explain details of mediation and who will be there
- Outline a settlement strategy and get on the same page. Discuss scenarios
- Discuss positive and negative aspects of case
- Discuss the emotional and physical rollercoaster of a mediation
- Schedule sufficient time for mediation or express time limitations
- Expect the unexpected and become comfortable with the uncomfortable

Goldberg-Shaw Study:
“Secrets of Successful Mediators”

What accounts for commercial mediator success?

- What successful mediators think
- What the advocates who hire them think

Shaw-Goldberg – Study 2. Views of reasons for mediator success

	Advocates	Mediators
Friendly, empathic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions	60%	75%
High integrity, respects confidences, non-judgmental	53%	25%
Smart, quick study, well-prepared, knows contract/law	47%	
Patient, persistent, never quits	35%	15%
Useful reality testing, evaluates likely outcome; candid	33%	10%
Asks good questions, listens carefully to responses	28%	
Diplomatic; softens bad news; makes suggestions tactfully	21%	
Proposes novel solutions, creative	18%	50%

The mediator was friendly, empathic (60%)

- “Because of his sincerity and likeability, he is able to keep people talking when other mediators might lose them.”
- “She demonstrates compassion for the client, which makes the client feel that she is working hard on her behalf and tends to make the client trust her.”

Honesty and integrity (53%)

- “He has honesty and integrity. We had absolute confidence that he would not reveal information we did not want revealed to the other side.”
- “Another essential quality is her personal integrity – as it is essential to any mediator. Both sides trust that the information she relays is accurate, and that she’s not putting a spin on things to help her get where she needs to go.”

Advocates' views of reasons for mediator *failure*

Lack of integrity, not neutral, disclosed confidential information, inconsistent evaluations	48%
Self-absorbed, non-empathetic or respectful, didn’t care or listen	20%
Didn’t understand issues/law, not well prepared	16%
Not firm/forceful, went through motions, just delivered messages	24%
Lack of patience/persistence, quit too easily	11%

How can mediators show these qualities?

- Friendly, empathic, likeable, conveys sense of caring
- High integrity, respects confidences, non-judgmental
- Useful reality testing, evaluates likely outcome
- Avoid this: Lack of integrity, not neutral

Meet Michael

Michael Bishop has been recognized by *Best Lawyers in America* in Alternate Dispute Resolution and Arbitration since 2006.

He was selected as a Panelist for the American Arbitration Association National Roster of Neutrals in 2008, where he serves on the Commercial, Employment, and Large Complex Case panels.

He is a Distinguished Fellow of the International Academy of Mediators, Diplomate of the National Academy of Distinguished Neutrals, and Member of the Academy of Court Appointed Neutrals.

BISHOP
MEDIATION
& ARBITRATION

Thank You

Section Three

SCOTT LAW OFFICE
AND MEDIATION CENTER

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MY ZOOM MEDIATION SET-UP

PRESENTED AT THE
ADVANCED ISSUES IN CIVIL MEDIATION SEMINAR
JULY 27-28, 2023

122 NORTH MAIN STREET • P.O. BOX 805 • KOKOMO, INDIANA 46903-0805 • PHONE: (765) 459-0751 • FAX: (765) 459-5950

Section Three

My Zoom Mediation Set-Up…….Mark A. Scott

Software, Internet and Apps

Hardware, Connections and Comfort

SOFTWARE, INTERNET AND APPS

Zoom (Pro Version): https://zoom.us/pricing

Quickbooks (Plus Version) for Bookkeeping/Invoicing: https://quickbooks.intuit.com/pricing/

Xfinity for Internet: https://www.xfinity.com

RingCentral for Phone: https://www.ringcentral.com

Adobe Acrobat Pro: https://www.adobe.com

Adobe Scan App: https://www.adobe.com/acrobat/mobile/scanner-app.html

HARDWARE, CONNECTIONS AND COMFORT

16" MacBook Pro: https://a.co/d/dhjiOD3

24" Dell Monitor: https://a.co/d/3OmGKaW

Logitech Adjustable Monitor Light: https://a.co/d/aUGJuWG

Blue Yeti USB Mic: https://a.co/d/0nSk3WC

Apple Earbuds with 3.5 mm plug (for Blue Yeti Mic): https://a.co/d/5L88yOt

Apple Magic Keyboard: https://a.co/d/hHp8CZX

Apple Magic Mouse: https://a.co/d/3y2YBMP

Nulaxy Adjustable Laptop Stand: https://a.co/d/1yLjEYN

Wrist Pad for Keyboard: https://a.co/d/9h57kdA

Wrist Pad for Mouse: https://a.co/d/aStWDC2

Anker USB Hub: https://a.co/d/5czTW0w

Lightning Charging Cables: https://a.co/d/68iiqdY

HDMI Cables: https://a.co/d/b7JEWIk

Power Strip: https://a.co/d/dvnWUWf

Foldable Wall Charger: https://a.co/d/etxL73F

Docking Station for Mobile Phone: https://a.co/d/aCWuSHr

Herman Miller Aeron Chair: https://store.hermanmiller.com/office-chairs-aeron/aeron-chair/2195348.html?lang=en_US

Foot rest: https://a.co/d/i7jmaeh

Foot massager: https://a.co/d/86eP7C3

Heating Pad: https://a.co/d/dbiaRWw

Theragun Mini: https://a.co/d/iRALSoR

Under Desk Treadmill: https://a.co/d/ghvHtM6

Purple Seat Cushion: https://a.co/d/5mwOK8F

Purple Back Rest: https://a.co/d/j1Kp74z

Photo Framing: www.keepsakeframes.com

Section Four

Value Drivers to Evaluate Damages at Mediation

Kyle M. Baker
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Section Four

VALUE DRIVERS TO EVALUATE DAMAGES AT MEDIATION

At the heart of every mediation is a goal to find out what each side believes the case to be worth and the reasons why. Mediators must play the role of devil's advocate in both rooms at mediation. This discussion focuses on the type of mediation where you are exploring with the Plaintiff evidence that drives the potential value downward and what drives the potential value upward in the Defendant's room. Some value drivers are on the fringe or penumbra of this discussion. In other words, these factors have less "mathematical certainty" than the others listed below. It is more difficult to quantify the potential effect they have on case value or a jury verdict. These are factors attorneys and mediators must put into perspective for their clients/participants and utilize their experience, education, and knowledge of their effect on outcomes.

1. How does each party present;
2. Which County is the case pending;
3. Is either party a corporate entity or insurance company;
4. Personality/charm of the parties; and
5. Occupation of the parties.

Other value drivers have more a direct or quantifiable effect on a case value or jury verdict.

6. Property damage/vehicle photos/injury photos;
7. Nature of the injury diagnosed;
8. Nature of the treatment rendered;
9. Length of treatment;
10. Types of medical professionals that provided treatment;
11. Permanency associated with the injury;
12. Medical expenses; and
13. Liability and comparative fault.

I struggled whether to include property damage/vehicle photos in this category of value drivers. However, the more cases I mediate the more I believe that vehicle damage photographs to be one of the three most important value drivers for any case. It is human

nature to look at property damage photos and decide whether someone was injured or not. A dent or scratch on the bumper – "you're fine." A vehicle that looks like an accordion – "did anyone lose their life?" Whether you represent the Defendant or Plaintiff the property damage photos are going to be your starting point for your argument *if they are favorable to your position*. I always say the goal for any opening statement is to be 60 seconds into it and have a juror thinking, "tell me more." Favorable photographs are an essential part of getting that initial reaction from a juror. Favorable photographs also allow a juror to connect to your arguments more easily regarding injuries, treatment, and damages. It is an important starting point in any mediation to have the party whose position contradicts the damage photographs admit or at least appreciate the value they have to the opposition's case and potential value.

With all the cases we have been a part of either as a Plaintiff attorney, Defense attorney, or Mediator there probably is not an injury claim we haven't collectively come across. The following list of injuries, treatments, and providers is not exhaustive but certainly common.

Nature of Injury
Strain/Sprain
Fracture/Dislocation
Herniated/Protruding Disc
Ligament/Tendon Injury
Nerve Pain/Radiculopathy
Traumatic Brain Injury/Concussion
Scarring/Disfigurement

Nature of the treatment rendered
Nothing/Rest
Diagnostic Imaging
Medications
Chiropractic Care/Spinal Manipulations
Physical Therapy/Occupational Therapy

Injections
Surgery

Treatment Provider
Chiropractor
Rehab/OT Therapist
Family Physician
Specialist (Orthopedic/Neurologist/Neurosurgeon/Neuropsychologist)

During mediation, it's helpful to get each side to acknowledge that case value is derived from each of these three categories. A jury takes all these things into account when deciding a case's value. The more active the care is (Chiropractic vs. PT), the more invasive the treatment (PT v. Injection v. Surgery), the more significant the diagnosis (strain/sprain v. tendon tear v. TBI), the more likely the case value will increase. When the case involves chiropractic care, with low back pain/dysfunction/strain the more likely a juror believes the case has a limited value. Especially true if there is an end date to the treatment and months or years of no further visits. This is the tough conversation in the Plaintiff's room when you have a Plaintiff who believes his/her life has been forever altered and made worse. On the flip side, if there is an objective injury that can be visualized either by looking at the Plaintiff or diagnostic test, that required injections or surgery the tough conversation in the Defense room is exploring how bad does it get on a bad day.

Permanency of an injury (or lack of) is probably the most important value driver for figuring out potential best day/worst day scenarios in both rooms. In the Defense room it should always be a concern when the Plaintiff has a legitimate (and even sometimes illegitimate) claim of permanency. The value of a credible claim of permanency allows Plaintiff to offer life expectancy evidence to the jury. That allows the attorney to blackboard compensation for

days, weeks, months, and years for the permanent injury. The numbers can really add up and a Plaintiff's attorney can sound very reasonable in what he/she is asking the jury to award. On the other hand, a lack of permanency or lack of credible evidence provides the Defense with a solid limitation to a best day verdict for Plaintiff.

Medical expenses are similar to vehicle/property damage photos. If I told you I was in an accident and had $2,000 in medical expenses, you would think – "he's fine/recovered." If I told you I had $150,000 in medical expenses, you would be very worried about my well-being and wonder if I would ever recover from my injuries. Getting the appropriate side to acknowledge the medical expenses as a damage to be awarded is not the real challenge in a mediation. Rather, it is getting the appropriate side to acknowledge the intrinsic value the medical expense number provides for showing the overall value of the case.

Liability and comparative fault considerations can be a part of any case but discussion regarding their effect on case value is usually a part of a premises liability mediation. If the facts warrant the discussion its important to have the Plaintiff acknowledge he/she could lose the case and verdict returned in favor of the Defendant. On the defense side if the condition on the Defendant's premises is likely to be found unreasonably dangerous the focus should be on the unlikely event of a comparative fault defense verdict.

All of this makes it sound as though one could plug in these factors into an equation and come reasonably close to figuring out the value of a case and where it should settle. Nothing could be further from the truth. You must treat it as a very general thumbs up/thumbs down discussion in both rooms. There is a therapeutic benefit to having each side recognize and acknowledge the value drivers that negatively impact their pre-mediation position and

evaluation of the case. Even if the case does not settle at mediation, discussion of the above factors will give each side something to think about and analyze as further discovery takes place and additional negotiations are contemplated.

I have sat in all the litigation chairs and tried jury trial cases on both sides. I've always believed that when taking a case to trial being a defense attorney i. easier" than being plaintiff attorney. Don't get me wrong, each side of our profession has its headaches and issues to deal with but as a Plaintiff attorney you must build your case, a/k/a meet your burden of proof on the issues. A Defendant simply must pull enough Jenga blocks from what has been built. If successfully done, the case comes crashing down and nothing is left. It is important for the Plaintiff to know their Attorney can make all the right arguments, get all the right rulings from the court, and get all the instructions to the jury, and the case can still not turn out as planned simply because the Defendant pulled the right block or two out from the stack. Discussion of value drivers in both rooms will allow each side to contemplate whether the evidence gives Plaintiff a chance to build a solid foundation or if Defendant has the right evidence to remove the correct blocks from the stack.

Table of Value Drivers

Nature Injury	Treatment Type	Provider Type	Length of Treatment	Permanency	Medical Expenses
Strain/sprain of the muscle Fracture/Dislocation Herniated/protruding disc Ligament/tendon tear Nerve pain/radiculopathy Traumatic Brain Injury/Concussion Scarring/disfigurement	Nothing/rest Diagnostic Tests Medications Chiropractic care PT/OT Injections Surgery	Chiropractor Rehab/OT Therapist Family Physician Specialist Orthopedic/ Neurologist/ Neurosurgeon/ Neuropsychologist	None Days Weeks Months Years	Yes/No Credible Not Credible	Low High

Section Five

Advanced Civil Mediation

Robert J. Dignam
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Section Five

Advanced Civil Mediation……. Robert J. Dignam

Dealing with lawyers who do not want the mediator to talk directly with their client or the insurance claim representative

This challenge raises the question of what constitutes attendance at a mediation. While many mediators serve around the state through Zoom and other forms of virtual mediation, in Lake County, LR 45-ADR2.7-2 Civil cases, paragraph H, provides as follows:

> Parties to Attend. In all non-family cases, the attorney(s) who will try the case and the parties shall attend the mediation conference. A corporate party shall send a corporate representative with full authority to settle the case. If insurance is involved in the matter, the insurance carrier shall send a company representative who has full and absolute authority to resolve the matter for an amount which is the lesser of the policy limits or the most recent demand of the adverse party.

This is consistent with ADR Rule 2.7(B)(2), which states:

> All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.

In addition, courts often issue orders specifying that in-person attendance is required.

Zoom mediations sometimes cloud the issue of what "shall attend" or "attendance" means, since the party representative or insurance representative can prove to be less involved by staying off camera or being less communicative. Prior to the COVID pandemic when in-person mediations were the norm, plaintiff's attorneys typically balked at remote participation by a defendant's representative or an insurance representative. Now, out of necessity, plaintiff's attorneys are more accepting of the remote participation. This does raise a challenge for mediators to engage those remote participants in order to achieve a successful mediation.

A pre-mediation conversation, several days in advance of the session, to establish expectations, is beneficial. Most of the time, counsel for the parties are familiar with the mediator and have agreed to his or her services, so it is easier to have a frank conversation about required

access to the parties and insurance representative. If it is the plaintiff's counsel, it is helpful to seek authority to discuss some of the challenges in the case directly with the plaintiff and the value of compromise. This is almost universally welcomed because counsel has been advocating for the client from the outset and the plaintiff may become confused or will not appreciate hearing from their own lawyer that there are challenges and risks ahead if the case goes to trial.

Similarly, defense counsel often appreciate the mediator expressing the potential issues and exposure directly with the defendant or insurance representative, since the defense attorney will not have to be the bearer of bad news and can avoid the appearance of weakness. This measure can be particularly important with a continuing client who may be sending more defense cases.

Despite the best planning and intentions, however, and the rules requiring attendance by someone with authority to settle, some lawyers are destined to be fanners of the flames instead of problem solvers. They are disinterested in meaningful input from the mediator. In those situations, mediators can work through the resistance by exploring the underlying basis for the resistance and provide persistent reminders of the value of a settlement instead of the risk of an adverse ruling on a motion or an unsuccessful trial verdict. These considerations warrant direct communication from the mediator with the party or representative, to control the risk and provide a full opportunity for settlement.

Dealing with lawyers who do not want to disclose information/evidence

Confidentiality is certainly an important part of mediation. ADR Rule 2.7(C) says the parties shall provide the mediator with a confidential statement of the case. The assurance of confidentiality of mediation submissions, as well as conversations during mediations, permits the parties to be candid with the mediator so the mediator can help the parties reach a fair resolution under the circumstances.

Mediators recognize that parties sometimes are highly interested in keeping certain information confidential as a trial strategy, but it is important for the mediator to educate the litigants as much as possible on the potential value of communication over confidentiality. When each side spends the mediation telling the mediator how much the jury will embrace their evidence, a mediator's response might be to consider how effective it could be to communicate that information and those positions to other side, either directly or through the mediator, and have the wherewithal to listen to the other side's response. Advocating at the time of mediation, hearing a response, and giving that response fair consideration can be the best way to reach a resolution. Holding back information for the trial can derail the chance to resolve the case at the mediation stage. Parties might be better served by considering that they are indeed taking a moment to collaborate during the mediation, and it can be helpful for them to hear that concept.

When and how a mediator should express opinions, and how to influence the mediation in a positive way

According to ADR Rule 2.7(A)(3), a mediator shall inform the parties that the mediator is not giving legal advice. Yet presumably the mediator has been selected because the attorneys either know that the mediator is familiar with the applicable law or has the capacity to understand the applicable law after receiving the parties' submissions and perhaps performing some independent research. Therefore, without giving legal advice, a mediator should be expected to offer for the parties' consideration the application of the law to the evidence and how the case might turn out if it is not settled. The risks the parties bear if they do not resolve the case in mediation affects its settlement value. This is an aspect of mediation where the mediator's own experience as a lawyer can be helpful. Sharing experiences about similar cases and potential outcomes can assist the parties in gauging risk and enhance the desire to settle.

One area where a mediator should limit input, at least early in the mediation, is the value of the case. If a mediator announces what a case is worth, the mediator is no longer a pure neutral and this interferes with the parties' negotiation. A mediator should instead be an intent listener and then assess where the parties might go to resolve a case. Also, while parties might share what they will require to resolve the case or will pay to resolve a case, those statements are rarely to be taken as absolutes, and may even be posturing to achieve the actual settlement they desire.

One tool where a mediator will insert an opinion of value is a mediator's proposal. This is not so much an opinion of the value of the case, but instead is a judgment of what each party will do to reach a settlement. With a mediator's proposal, neither side knows the other party's

answer to the proposal. If both parties, however, communicate to the mediator that the proposal is acceptable, the case will be settled.

Finally, if a mediator believes there is a misunderstanding of a material fact or a misreading of a contract or other important document, the mediator, in the correct circumstances, may consider addressing this with counsel for that party.

The trend away from opening joint sessions, and how mediators might compensate for this trend

There is no doubt that the trend is away from joint sessions. But forgoing a joint session is often a lost opportunity. Joint sessions should not be forced, and all parties should agree before one occurs, and their positions on joint sessions usually should be determined before the day of the mediation. However, the parties should be reminded that mediation is a human interaction, and putting faces to names and getting commitments toward a good faith negotiation at the outset can be helpful.

Joint session ground rules should be encouraged. There should be no agitation or provocation in a joint session. A civil exchange can be helpful if the parties are prepared and willing to discuss the evidence and applicable law in a constructive manner. Importantly, the parties should be willing to actually listen to each other. This is the chance to learn even more about the case and to also consider the other side's viewpoints.

When an opening joint session is still not preferred, a mediator can always remind the parties that at any point if convening for a joint conversation is advisable, that can be arranged. This is true in both in-person and virtual mediations. Such a mid-mediation session can involve all parties or perhaps just the attorneys.

How a mediator can serve as more than a "message carrier," repackage messages that are unproductive or harmful, and work with lawyers who want to make imprudent or counter-productive arguments

One of the most important skills a mediator must possess is the ability to deal with the emotions of a mediation and repackage messages so that they are received in the best possible light. A mediator is often a sounding board for the perceived merits of a party's case, the flaws in the other party's case, and sometimes personal animosity between the parties and/or their counsel.

A mediator, however, must control the proceedings and decline to be a vehicle to insult or criticize the opposing side on a personal level. A mediator should honor a party's decision to communicate difficult or unpleasant points, but the delivery of those points is exclusively within the mediator's control. A mediator cannot be successful if he or she is forced to deliver disrespectful or harmful messages. A mediator should communicate the content of a difficult message, but with respect for the parties and the process.

Ultimately, a mediator can be more than a "message carrier" by keeping the parties in a problem-solving and collaborative mode to reach a settlement that might only be achieved through the flexibility of mediation. At a minimum, a mediator should guide the parties to a responsible decision where everyone might not be thrilled with the outcome but find that they

are satisfied that a settlement following an effective negotiation is a sound alternative to the risk and expense of a trial.

Section Six

Impasse Tools

Joy L. Colwell
Purdue University Northwest
Munster, Indiana

Section Six

Impasse Tools……..….. Joy L. Colwell

Discussion Outline

Impasse Tools

Discussion Outline

How Can Mediators Break Impasse?

What is Impasse? Impasse is when a mediator's skills really come into play. Impasse is when the parties have reached a point where they believe further movement in the negotiations will not occur. This is usually in the later rounds of discussions, when the information-sharing and "testing" phases have occurred.

I look at impasse in phases: the first phase is when there is still room for negotiation, but one or both sides are reluctant to make a movement. True impasse is when one or both parties have decided that there is no possibility of settlement in that session, also known as deadlock. While cases may deadlock at mediation, many of those cases often go on to settle before trial.

What are some tools/interventions that mediators can use in breaking impasse?

There are a number of tools which mediators can use in breaking impasse, or which are more useful at a point where movement is stalled. Often these are techniques which are tricky to use in mediation, because they tend to be more evaluative or more "challenging" to the parties. Techniques which fall on this end of the spectrum of mediator interventions are often risky because they tend to feed a perception that the mediator has chosen a side (or been co-opted by the opposing party), or to some degree has lost neutrality. Although you as a mediator may know you are still neutral, the mediation process is built on perceptions and influence, so I would encourage you to be very aware of how you apply these interventions, to avoid contributing to this perception.

The goals of these tools is to keep the parties working/making progress. Often the parties will find that something that was rejected earlier may look better in hindsight, with the benefit of having explored other alternatives.

Impasse Phase Tools

a. **Bracketing**: some mediators consider bracketing an impasse tool. I tend to consider that if bracketing is working, you haven't really reached a tough impasse. It is true that bracketing is a mid- to late-stage tool in mediation. Bracketing is the if-then proposal that can help set a settlement range. Typically, it's stated as if Plaintiff reduces demand to x, Defendant will raise offer to y, with the understanding that the settlement range is somewhere between the two. Multiple rounds of bracketing are possible. The mediator's goal is to help the parties understand what message is being communicated with the bracket. Usually the message received is that the parties are talking about the midpoint of the bracket. If that is not where the range should be, you will need to help the parties target an appropriate bracket.
I have read about something called "blind bracketing", where the mediator is the only one who know what the numbers are that each side comes up with. When the parties reach an agreed upon range, the mediator splits the difference for the settlement number. Have you used this?

b. **Risk-cost benefit analysis**: A risk/benefit or cost/benefit analysis can be helpful as the settlement negotiations reach a sticking point. Even if you have raised this topic before in settlement discussions, it may be useful to revisit the risks and costs later in the session, when parties have had a chance to flesh out their thinking on these topics. Often mediators are able to frame these discussions in more realistic terms later in the discussions. Some topics that are relevant are risks of trial, delay, costs of trial, value of certainty, etc.

c. **Good day/bad day/average day**: another topic that may be helpful to revisit is trial outcomes. There may be a more realistic discussion of trial outcomes later in the session, after a fuller discussion of risks and weaknesses of the case.

d. **Discussing weaknesses or uncertainties in case through artful questions**: are parties reasonably evaluating their cases and probable outcomes? Can you help the parties identify weaknesses and uncertainties that they may not be evaluating carefully?

e. **BATNA and WATNA or BALTO** (Best Alternative to Litigated Outcome)—revisit this analysis.

BATNA: Best Alternative to Negotiated Agreement (from Getting to Yes)

WATNA: Worst Alternative to Negotiated Agreement

BALTO: Best Alternative to Litigated Outcome

These generate "yardsticks" to compare settlement outcomes against, and can help parties with decision making or reality checking.

Parties may change their earlier conclusions based on information they have gained during the mediation process. Mediators should use counsel to draw out the information for comparison.

Emphasize the future (resolution) over the past (fault) as part of these discussions for a more positive frame.

f. **Brainstorming**: Put the burden back on the parties to come up with ideas for settlement. This is a way to engage the parties again, even if the ideas do not bear fruit. It can break stale thinking, or make previously rejected ideas look better.

g. **"What if" Questions/ Trial Balloons/Mediator ideas/hypotheticals**: these are ideas that come from the mediator that can help identify the outlines of a potential solution. One practice tip: always be sure to clarify these are your ideas, not proposals from the other side.

h. **Extra-legal solutions/creative solutions/focus on non-monetary items**: sometimes bring in additional options or issues can help move the discussions forward. I use "extra-legal" because

sometimes parties can agree to something which a judge or jury cannot order. An example of a non-monetary item is timing of payments, for example, or a confidentiality provision. Reframing the discussions in terms of interests rather than positions can help here.

i. **Straw man** (unworkable solution picked apart by parties): a strawman is an idea which typically comes from the mediator, which the mediator knows will be unacceptable to either or both parties. In the process of getting feedback on why it won't work (or is not acceptable), the mediator can learn avenues of approach that may be acceptable.

j. **Counsel meeting without clients**: sometimes a brief discussion with the lawyers (outside the presence of the clients) can identify sticking points or specific issues. Keep these meetings as brief as possible.

k. **Take a break/change gears/refocus on other issues**: sometimes a little mental break is what is needed for progress. People do have different speeds at which they process information and make decisions. Keep breaks to a reasonable amount of time to avoid losing momentum. Focusing on other issues (even a small side issue) can result in an agreement and give momentum to the main issue discussions again (building on agreement). Don't underestimate the value of a well-timed snack or coffee break.

l. **Schedule another session**: this is a tough one. Additional sessions can be productive, but you start from scratch on building momentum in the second session. It is not unheard of for there to be backsliding or a re-thinking of last positions in the second session.

m. **Evaluation techniques**: Giving parties an evaluation in the form of a number or range is something the Indiana ADR rules anticipate, but this does come with the risk of alienating one side or the other. Expression of evaluations can be done artfully and in a "soft" manner that leaves the mediator more appearance of neutrality. This should be a last resort, not a go-to in tough discussions. I think a mediator number (below) is also a last resort technique.

n. **Mediator number (aka double blind proposal)**: Mediator proposes a settlement number when the parties are absolutely stuck. This is based on the mediator's idea of what will settle the case, not what a decision-maker may have determined if they had heard the case from the beginning. Each party can let the mediator know if the proposal is a yes or a no. Neither party knows the other's answer (double blind) unless both say yes.

o. **When all else fails**: close on a high note. Emphasize the value of the discussions and the distance closed between the parties, even without settlement.

Section Seven

Alternative Dispute Resolution
The Indiana Case Law

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Section Seven

Alternative Dispute Resolution
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Alternative Dispute Resolution
The Indiana Case Law

By Teresa L. Todd and Michael Bishop

Videotape Prepared Specifically For Mediation Is Not Admissible At Trial

R.R. Donnelley & Sons, Company v. North Texas Steel Company, Inc.
752 N.E.2d 112 (Ind. Ct. App. 2001)

Storage racks in the warehouse of a catalog printing firm ("RRD") collapsed. RRD sued NTS, the steel company that manufactured the component parts of the storage racks, for damages caused when the racks collapsed. The trial court granted the defendant steel company's motion for summary judgment, dismissing RRD's breach of contract and negligence claims; and, entered judgment on the jury's defense verdict on the product liability claim. The Court of Appeals reversed.

On appeal, RRD argued, *inter alia*, that the trial court erred in admitting into evidence a videotape because it had been specifically prepared for use during settlement negotiations. The videotape depicted a series of tests that had been done on welds similar to those used in making the storage racks in question, demonstrating the strength of the welds when subjected to various amounts of weight.

The Court of Appeals noted that since the two settlement conferences during which the videotape was shown had occurred before RRD filed suit, absent an agreement providing otherwise, Indiana's Alternative Dispute Resolution Rules did not apply.[1] Generally, the admission of evidence relative to conduct or statements made during settlement negotiations that take place before suit is filed is governed by Indiana Rule of Evidence 408.[2] However, based on the parties' arguments in this case, the Court determined that they intended to be bound by the ADR Rules during their pre-suit negotiations. Therefore, the Court analyzed the issue in this case under Indiana ADR Rule 2.12[3] in

[1] Because Indiana ADR Rule 1.4 provides that the ADR Rules shall apply "... in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the State" [emphasis added].

[2] Evidence Rule 408 provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

[3] The Indiana ADR Rule regarding confidentiality is now Rule 2.11. Rule 2.11 still contains the statement that "[m]ediation shall be regarded as settlement negotiations as governed by Evidence Rule 408" and sets

conjunction with Indiana Rule of Evidence 408.[4]

The Court of Appeals noted that there is an exception to Rule 408, which provides that evidence that is otherwise discoverable is not rendered inadmissible merely because it was presented during the course of settlement negotiations. However, that exception does not apply if the document or statement in question would not have existed "but for" the settlement negotiations. Therefore, the question of whether the trial court erred in admitting the videotape in this case turned on whether it had been produced solely for use at mediation. Based upon an affidavit from RRD's counsel and copies of correspondence that was exchanged between counsel for the parties prior to the mediation sessions, the Court of Appeals concluded that it was.

However, the Court also pointed out that

> ... when analyzing the admissibility of evidence of compromise negotiations, we must keep in mind that no "fruit of the poisonous tree" doctrine is intended. [citation omitted]. In other words, a party cannot immunize from admissibility documents otherwise discoverable merely by offering them during compromise negotiations. [citation omitted].
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> ...
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> While the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations, this exception does not extend to the instant case where the videotape would not have existed but for the negotiations. Hence, the offering of the videotape during the settlement negotiations was not being used as a device to thwart discovery by making existing documents unreachable. Because we find that the videotape was prepared specifically for the settlement negotiations, and that to allow its use in any subsequent litigation would have a chilling effect on settlement discussions by subjecting opinions and research presented for the sole purpose of settlement negotiations to subsequent disclosure during any lawsuit that may ensue, we hold that the trial court erred by admitting such evidence over RRD's objections.

However, the Court noted that a factual matter disclosed in the course of compromise negotiations may be admissible at trial, although the evidence disclosing it would not be admissible. Therefore, in this case, the Court stated

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out the provisions of Rule 408 relative to the admissibility of evidence relative to settlement negotiations. Rule 2.12 contained the statement that "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process". Rule 2.11 does not contain that sentence.

[4] The Court noted that Rule 408 and ADR Rule 2.12 should be read together given the fact that ADR Rule 2.12 incorporated the language of Rule 408. However, the Court also stated that it would have reached the same result in this case if it had analyzed the issue solely under Indiana Rule of Evidence 408.

that the Defendant would have been permitted to present the information contained in the videotape to the jury in a form other than the videotape that RRD had created specifically for use during the mediation sessions.

RRD also argued on appeal that the trial court erred in admitting testimony from an expert witness named Raymond Tide. Tide had been hired by a Defendant (Associated) who settled out of the case before designating him as a witness for trial. Before Associated settled with RRD, it gave a copy of Tide's preliminary report to RRD and North Texas Steel. After Associated was out of the case, NTS sought to discover Tide's opinions and the trial court ruled that NTS had full discovery rights in that regard. The trial court also denied RRD's motion in limine and allowed Tide to testify at trial, over RRD's objection.

In support of its motion in limine, RRD filed an affidavit from Associated's attorney, which stated that Tide had been hired as a consultant and that the purpose of giving Tide's preliminary report to the other parties prior to the mediation and having Tide attend the mediation was to assist him in presenting arguments on behalf of Associated during the settlement negotiations. The Court of Appeals stated that the information in the affidavit suggested that Tide's preliminary report was prepared specifically for mediation. In addition, the Court of Appeals stated that by admitting Tide's testimony at trial, the trial court violated Indiana Trial Rule 26(B)(4).[5]

RRD argued that under Trial Rule 26(B)(4), Tide's testimony should not have been discoverable or admissible at trial because he was a consulting expert, not a testifying expert, and there was no showing of "exceptional circumstances" as required by Trial Rule 26(B)(4). The Court of Appeals agreed, stating that Tide qualified as an advisory witness under TR 26(B)(4)(b) because he was retained in anticipation of litigation but was never put on Associated's witness list because Associated settled out of the case before it was required to file a witness list.[6] Therefore, the Court stated that in order for NTS to use Tide at trial, it would have needed to show exceptional circumstances – which it did not do. Because Tide's preliminary report was used for settlement purposes

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[5] Trial Rule 26(B)(4) provides that:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

[6] The Court of Appeals noted that the purpose of Trial Rule 26 was largely developed around the doctrine of unfairness and was designed to prevent a party from building its own case by means of his opponent's financial resources, superior diligence and more aggressive preparation. With this in mind, the Court of Appeals observed that NTS would benefit from the financial resources of Associated, an adverse party, if it were permitted to use Tide's testimony; and, the Court stated that the same reasoning applied even though Associated had settled out of the case.

and he was a consulting witness, the Court of Appeals held that the trial court committed reversible error in admitting his testimony.

[Note: In its decision in this case, the Court of Appeals also stated that "all matters discussed in mediation are strictly confidential and privileged".]

Meaning Of "Full Settlement Authority"

Consolidated Rail Corporation v. Estate of Martin
720 N.E.2d 1261 (Ind. Ct. App. 1999)

In this wrongful death case, Conrail appealed from the trial court's contempt order sanctioning it for failing to send or have available at a court-ordered settlement conference/mediation a representative with: (1) final settlement authority and (2) authority to make a settlement offer in an amount higher than the previous offer. The Court of Appeals reversed.

The trial court issued an order requiring counsel and their clients "with full settlement authority" to participate in a settlement conference. Claim agent Robert McQuestion attended the mediation on behalf of Conrail. After two hours, Conrail's attorney stated that he and McQuestion had no authority above the $250,000.00 that had previously been offered to settle the case.

With regard to Conrail's claims handling procedure, McQuestion stated in an affidavit that he possessed authority to settle "up to a certain amount". When a claim appeared likely to involve a settlement amount in excess of McQuestion's authority, Conrail's policy was to present the claim to a committee of Conrail personnel, including management, claims agents and legal counsel. The committee evaluated the claim and placed a maximum reasonable settlement value on it based upon the committee's evaluation of the facts known to it at that time. Once that value was established, the claim agent in charge of the case (here, McQuestion) had sole discretionary authority to settle the claim at any amount up to the maximum reasonable value the committee had established.

If at any time while McQuestion was negotiating a claim, facts or arguments were presented which persuaded him that the reasonable settlement value of the case was higher than the claim committees' evaluation, he could obtain additional settlement authority by conferring (whether in person or by telephone) with members of the committee and advising them that an increase in the authorized settlement amount was warranted.

The trial court entered a sanctions order against Conrail which stated that because it was not discovered until over two hours into the settlement conference that McQuestion had absolutely no authority to make any settlement offer above what had previously been offered and because Conrail's claims committee was not readily available by telephone during the mediation, the net result was that the settlement conference was "a total waste of time". The trial court found that Conrail's actions were "arrogant, deceitful and in flagrant disregard of its order directing counsel and their clients "with full settlement authority" to mediate the case. The trial court also stated in its order that "the situation was further aggravated by the fact that just a small percentage movement by Conrail would have

probably resulted in the matter being settled".

According to the Court of Appeals, the dispositive issue in this case was whether the sanctions imposed by the trial court could stand when its finding was based in part upon the amount of the settlement offer Conrail made during the settlement conference. The Court of Appeals held that it could not.
According to the Court of Appeals:

> The order of contempt was erroneous because a court cannot mandate any particular amount of settlement. ... Conrail remained free to value the case as it saw fit, offering nothing at all or any amount beyond that point. Other than persuasion, the court is without authority to order a party to appear at a settlement conference with more money, a larger offer, or for that matter, any offer at all. ...
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> ... Thus, the trial court cannot by its own order make Conrail value the case at more than what they chose to value it at. As long as the amount that they have chosen is their absolute final value, and the person present at the settlement conference could have offered that amount, then there would be a representative present with full settlement authority. Thus, to the extent that Conrail was sanctioned because no offer was made above the previous offer of $250.000, the order was improper.

The Court of Appeals did find that Conrail failed to send or have available at the settlement conference a person with "full settlement authority". In that regard, the Court stated that if Conrail had decided that under no circumstances would it increase the settlement offer above $250,000, then by sending McQuestion to the settlement conference with that amount of authority, it would have sent a representative with "full settlement authority". However, the Court found that McQuestion's statement in his affidavit that "if at any time, facts or arguments were presented to me which persuaded me that a reasonable settlement value of the claim was higher than the committee's evaluation, I could obtain additional settlement authority by conferring either in person or by telephone, with members of the evaluation committee" meant that Conrail acknowledged that the entity with "full settlement authority" had not been present at the mediation and that although there was no absolute requirement that McQuestion call the committee during the mediation, the committee was not even available to be contacted if the facts had warranted it.

The Court of Appeals stated that:

> ... If certain facts presented themselves to McQuestion, the final settlement offer could, potentially, have been raised by the committee. Had Conrail decided, fully and finally, that $250,000 was their absolute final offer, then, and only then, McQuestion would have had final settlement authority. This is not the case here, however. There was the lingering possibility that some additional fact could have persuaded McQuestion to call the committee and seek to raise the amount offered from $250,000. As long as there was any

> possibility that the "so called" maximum reasonable amount the case was valued at could be raised, final authority was not vested in McQuestion.

However, despite that finding, the Court of Appeals concluded that there was insufficient evidence to prove that Conrail had *willfully* disobeyed the trial court's order when it sent McQuestion to the settlement conference because it was conceivable that Conrail could have believed that "McQuestion, with his ability to contact the committee (the ultimate decision-making authority) to extend his authority, ultimately did have, if not final authority, at least a means by which to achieve it if necessary".

The Court of Appeals anticipated that if "full settlement authority" is held to mean what its plain terms suggest – that is, "a person, committee, appointee, representative, etc. with the ability and power vested in him to make the full and final decision on settling an issue", businesses may proclaim that there is always someone one step higher that authorizes or actually makes the final decision. However, the Court of Appeals responded to that "argument" by stating that:

> ... it is the business that has the power to appoint or vest final authority in a person or committee to make that decision. There should be no fear that there is always someone "higher up" when that very company has the right to decide exactly who can raise the bar, and what or how high that final decision will be. The business has the power to choose who makes final decisions; it is the company's responsibility to vest that power in someone or some group when ordered by a court to send, or at least have available, a representative with full or final settlement authority.

Because it held that the trial court's order was erroneous because it was based partly on the amount of money Conrail offered to settle the case and because it found that Conrail did not *willfully* disobey the trial court's mediation order, the Court of Appeals did not decide whether Conrail's claims evaluation committee's availability by telephone and contact with the committee would have resulted in a finding that Conrail had provided "full settlement authority" at the settlement conference. However, the Court of Appeals stated that:

> [w]e would strongly urge in such future situations, regardless of the outcome of a settlement conference or case, that when ordered to appear with 'full settlement authority,' corporations strictly comply and if the true final authority is not present in person, that the final authority be available to make the final decision.

Bad Faith

State v. Carter
658 N.E.2d 618 (Ind. Ct. App. 1995)

Following a mediation in a personal injury case which ended in the parties being $20,000.00 apart in their settlement negotiations, the trial court granted the plaintiff's motion for sanctions against the State of Indiana for failure to negotiate in good faith as required by

Indiana's ADR Rule 2.1. The State took an interlocutory appeal and the Court of Appeals reversed.

The State argued that a determination of failure to negotiate in bad faith should require a specific finding of misconduct. The State asserted that the record in this case was devoid of any evidence of bad faith because unwillingness to settle a case during mediation does not constitute evidence of bad faith.

The Court of Appeals noted that Indiana courts had never specifically addressed the issue of bad faith and sanctions for bad faith during mediation under Indiana's ADR Rules. However, the issue had been litigated in other contexts, in which it had been held that bad faith amounts to more than bad judgment or negligence, and instead implies the conscious doing of wrong because of a dishonest purpose or moral obliquity. In other words, it contemplates a state of mind affirmatively operating with furtive design or ill will. The Court also stated that since a determination of bad faith inherently includes an element of culpability, such a finding should require more than the unsubstantiated allegations of an adverse party.

In the present case, no evidence of bad faith was presented with the plaintiff's motion for sanctions or at the hearing with regard to the motion, nor did the trial court set forth any factual or legal basis for its finding that the State mediated in bad faith. The only evidence in the record regarding what happened at the mediation was in the mediator's report to the court, which stated that "'[t]he mediation conference was conducted in accordance with procedures provided in the A.D.R. Rules'". According to the Court of Appeals, because the mediator's report stated that the rules had been complied with, it implied that the parties had mediated in good faith pursuant to ADR Rule 2.1.

Because there was no evidentiary basis to support the trial court's finding and because the Plaintiff bore the burden of proof, Court of Appeals held that the lack of evidence should have been fatal to her motion for sanctions for failure to negotiate in good faith.

The Plaintiff also asserted that the State was guilty of bad faith because it did not send a representative to the mediation who had the authority to settle the case. The Deputy Attorney General who represented the State at the mediation had talked to her supervisor before the mediation and had authority to settle the case for a specific amount. However, by statute, the Governor has the sole authority to bind the State in a legal settlement. Therefore, according to the Court of Appeals, he is the only State official having any settlement authority.

Despite that fact, the parties agreed that it would be impractical to expect the Governor to appear in person at every mediation in which the State is involved; and that as a result, a substitute representative for the State is acceptable during most mediations. Still, the Plaintiff argued that the State was guilty of bad faith in this case because the supervisor of the Deputy Attorney General who attended the mediation was not also present. However, the Plaintiff offered no explanation of why the supervisor's presence rather than the presence of the Deputy Attorney General who attended the mediation would have been acceptable.

The Court of Appeals stated that from a practical standpoint, the Deputy Attorney General who attended the mediation did have the ability to settle the case for a certain amount after she talked to her supervisor prior to the mediation. In addition, the Court of Appeals noted that the State submitted a Confidential Mediation Statement, participated in the mediation, and raised its initial settlement offer from $2000.00 to $3000.00. According to the Court, it was not for it to decide whether the State's assessment of the value of the case was reasonable. Rather, the only important fact was that the State, through the Deputy Attorney General who attended the mediation, was prepared to settle the case at some figure. That it was not a figure to the Plaintiff's liking was of no consequence.

The Court of Appeals rejected the Plaintiff's argument that the State demonstrated bad faith by "participating in the mediation knowing it had a limited willingness to mutually resolve the dispute" because the State offered to settle the case for a specified sum even though the amount was not acceptable to the Plaintiff. The Court stated that the State's assessment that the case did not merit a higher settlement offer did not constitute bad faith, noting that the Plaintiff offered no authority for the argument that taking a firm stance during mediation justifies the imposition of sanctions. In addition, the Court pointed out that the Plaintiff offered no explanation as to why her refusal to accept the settlement offered by the State was less culpable than the State's refusal to settle on her terms.

The Court also noted that the Indiana ADR Rules explicitly state that parties and their representatives are required to mediate in good faith, but are not required to reach an agreement. Therefore, the Court stated that "a reasonable disagreement over the merits of the case should not prompt an award of sanctions against either party".

The Court of Appeals also noted that ADR Rule 2.1 provided that an agreement reached during mediation had to be based upon the autonomous decision of each party. In addition, the Court stated that although a mediation may not result in a settlement, it may at least reduce points of contention. According to the Court, settlement of the whole case is not the only goal of mediation. "Agreement" is another goal, whether it be in the form of a factual stipulation, an agreement to resolve the case through binding arbitration rather than jury trial, identification of issues or points of agreement, reduction of misunderstandings, or clarification of priorities. Therefore, the Court stated that even where the odds of a case being completely resolved, mediation can still be beneficial because other goals may be achieved; and, if sanctions are imposed in situations where no settlement is reached, parties may refuse to participate in mediation. For all of these reasons, the Court of Appeals held that the trial court's order imposing sanctions on the State constituted an abuse of discretion.

The State also argued that the sanctions the trial court imposed against it were improper because the State is immune from paying costs and fees. The Court of Appeals noted that neither party cited any authority, nor did its independent research reveal any case which had specifically addressed this issue in the context of the ADR Rules. However, the Court concluded that based upon other relevant considerations and the public

policy issues involved, the trial court should not have sanctioned the State because it is immune from paying costs and fees/punitive awards. Therefore, the Court of Appeals held that even if there had been sufficient evidence to support the conclusion that the State mediated in bad faith, the award against the State was improper and should be reversed.[7]

Stoehr v. Yost
765 N.E.2d 684 (Ind. Ct. App. 2002)

Prior to trial, the Plaintiffs in a personal injury case filed a petition for sanctions against the defendant's insurance carrier, State Farm, asserting that it had acted in bad faith by failing to authorize defense counsel to settle the case at mediation. The case was tried to a jury, which returned a defense verdict. Immediately after the trial, the court conducted an evidentiary hearing on the petition for sanctions, found that State Farm had acted in bad faith, and ordered the Defendant to pay the Plaintiffs' costs and attorney fees in the amount of $2139.75.

The Defendant appealed, asserting that the trial court abused its discretion by sanctioning State Farm for mediating in bad faith when the Plaintiffs failed to provide the trial court with evidence that it had engaged in conscious wrongdoing for dishonest purposes or that State Farm proposed mediation with surreptitious or malevolent intent. The Plaintiffs argued that State Farm's conduct, in inducing them to mediate when it had no intention of participating, constituted bad faith. In addition, the Plaintiffs asserted that despite the mediator's specific instructions, State Farm did not have a representative present at the mediation with settlement authority and that State Farm was unwilling to "*really* listen".

ITLA filed an amicus brief in this case, advocating the position that the trial court properly imposed sanctions against State Farm for failing to mediate in good faith. ITLA asserted that State Farm had acted in bad faith by continuing the trial date under false pretenses, by failing to materially participate in the mediation process, and by failing to timely notify the Plaintiffs' attorney that it had no intention of ever making a settlement offer.[8]

The relevant facts in this case were as follows. After suit was filed, the defense attorney sent a letter to Plaintiffs' counsel stating that since the case was pending in Marion County, the parties would be required to mediate the case prior to trial and that he would like to schedule the mediation as soon as possible. However, due to scheduling conflicts, there were no dates on which the parties could mediate the case prior to the previously-scheduled trial date. Therefore, defense counsel filed a motion for continuance, which the trial court granted.

When defense counsel arrived at the mediation, he advised the mediator that based on the facts of the case, he did not

[7] The sanctions that the trial court assessed against the State in this case consisted of $500.00 for attorney fees and $212.50 for mediation costs.

[8] ITLA also argued that the jury verdict in favor of the Defendant should have no effect on the Court of Appeals' determination as to whether the trial court abused its discretion by imposing sanctions against State Farm. The Court of Appeals stated that for purposes of its discussion, it summarily agreed with ITLA on this point, and therefore, did not consider the fact that the jury returned a defense verdict in reaching its decision in this case.

believe that his client was liable and he questioned the Plaintiffs' alleged damages. Therefore, he stated that he did not intend to offer the Plaintiffs any money to settle their case.[9] However, defense counsel also expressed a willingness to go forward with the mediation and possibly change his position depending upon what the Plaintiffs had to say. When Plaintiffs' counsel learned that State Farm was not going to make a settlement offer, he elected to terminate the mediation.

Citing *State v. Carter*[10], the Court of Appeals began its analysis by noting that because the trial court is not present during mediation, and is therefore unlikely to appreciate all that took place there, it is vital that a party alleging that an opposing party failed to mediate in good faith is able to provide the trial court with some evidence beyond bald assertions of bad faith. However, the Court stated that the Plaintiffs failed to provide it with any such evidence in this case. Therefore, the Court of Appeals declined to conclude that State Farm had acted in bad faith.

In support of this conclusion, the Court noted that although it was alleged that State Farm had engaged in bad faith by inducing the Plaintiffs to mediate the case and continuing the trial date to accommodate the mediation session, Marion County Local Rule 16.3(C) requires mandatory mediation of certain cases, including this one. Despite that fact, the Plaintiffs argued that if State Farm had no intention of making a settlement offer it should have filed an objection to mediation as permitted by the Local Rule.

The Court of Appeals noted that the trial court's order contained the following quotation from *State v. Carter*:

> Settlement of the whole case is not the only goal of mediation; 'agreement' is another goal, whether it be a factual stipulation, an agreement to forego jury trial in favor of binding arbitration, an identification of issues, a reduction of misunderstandings, a clarification of priorities, or a location of points of agreement. Thus, even where the odds of resolution are slim, mediation can be beneficial because other goals might be achieved. [11]

[9] The Defendant struck Plaintiff, Carolyn Yost, with her vehicle while Carolyn was crossing Washington Street, in downtown Indianapolis. As a result, the Plaintiffs claimed that Carolyn sustained a fractured leg and soft tissue injuries to her neck, back and shoulders. It was undisputed that while Carolyn was crossing the street, the automatic traffic signal turned from red to green. Two witnesses testified that Carolyn was crossing the street against the light and that the Defendant would have had difficulty seeing her due to other vehicles on Washington Street. Carolyn was taken to the hospital by ambulance. However, no x-rays were done and no confirmation of a fracture was made. Carolyn followed up with her family physician, who also did not order any x-rays of her leg. Carolyn sought no further medical treatment until about 14 months after the collision, when she saw a chiropractor. Three months later, Carolyn scheduled an appointment with an orthopedic surgeon because she had discomfort in her leg and was having problems walking. The orthopedic surgeon examined Carolyn and took x-rays, which revealed a healed fracture of one of the bones in her leg.

[10] 658 N.E.2d 621. (Ind. Ct. App. 1995)

[11] However, the Court of Appeals cautioned against the use of mediation solely for the

According to the Court of Appeals, this statement made it apparent that even if State Farm had no intention of offering to settle the case for a certain dollar amount, there were still several valid reasons why it could have sought to mediate the case rather than trying to avoid the mandate to mediate contained in Local Rule 16.3(C)(1). In fact, the Court noted that State Farm's counsel asserted that although they were not going to make an offer during the mediation, they were willing to listen to what the Plaintiffs had to say; and, depending upon what they said, he could have gone back to State farm to see if it might have been willing to make an offer.

The Court of Appeals concluded that "[b]ecause mediation is not all 'about money'", State Farm's behavior in suggesting that a mediation be scheduled in accordance with the local rules did not constitute bad faith. Nor could it say that State Farm acted in bad faith by seeking a continuance of the trial date.

The Court of Appeals noted that after reviewing his calendar as well as calendars submitted by both parties, the mediator was unable to find a date on which everyone was available to mediate the case before the previously-scheduled trial. According to the Court, the record did not reveal that State Farm maliciously manipulated that process in any way. Rather, all the record disclosed was that defense counsel notified Plaintiffs' counsel (whose office was located in Hamilton County) of the Marion County Local Rules regarding mediation of civil jury trials, submitted calendars as requested by the mediator, and moved to continue the trial because the parties were unable to find an open date for the mediation prior to the previously-scheduled trial date. According to the Court of Appeals, none of those actions demonstrated "furtive design or ill will".[12]

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purpose of docket control because such a use would eviscerate the primary purpose of mediation, which is the efficient and cost-effective settlement of disputes. Instead, the Court stated that it advocates a system in which cases are individually assessed for suitability for mediation since sending a case to mediation could be a futile exercise and result in unnecessary expenses for the parties if the case is inappropriate for mediation. According to the Court of Appeals, in determining whether a case is appropriate for mediation, a court should assess the likelihood that the parties will be able to reach a settlement, make factual stipulations, agree to forego a jury trial in favor of binding arbitration, identify issues, reduce their misunderstandings, clarify their priorities, or identify points of agreement.

The Court also noted that because the chance of effectuating many of these ancillary goals is greater when mediation takes place earlier rather than later in the litigation process, it suggests that parties attempt to mediate earlier to fully realize the benefits of mediation. However, the Court also urged parties to conduct at least limited discovery prior to mediation so that they have an enhanced understanding of the liability and damages involved in the case, and therefore will be better able to make informed decisions as to which issues, if any, can be conceded.

[12] In *State v. Carter,* the Court of Appeals had previously defined bad faith in the mediation context as amounting to more than bad judgment or negligence; rather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will. However, the Court of Appeals stated that it found the definition of bad faith set forth in

The Court of Appeals also rejected the Plaintiffs' argument that State Farm did not have someone present at the mediation with settlement authority, stating that:

> Our review of the record shows that State Farm not only sent counsel to the mediation but also sent a claims adjuster. The claims adjuster was in a position to advise State Farm to change its stance and settle the case if the [Plaintiffs'] argument at mediation merited such action. However, the [Plaintiffs] foreclosed this opportunity by refusing to go forward with the mediation once they found out that State Farm's initial inclination was not to offer them any dollar amount to settle the case due to the disputed liability and damages involved. Even if State Farm was not persuaded by the [Plaintiffs'] presentation, the other goals of mediation, such as factual stipulations, identification of issues, reduction of misunderstandings, clarification of priorities, and location of points of agreement, could have been realized but for the [Plaintiffs'] decision to terminate the mediation.

Finally, with regard to ITLA's argument that State Farm acted in bad faith by failing to timely notify the Plaintiffs that it did not intend to offer them any money to settle their case, the Court of Appeals noted that neither Indiana's ADR Rules nor the Marion County Local Rules require counsel to notify an opposing party of his/her intention not to make any settlement offer at mediation. According to the Court, some attorneys may do this as a matter of courtesy, but it is not required.

Because mediation is aimed at accomplishing more than just reaching a settlement, the Court of Appeals declined to find that it was bad faith for State Farm to wait until the beginning of the mediation to advise the Plaintiffs that it did not intend to make a settlement offer. However, the Court also stated that "... this is not to say that a party could not be found to have engaged in bad faith by failing to offer a settlement amount if there exists other evidence of dishonest purpose or moral obliquity".

Because it found that the evidence was insufficient to support a finding of bad

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State v. Carter to be of limited assistance and that its review of cases from other jurisdictions revealed "equally nebulous descriptions of bad faith". Therefore, in order to provide some guidance to practitioners as to what is expected of them by ADR Rule 2.1's mandate that they mediate "in good faith", the Court suggested that "a more objective approach to determining good faith be adopted". For example, the Court pointed out that I.C. 26-1-2-103(b) defines "good faith" objectively under Indiana's Commercial Code as "honesty in fact and observance of reasonable commercial standards of fair dealing in the trade"; and, Indiana Trial Rule 16 imposes sanctions if no appearance is made on behalf of a party at a pre-trial conference or if an attorney is grossly unprepared to participate. According to the Court:

> [b]y implementing an objective approach to determining good faith in mediation, it is possible to decrease the chance that subsequent litigation which undermines the economy and efficiency of mediation, will result when a party is dissatisfied with the outcome of the mediation and therefore claims that the other party failed to mediate in good faith.

faith by State Farm, the Court of Appeals held that the trial court abused its discretion in sanctioning State Farm. Therefore, the Court of Appeals reversed the trial court's sanctions order.

Confidentiality

The Mediator's Privilege Under Indiana's ADR Rules Held Not Applicable In Federal Grand Jury Proceeding

In re March, 1994 – Special Grand Jury
897 F. Supp. 1170 (S.D. Ind. 1995)

An attorney who served as the mediator in a civil case moved to quash a subpoena to testify before a grand jury that was investigating allegedly false claims for personal injuries, lost wages and other damages made by "Mr. and Mrs. John Doe" as a result of two slip and fall incidents, one of which had been the subject of a mediation conducted by the movant. The subpoena required the mediator to testify before the grand jury and to bring with him his file relative to the mediation. The purpose of the subpoena was to discover statements or claims made by Mr. and Mrs. Doe during the course of the mediation which would indicate whether Mr. Doe had knowledge of the basis for his wife's claims and whether he himself had made any statements or claims that would establish complicity in his wife's allegedly false claims.

The mediator based his motion to quash the subpoena on the evidentiary privilege for mediator's established by Rule 2.12 of the Indiana Rules for Alternative Dispute Resolution relative to confidentiality. Rule 2.12 (now Rule 2.11) provided in pertinent part that "[t]he mediator shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but, rather, such matters shall be considered confidential and privileged in nature".
For several reasons, the United States District Court held that the mediator's privilege established in Rule 2.12 did not apply to federal criminal proceedings such as the grand jury at issue in this case. First, the Court stated that the Indiana ADR Rules, including Rule 2.12, by their own terms, did not apply to either federal or criminal proceedings.[13]

However, the Court also stated that even if ADR Rule 2.12 were not expressly limited by Rule 1.4, the privilege established in Rule 2.12 still would not apply in this case – because under Rule 501 of the Federal Rules of Evidence, federal law governs the recognition of testimonial and/or disclosure privileges in federal cases unless some state law serves as the rule of the decision. The grand jury investigation in this case involved possible violations of federal mail and wire fraud, as well as tax evasion laws. Therefore, because there was no state law rule of decision applicable here, the Court concluded that federal law governed the existence of the privilege at issue in this case.

However, the Court stated that state law regarding evidentiary privileges should not be ignored because a strong policy of comity between state and federal sovereignties impels federal courts to recognize state privilege where that can be accomplished at no substantial cost to

[13] At the time this case was decided, ADR Rule 1.4 explicitly stated that Indiana's ADR Rules do not apply in criminal cases or proceedings. ADR Rule 1.4 now simply states that "[the ADR Rules] shall apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state".

federal substantive and procedural policy. In deciding whether Indiana's mediator's privilege should be recognized, the Court acknowledged that it had to take into account the particular factual circumstances of the case in which the issue arises and weigh the need for the truth against the importance of the relationship or policy sought to be furthered by the privilege, as well as the likelihood that the recognition of the privilege would, in fact, protect that relationship in the factual setting of the case.

According to the Court, the policy sought to be furthered by Indiana's mediator's privilege[14] is to protect information relating to settlement negotiations. However, the Court noted that Rule 2.12 itself provided that it did not require exclusion of evidence "when offered for another purpose" (i.e, other than that relating to the settlement negotiations). In this case, the Court noted that the United States had subpoened the mediator not to discover information regarding the settlement negotiations or amounts, but rather to discover what statements or claims were made by Mr. and Mrs. Doe in an attempt to determine whether Mr. Doe had knowledge of the basis for his wife's claims and whether he had made any statements or claims that would establish complicity in the claims his wife was making that were believed to be false. Because the United States was not interested in any information regarding settlement amounts or negotiations, the Court concluded that application of Indiana's mediator's privilege would not further the policy of protecting the confidentiality of settlement amounts or negotiations.

The Court also noted that in striking a balance between the interests protected by the state privilege and the need for the truth, the 7th Circuit case law establishes that evidentiary privileges are not favored because they operate to exclude relevant evidence and thereby block the judicial fact-finding function. In addition, the Court stated that the federal interest in fact-finding was particularly strong in this case because the United States asserted that the evidence sought from the mediator regarding statements made by Mr. and Mrs. Doe during the mediation could determine whether or not the government would seek an indictment against Mr. Doe and was critical evidence for the grand jury to consider. Therefore, the Court found that the interest in fact-finding which would be served by the subpoena outweighed any interests that would be served by recognizing the mediator's privilege in this case. Therefore, the Court refused to recognize the privilege for mediators established by Indiana ADR Rule 2.12[15] and denied the mediator's motion to quash the subpoena.

Parties Cannot Waive Confidentiality Relative To Statements Made During Mediation

Marchal v. Craig
681 N.E.2d 1160 (Ind. Ct. App. 1997)

Keith Marchal and Paula Craig were the parents of one child born during their

[14] Formerly ADR Rule 2.12, now ADR Rule 2.11.

[15] Now ADR Rule 2.11.

marriage. When they were divorced, the parents entered into a settlement agreement, which provided for joint legal custody of the child.

After various conflicts and additional litigation, Marchal petitioned the trial court to order mediation. As a result, the parties entered into a written agreement, signed by both of them and their attorneys, and entered on the court's docket, which stated that with the assistance of Dr. Jonn Ehrmann, a clinical psychologist, the parties would attempt to resolve all child-related issues, but if an agreement were not reached, Dr. Ehrmann had authority to resolve the dispute considering the child's best interests and his determination would be binding.

Dr. Ehrmann subsequently sent a letter to Craig's attorney, which stated that after meeting with Craig and Marchal to begin mediation per the agreed entry ... he saw no course other than to proceed toward the legal arena. Because the mediation had failed, the litigation resumed.

Ultimately, the parents stipulated that Dr. Ehrmann would be an acceptable witness for both of them and Marchal filed a witness list which included Dr. Ehrmann. Marchal also filed a supplemental exhibit list which included all tape recordings he had made of the sessions with Dr. Ehrmann relative to the evaluation, mediation and counseling of he and his wife and the minor child and all of the correspondence he had sent to Dr. Ehrmann.

Marchal's attorney withdrew from the case and Marchal proceeded to trial pro se. During the trial, Marchal objected to testimony from Dr. Ehrmann based upon the version of Indiana's ADR Rule 2.8 which was in effect at that time, which provided that:

> A person who has served as a mediator in a proceeding may act as a mediator in subsequent disputes between the parties, and the parties may provide for a review of the agreement with the mediator on a periodic basis. However, the mediator shall decline to act in any capacity, except as mediator, unless the subsequent association is clearly distinct from the mediation issues. ... The mediator may not subsequently act as an investigator for any court-ordered report or make any recommendations to the court regarding the mediated litigation.

In addition, ADR Rule 2.12 (regarding confidentiality) provided that:

> ... Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators. [sic][16]

[16] Effective March 1, 1997 ADR Rule 2 was amended and Rule 2.12 became Rule 2.11. However, the amended version the same language providing that the confidentiality and privileged nature of mediation proceedings could not be waived.

The trial court overruled Marchal's objection to Dr. Ehrmann's testimony on the basis that both Marchal and Craig had stipulated that he would be an acceptable witness for both parties. At trial, Dr. Ehrmann gave extensive testimony, which was highly prejudicial to Marchal, and supported Craig's request for sole legal custody of the child. The trial court's findings and judgment, awarding sole legal custody to Craig, relied heavily upon Dr. Ehrmann's testimony.

The Court of Appeals began its analysis by noting that Indiana's ADR Rules regarding the confidentiality and privileged nature of mediation communications are unequivocal. The Court also noted that:

> [t]he parties to mediation seek to resolve their dispute unhindered by the threat of subsequent litigation. Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide*, §27:1 (1995). Accordingly the mediator should be perceived as impartial and willing to protect the confidentiality of the process. *Id.* it is therefore *essential* that the confidentiality of the process be protected on two levels - first, that which is disclosed during the private caucus sessions will not be revealed to the opponent during the mediation, and second, that which transpires during the mediation is not used in any subsequent trial or other proceeding. *Id.* In the landmark decision of *N.L.R.B. v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir.1980), the court held that the public interest in maintaining the perceived and actual impartiality of mediators outweighed any benefit to be derived from the testimony which could be obtained from mediators. 618 F.2d at 54.

The Court of Appeals noted that Indiana's ADR Rules strictly prohibit mediators from providing evidence in cases they have attempted to mediate [ADR Rule 2.8 (1986)]; and, all matters discussed during mediation are strictly confidential and privileged [ADR Rule 2.12 (1986)]. In addition, and according to the Court of Appeals, dispositive in this case, the ADR Rules expressly provide that the confidentiality requirement cannot be waived by the parties and that an objection to the obtaining of testimony or physical evidence from the mediation may be made by any party. [ADR Rule 2.12 (1986)] According to the Court of Appeals, these provisions are designed to protect the integrity of the mediation process itself and that they are operational despite any attempt by the parties to override them.

Because the trial court's findings in this case relied extensively upon the evidence provided by Dr. Ehrman, and because Indiana's ADR Rules strictly prohibit the use of evidence derived from unsuccessful mediation proceedings in subsequent litigation, the Court of Appeals stated that the evidentiary error required it to reverse and remand the case for re-trial.

R.R. Donnelley & Sons, Company v. North Texas Steel Company, Inc.
752 N.E.2d 112 (Ind. Ct. App. 2001)

In this case, the Court of Appeals noted that the ADR Rules expressly provide that the confidentiality requirement

contained in ADR Rule 2.12 (now ADR Rule 2.11) may not be waived by the parties and that an objection to the obtaining of testimony or physical evidence from mediation may be made by any party. The Court also commented that the confidentiality provisions in the ADR Rules are designed to protect the integrity of the mediation process itself and they are operational despite any attempt by the parties to override them.

Bridges v. Metromedia Steakhouse Company
807 N.E.2d 162 (Ind. Ct. App. 2004)

Trial Court allowed insurance adjuster to testify regarding her observations of the appearance of the plaintiff's hand that were observed during a court-ordered mediation. The Court of Appeals concluded that the adjuster's testimony did not constitute conduct or statements that were made during the course of a mediation. The Court of Appeals noted that Rule 408 only disallows evidence of offers of valuable consideration in settlement of disputed claims and that evidence of a plaintiff's appearance at mediation could not be characterized as evidence of an offer of valuable consideration in settlement of a disputed claim.

Gast v. Hall
858 N.E.2d 154 (Ind. Ct. App. 2006)

Uncle John and Uncle Joe were brothers who never married and lived together all their lives in a farm owned by Uncle John. Uncle John and Uncle Joe raised Hall, their nephew, in their house for much of Hall's childhood. According to Hall, he and Uncle Joe had a strained relationship for some time. Uncle Joe had executed a will in 1997 in which Hall was not a beneficiary. Uncle John died in March, 2002, and Hall filed for probate of the will executed by Uncle John in 1994 which left all of Uncle John's property to Hall. Uncle Joe filed a will contest alleging that the 1994 will was superseded by Uncle John's 1995 will which left all his property to Uncle Joe. Uncle Joe and Hall attended a full-day mediation on September 11, 2002. Also in attendance at the mediation were a business advisor of Uncle Joe and his attorney. No agreement was reached during the mediation session, but afterwards, tensions between Hall and Uncle Joe subsided. They continued to work to settle the first will contest and Hall began helping Uncle Joe with his day-to-day activities.

At some point, Uncle Joe advised his attorney that he wished to leave all of his assets to Hall. A new will was signed by Uncle Joe leaving all of his assets to Hall on November 25, 2002. Uncle Joe died January, 2003. Hall submitted the 2002 will for probate, which generated a will contest by Uncle Joe's relatives and beneficiaries under the 1997 will.

Hall filed a motion for summary judgment in the second will contest. In response, Plaintiff's filed affidavits of the business advisor and the attorney reflecting their observations during the mediation concerning Uncle Joe's mental status. The trial court granted Hall's motion to strike the offending paragraphs in the affidavits on the basis that they either violated the privilege and confidentiality of mediation or were merely conclusory and should not be considered.

The Court of Appeals concluded that the statements in the affidavit did not violate ADR Rule 2.11 and Rule of Evidence 408, because the affiant's observations made

during mediation were not being offered "to prove liability for or invalidity of the claim or its amount." They were not being offered to validate Uncle Joe's claims regarding Uncle John's wills, rather they were being offered for the completely distinct purpose of proving Uncle Joe's testamentary capacity or lack thereof as it pertained to the second will contest. The court concluded that since the affidavit was being offered for a purpose other than to prove liability for or invalidity of the claims being litigated in the first will contest, the affidavits were not barred by ADR Rule 2.11.

Horner v. Carter
981 N.E.2d 1210 (Ind. 2013)

Husband and wife divorced after thirty-eight years of marriage. Both parties reached a mediated settlement agreement during the dissolution proceedings and husband later sought to modify the terms of the agreement because of mistake. The trial court denied his request and he appealed.

On appeal, the husband argued that the trial court erred in not allowing him to introduce extrinsic evidence of communications which occurred during mediation in order to show that there was a mistake made in drafting the agreement. The husband contended that his obligation to make housing payments to his former wife pursuant to the agreement was actually classified as maintenance which terminated upon her remarriage. The wife argued that because she had relinquished her right to a portion of the husband's pension because the husband agreed to pay her housing expenses, the monthly house payments were not categorized as maintenance and thus were not affected by her remarriage.

The Court of Appeals held that ADR Rule 2.11 and Indiana Evidence Rule 408 allow for the introduction of mediation communications as extrinsic evidence at trial to establish traditional contract defenses. The Court further held that the provision in the settlement agreement which obligated the husband to make housing payment to his former wife was ambiguous and that these monthly payments were for a property settlement which survived her remarriage rather than for maintenance as he contended.

The Supreme Court reversed, holding that the husband's statements made during the mediation could not be admitted as extrinsic evidence to help construe an ambiguous agreement. "Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue." 981 N.E.2d at 1212. The Supreme Court also noted that the Court of Appeals expressly approved of a different approach presented in the Uniform Mediation Act but that Indiana has not adopted the Act and the Court declined to follow it here.

Fackler v Powell
891 N.E.2d 1091 (Ind. Ct. App. 2008)

As a part of a mediation in a divorce case, the parties signed an agreement that awarded Wife a promissory note and mortgage on marital property. Husband acted contrary to terms of agreement

and Wife sued for a quiet title and constructive trust over real estate. Case goes up to Supreme Court which holds that case should have been filed in dissolution court. Wife re-files claim and trial court holds hearing where mediator who drafted agreement testified over Wife's objection to resolve alleged ambiguities in agreement.

The Court of Appeals held that the mediator's testimony was not admissible as settlement negotiations prohibited by ADR Rule 2.11 and Evidence Rule 408. The Court noted that proffered testimony of the mediator to establish his "intent" in drafting the mediated settlement agreement was irrelevant because pursuant to ADR Rule 2.1, any agreement is to be based on the decisions of the parties' and not the mediator.

IN RE: The Marriage of S.B. v. J.B.
69 N.E. 3d 950
(Ind. Ct. App. 2016-unpublished opinion)

The parties divorced in 2014. As a part of the dissolution order, the court incorporated a Mediation Agreement, which outlined the principal terms of the joint legal custody, child support, and parenting time issues. Post dissolution, the mother filed a notice of intent to relocate and petition to modify parenting time along with a motion seeking to have father found in contempt. The Court conducted an evidentiary hearing on the pending motions at which the mediator testified. He testified that he was present at the mediation, that the parties reached a mediated agreement, that the agreement presented to him at trial was the agreement they reached, and that the agreement said what it said.

On appeal, the mother argued the mediator breached confidentiality obligations when testifying at the hearing. The Court reviewed the substance of the mediator's testimony after first noting that Rule 2.11 provides that evidence of conduct or statements made during mediation is not admissible and that this confidentiality requirement may not be waived by either party. The Court found that none of the testimony divulged confidential information or was in anyway improper. Nevertheless, the Court noted that the mediator veered into what he believed the parties intended and that testimony was improper. The Court found that this was de minimis testimony and did not rise to the level of violating mother's due process rights.

Enforceability Of Agreements Reached During Mediation

General Rule

Wagner v. Spurlock
803 N.E.2d 1174 (Ind. Ct. App. 2004)

Siblings entered into a settlement agreement at mediation with a sister on their claims of breach of trust, conversion, and negligence based on sisters' purchase of stock and management of a trust. Sister did not comply with all of the terms of the settlement agreement, and siblings filed a petition to enforce the settlement agreement. Following an evidentiary hearing, the Court entered judgment against the sister in the amount of $72,885.78 plus interest.

Although the Court of Appeals reversed a portion of the judgment concerning payment of attorney fees as compensatory damages for settling the malicious prosecution claim, the Court of Appeals reaffirmed prior precedent that

the Courts have jurisdiction to resolve breaches of settlement agreements and that specific performance is an appropriate remedy to enforce settlement agreements reached at mediation.

Enforceability Of Agreements Reached During Mediation

Necessity Of A Written Agreement

Silkey v. Investors Diversified Serv., Inc.
690 N.E.2d 329 (Ind. Ct. App. 1997)

Herschel and Wanda Silkey were investors who sued a securities brokerage and its registered representative for misrepresentation, violations of state securities law, breach of fiduciary duty and constructive fraud. The issue in this case was whether the oral settlement agreement reached by the parties during mediation session was a final and binding agreement.
The mediator concluded the mediation by orally reciting the terms of the agreement and receiving verbal assent to its terms from the parties. That exchange was tape-recorded. The mediator subsequently had the tape transcribed and sent copies to the parties. However, when the Silkeys received the agreement, they refused to sign it and repudiated the settlement.

The Defendants filed a Motion to Enforce Agreement for Settlement, which the trial court granted. In support of its finding that the parties had reached an enforceable settlement agreement, the trial court noted that this was not a case where the parties were disputing whether the document accurately reflected the agreement, but instead, was a situation in which one of the parties was attempting to repudiate the agreement. Under these circumstances, the trial court held that the audio tape recording was a legally binding form of the agreement which set forth with reasonable certainty the terms and conditions of the agreement and the parties' agreement to those terms and conditions.

The Silkeys acknowledged that an agreement was reached at mediation and that it was subsequently reduced to writing. They also acknowledged that the transcription accurately reflected the agreement that had been reached at mediation. They simply stated that they had changed their minds and were rescinding their verbal assent to the terms of the agreement. They argued that because the agreement was neither signed by them nor filed with the court, and no joint stipulation was ever entered, there was no contract and therefore no breach occurred which could allow the court to enforce the agreement. In other words, the Silkeys argued that the settlement agreement was neither final nor binding because it was oral.

The Court of Appeals noted that a settlement agreement is not required to be in writing and that if a party agrees to settle a pending action, but then refuses to consummate his settlement agreement, the opposing party may obtain a judgment enforcing the agreement. Therefore, the Court held that the oral settlement agreement in this case was enforceable and that the trial court acted within its authority by enforcing it because it was a situation where the parties had clearly agreed to the terms of the agreement, but later attempted to rescind their assent.

Vernon v. Acton
732 N.E.2d 805 (Ind. 2000)

In this case, the Indiana Supreme Court held that "... the mediation confidentiality provisions of our A.D.R. rules extend to and include oral settlement agreements undertaken or reached in mediation. Until reduced to writing and signed by the parties, mediation settlement agreements must be considered as compromise settlement negotiations under the applicable A.D.R. Rules and Evidence Rule 408". This means that testimony/evidence relative to the terms of an oral settlement agreement reached during mediation is not admissible in a proceeding seeking to enforce the agreement.

This case arose from an automobile collision in which the Plaintiff, Kirk Vernon, and the Defendant, Adam Acton, were involved. The parties participated in a voluntary pre-suit mediation pursuant to a written agreement establishing the terms and conditions of the mediation process. The Defendant claimed that the mediation resulted in an oral agreement to settle the case for $29,500.00. A few days after the mediation, the Defendant's insurance carrier sent a check and release to the Plaintiffs. However, the Plaintiffs returned both unsigned and filed a lawsuit against Acton in which they sought compensation for personal injuries and loss of consortium.

In his Answer, the Defendant filed a counterclaim seeking damages for breach of the settlement agreement and attorney fees. Later, the Defendant also filed a motion to enforce the settlement and a motion for attorney fees.

The trial court heard evidence with regard to the Defendant's motions and determined that: the Plaintiffs had accepted the Defendant's settlement offer; there was an oral agreement that the Plaintiffs would execute a release of all claims in exchange for $29,500.00; the Defendant did not breach the confidentiality provisions contained in the ADR Rules or the parties' agreement to mediate by disclosing statements made during the mediation; and, the Defendant was entitled to collect $8000.00 in attorney fees from the Plaintiffs because the lawsuit was frivolous, unreasonable and groundless in view of the settlement agreement.

The Plaintiffs asserted that during the hearing on the Defendant's motions to enforce the settlement agreement and for attorney fees, the trial court erred by admitting evidence regarding the alleged settlement agreement in contravention of the parties' mediation agreement, Indiana ADR Rule 2.12[17] and Indiana Evidence Rule 408. The Defendant argued that only the statements that were made during the mediation process before the settlement was reached were confidential and asserted that neither the parties' mediation agreement, the ADR Rules or Evidence Rule 408 prohibits evidence of an oral settlement agreement reached during mediation.

At the evidentiary hearing, the trial court permitted David Young, a claims representative employed by the Defendant's insurance carrier, Farmer's Insurance, to testify that at the conclusion of the mediation session, the parties agreed to settle the case for $29,500.00; and, that a few days later, he delivered the settlement check and release to the office of Plaintiff's counsel. The mediator testified that the parties had reached the settlement agreement

[17] Now ADR Rule 2.11.

while in separate rooms, after which he brought them together for the purpose of summarizing the terms of the agreement. He also testified that the parties had agreed to settle the case for $29,500.00 and that the adjuster would deliver the settlement draft and release to the office of Plaintiff's counsel. At no time did the mediator prepare or submit a written version of the agreement to the parties for them to sign. However, five months after the mediation, at Young's request, the mediator issued a written report in which he stated that after 3½ hours of negotiation at the pre-suit mediation, the parties had reached an agreement for a full and final settlement of the Plaintiffs' claims for $29,500.00.

Since the trial court overruled the Plaintiffs' objections to the trial court hearing evidence about the existence of an alleged oral settlement agreement, Plaintiff, Kirk Vernon, testified that when he left the mediation, he did not believe that he had entered into a binding agreement. The investigator employed by Plaintiffs' counsel, who had also attended the mediation, testified that when the parties left the mediator's office, a settlement offer had been extended, but the Plaintiffs had unresolved questions regarding whether they had to reimburse their medical insurance carrier. To support their position that there had been no meeting of the minds with regard to a settlement, the Plaintiff also attempted to present testimony regarding statements and events that occurred during the mediation prior to the time when the mediator brought the parties back together to summarize what had occurred during the mediation. However, the trial court sustained the Defendant's objection to that testimony on the basis that although it could hear evidence that an agreement had been reached, ADR Rule 2.12[18] prevented it from receiving evidence of "'what went on during the mediation process'".

The Court of Appeals upheld the trial court's judgment, but the Supreme Court granted transfer (thereby vacating the opinion of the Court of Appeals) and requested additional briefing with regard to issues related to Indiana's ADR Rules.

Both parties acknowledged that by their written Agreement to Mediate, they intended to be governed by the ADR Rules. They disputed the scope, but not the applicability of the ADR confidentiality rule. The Supreme Court noted that because the mediation at issue in this case was a pre-suit mediation, the ADR Rules would not have applied if the parties had not entered into the Agreement to Mediate which required confidentiality in conformity with state law and the Supreme Court Rules. However, because the parties intended to be governed by the mediation confidentiality rule contained in Indiana's ADR Rules, "and to guide the bench and bar", the Supreme Court analyzed the mediation in this case as being governed by the ADR Rules.

At the time of the mediation in this case, "ADR Rule 2.12 Confidentiality" provided that:

> Mediation shall be regarded as settlement negotiations. Evidence of (1) furnishing or offering to furnish, or (2) accepting or offering to accept, a valuable consideration in compromising or attempting to compromise a claim

[18] Now ADR Rule 2.11.

> which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay. ... Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. ... .

The Supreme Court noted that ADR Rule 2.12 provided for confidentiality in mediation to the same extent provided for in other settlement negotiations; and, that remained true when the Court revised and renumbered the Rule as ADR Rule 2.11, modifying it to say that "[m]ediation shall be regarded as settlement negotiations as governed by Ind. Evidence Rule 408", the language of which the Court specifically set forth in Rule 2.11.[19]

In addition, the Court pointed out that since it was adopted in 1994, Evidence Rule 408 has provided that "[c]ompromise negotiations shall encompass alternative dispute resolution".

The Supreme Court noted that in general, settlement agreements do not need to be in writing to be enforceable. However, the Court also pointed out that at the time of the mediation at issue in this case, ADR Rule 2.7(E)(2) provided in pertinent part that "[i]f an agreement is reached [during mediation], it shall be reduced to writing and signed".[20]

The Supreme Court distinguished the facts before it in this case from those in *Silkey v. Investors Diversified Serv., Inc.*[21], by noting that the Court distinguished the facts before it in *Vernon v. Acton* from those in *Silkey* by stating that unlike the present case, the parties in *Silkey* agreed that an agreement had been reached. The issue in Silkey was whether the agreement was enforceable even though it was not signed. Noting that the terms of the agreement were not in dispute, the Court of Appeals in Silkey held that the trial court acted properly in ordering the parties to reduce their agreement to writing and to file it with the court. The Silkey court did not address the admissibility of evidence to establish the

[19] The Supreme Court revised and renumbered ADR Rule 2.12 in March 1996 and the new Rule 2.11 became effective March 1, 1997.

[20] The amendment to this sub-section that was adopted in December 1996 and went into effect March 1, 1997 added the phrase "and signed by the parties and their counsel" to the end of this sentence. ADR Guideline 8.8 also states that "[i]f an agreement to settlement is reached, it should be reduced to writing promptly and a copy provided to all parties".

[21] 690 N.E.2d 329 (Ind. Ct. App. 1997). In *Silkey*, the Court of Appeals addressed the issue of what effect, if any, should be given to an oral agreement reached by the parties at the conclusion of a mediation.

existence and terms of an alleged oral mediation settlement agreement.

In *Vernon v.* Acton, the Supreme Court reversed the decision of the trial court and remanded the case for a jury trial based upon its conclusion that pursuant to the ADR Rules incorporated into the parties' agreement to mediate, the mediator's testimony regarding the alleged oral settlement agreement was confidential and privileged and not admissible. The reasoning that led the Court to this conclusion was as follows:

> Notwithstanding the importance of ensuring the enforceability of agreements that result from mediation, other goals are also important, including: facilitating agreements that result from mutual assent, achieving complete resolution of disputes, and producing clear understandings that the parties are less likely to dispute or challenge. These objectives are fostered by disfavoring oral agreements, about which the parties are more likely to have misunderstandings and disagreements. Requiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict. Once the full assent of the parties is memorialized in a signed written agreement, the important goal of enforceability is achieved. We decline to find that the enforcement of oral mediation agreements is a sufficient ground to satisfy the "offered for another purpose" exception to the confidentiality rule and Evidence Rule 408.

For those reasons, the Supreme Court held that the mediation confidentiality provisions of Indiana's ADR Rules extend to and include oral settlement agreements reached during mediation. According to the Court, until reduced to writing and signed by the parties, settlement agreements reached during mediation must be considered as compromise settlement negotiations under the applicable ADR Rules and Evidence Rule 408. This means that testimony/evidence relative to the terms of an oral agreement reached during mediation is not admissible in a proceeding seeking to enforce the agreement.

Reno v. Haler
734 N.E.2d 1095 (Ind. Ct. App. 2000)

At the end of a mediation session in a dissolution action, the Husband, Jeffery Haler and Wife, Kimberly (Haler) Reno, signed the mediator's handwritten notes reflecting the agreement they had reached, which included joint custody of their child. Before the parties signed the agreement, the mediator explained the terms of the agreement to both parties and their attorneys. The mediator subsequently typed a detailed copy of the agreement. However, Wife refused to sign the typed agreement. The mediator then attached the typed "Mediated Agreement and Parenting Plan" [hereinafter "the Agreement"] to the Report Of The Mediator and filed it with the trial court.

Two days later, Wife filed a notice of her intent to move to Pennsylvania. Husband filed a motion to enforce the Agreement, modify custody and for

sanctions. Wife subsequently moved to dismiss Husband's motion to enforce the Agreement and to set aside the Agreement, claiming that she had repudiated the Agreement. The trial court subsequently entered a decree of dissolution, in which it approved the mediated Agreement filed by the mediator and awarded the parties joint custody of the child. The trial court also entered an order relative to the Wife's pending motions, including her notice to change residence. The order stated that if the Wife moved more than 50 miles from the City of Rushville, Indiana, the Parenting Plan would be reversed and Husband would become the primary caretaker of the child.

Wife appealed, arguing that it was error for the trial court to accept the Mediator's Report because it contained a mediated Agreement which had not been signed by either party. Wife conceded that an agreement had been reached during the mediation. However, she asserted that the terms to which she had agreed (namely, sole custody of the child being given to her, with visitation rights being given to Husband) were not included in the typed Agreement. Therefore, Wife argued that she was not bound by the typewritten Agreement and that she had timely repudiated the Agreement when it was filed with the trial court.

Wife based her argument that she was not bound by the Agreement because it was not signed by the parties on ADR Rule 2.7(E)(2), which provides that if an agreement is reached at mediation, it shall be reduced to writing and signed by the parties and their counsel; and, in domestic relations cases, then filed with the court.

The Court of Appeals noted that in *Vernon v. Acton*[22], the Indiana Supreme Court held that in order for a mediated settlement agreement to be enforceable, it must be reduced to writing and signed by both parties and their attorneys. The Court then noted that in the case before it, neither party had signed the Agreement that the mediator filed with the trial court. However, unlike the litigants in *Vernon v. Acton*, both parties and their attorneys had signed the mediator's handwritten notes of the agreement after the mediator and all parties had fully reviewed the terms. According to the Court of Appeals, this was sufficient to comply with ADR Rule 2.7(E). Therefore, the Court held that to the extent that the terms of the typed Agreement that was filed with the Court conformed to the terms of the handwritten notes that had been signed by the parties at the conclusion of the mediation, the Agreement was enforceable.

Still, Wife asserted that the typed Agreement contained terms not found in the mediator's handwritten notes, and that therefore, she was not bound by the additional terms. Specifically, Wife asserted that she never agreed to joint custody. The Court of Appeals noted that the mediator's handwritten notes were in a very rough form. However, the Court stated that they did contain the terms to which the parties agreed, noting that at the top of the first page of the notes the words "joint custody" were written in large print and underlined. Therefore, the Court of Appeals concluded that Wife agreed to joint custody of the parties' child by signing the mediator's handwritten notes and that she was bound by that agreement.

[22] 732 N.E.2d 805 (Ind. 2000).

With regard to Wife's assertion that she did not recall agreeing to joint custody, the Court of Appeals noted that ADR Rule 2.7(A)(3) requires the mediator to ensure that the parties understand the consequences of any decision that they reach concerning children. However, the Court stated that there was no evidence that the mediator in this case failed in that duty. Therefore, this argument did not affect the Court of Appeals' decision that the trial court did not err approving the typewritten Agreement in its dissolution decree because the parties had signed the mediator's handwritten notes in compliance with Indiana's ADR Rules.

Spencer v. Spencer
752 N.E.2d 661 (Ind. Ct. App. 2001)

During the course of a dissolution proceeding, Husband and Wife agreed to mediate their marital property distribution. The 3½ hour mediation concluded with an oral agreement that the mediator dictated in the presence of the parties, who then left the mediation. The same day, the mediator prepared a written version of the agreement (a proposed Decree of Dissolution, which reflected the agreement the parties had made regarding the distribution of the parties' marital property) and faxed a copy of it to both parties.

Wife refused to sign the Decree because she did not agree with its terms. The reasons she gave for refusing to sign the Decree were that the length of the mediation combined with the mediator's conduct "deprived her of the ability to make a considered judgment" and that it was her understanding that when she received the written Decree, she would have the opportunity to accept or reject it. Husband subsequently filed a motion to enforce the Agreement.

At the final hearing, instead of hearing evidence as to the marital property, its value and the parties' respective wishes regarding the distribution of the property, the trial court heard limited testimony from the mediator and the attorney who represented Husband at the mediation regarding the conduct of the mediation. The trial court then granted Husband's motion to enforce the Agreement by signing the Decree of Dissolution prepared by the mediator.

Wife appealed, asserting that the trial court erred by distributing the marital property according to the terms of the oral agreement. The Court of Appeals noted that according to I.C. 31-15-2-17, if the parties in a dissolution proceeding agree to the distribution of marital assets, the agreement must be signed by the parties and submitted to the court for approval and incorporation into the dissolution decree, at which time it becomes an enforceable agreement. In the absence of an agreement, the trial court must determine the appropriate distribution. In that situation, I.C. 31-15-7-4(b) requires an equal distribution of the marital assets and liabilities unless the evidence demonstrates that an equal distribution would not be fair and reasonable. To rebut that presumption, the party opposing an equal distribution must present supporting evidence. If, after hearing the evidence, the trial court determines that an equal division would not be fair and reasonable, the court must enter its findings that state the reasons for deviating from the presumption.
However, in this case, the trial court did not base the property distribution on a signed agreement, nor did it conduct an

evidentiary hearing. Instead, it adopted an alleged oral agreement reached at the conclusion of mediation, but which was repudiated by Wife prior to its execution.

Husband argued that the trial court correctly approved the oral agreement reached at the end of the mediation despite Wife's repudiation of it, based upon *Silkey v. Investors Diversified Services, Inc.*[23], in which the Court of Appeals held that an oral agreement reached at the end of a mediation was enforceable under ADR Rule 2.7(E). However, the Court of Appeals rejected Husband's argument and held that the trial court erred in granting his motion to enforce the mediation agreement because the alleged agreement had not been reduced to writing, signed by the parties, and approved by the court.

The Court of Appeals based its decision in this case on the Indiana Supreme Court's decision in *Vernon v. Acton*[24], which held that pursuant to ADR Rule 2.12 (now ADR Rule 2.11), evidence of conduct or statements made during mediation is not admissible in a proceeding seeking to enforce the agreement. Therefore, the Court concluded that because Wife testified in her affidavit that she believed the mediated settlement agreement would not be binding until she had a chance to review and sign the written agreement, there apparently never was an agreement. In addition, the Court stated that even if a valid agreement had been reached at the conclusion of the mediation, it could not bind Wife until the parties had signed it and it was approved by the trial court. Therefore, the Court of Appeals held that the trial court incorrectly granted Husband's motion to enforce the agreement because it had not been signed by the parties and approved by the trial court.

Estate of Skalka v. Skalka
751 N.E.2d 769 (Ind. Ct. App. 2001)

Prior to his death, John Skalka created a revocable living trust agreement for the purpose of bequeathing 50 acres of property to his four children. After their father's death, three of the children filed a petition to partition the property because they could not agree with their other brother as to the use of the property. During a pre-trial conference, the judge spoke with the parties without their attorneys being present and an oral settlement agreement was reached. The attorneys then joined their clients in chambers to make notes about the agreement their clients had reached. Later that day, the attorney for the Petitioners submitted a written settlement agreement to the court and to the other brother for signing. However, the parties never signed the agreement.

The trial court judge subsequently issued an order putting in writing the agreement that he recalled the parties had reached during the pre-trial conference. The Petitioners denied that they had agreed to a settlement during the pre-trial conference and claimed that the judge's recollection of what had occurred during the pre-trial conference was inaccurate.

On appeal, the Petitioners argued that the record was devoid of evidence that they had accepted the settlement and suggested that the judge had exerted pressure on them to accept the settlement when he met with them in chambers without their attorneys being present. The Court of Appeals disagreed

[23] 690 N.E.2d 329 (Ind. Ct. App. 1997).
[24] 732 N.E.2d 805 (Ind. 2000).

and held that the record did contain sufficient evidence to support the trial court's finding that an agreement had been reached at the pre-trial conference. In that regard, the Court noted that the lack of a transcript of the settlement conference did not render the agreement unenforceable, pointing out that generally, a settlement agreement is not required to be in writing. The Court also noted that in addition to the fact that the trial judge was present during the settlement discussions and heard the parties agree to the settlement, it found it particularly compelling that the Petitioners' attorney had drafted a written version of the agreement the afternoon of the settlement conference and provided a copy of it to the court and all of the parties. Because of that, the Court of Appeals was not persuaded that the trial court 's memory was the only evidence supporting the agreement and held that there was sufficient evidence showing that the Petitioners had agreed to the settlement as reflected in the trial court's order. Therefore, the trial court's order enforcing the settlement agreement was affirmed.

Georgos v. Jackson
790 N.E.2d 448 (Ind. 2003)

Claude Jackson was injured in a collision with a truck being driven by Michael Georgos. After Jackson filed suit against Georgos and his employer, the court ordered mediation. Indiana's ADR Rule 2.7(B)(2) provides that all parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference unless excused by the court.

Jackson did not appear at the mediation and his appearance was not excused by the court. However, Jackson's attorney was present, and stated that he had the authority to settle the case – which Jackson has never disputed. At the end of the mediation, Jackson's attorney and the attorney for the defendants signed a written Settlement Agreement which stated that the defendant's insurance carrier would pay $94,500.00 in exchange for a full release.

At some point after the mediation, Jackson advised the defendants that he had repudiated the settlement and the defendants filed a Motion To Enforce Settlement Agreement. Jackson's response was that at the time of the mediation both he and his attorney believed that the policy limit on the defendants' insurance coverage was $100,000.00. However, they subsequently learned that it was $1 million. Therefore, Jackson asserted a variety of legal theories (such as fraud, mistake, et cetera), which he argued warranted voiding the settlement agreement.[25]

The trial court granted the Motion To Enforce Settlement Agreement, but did not dismiss Jackson's Complaint. Apparently treating the trial court's order granting the Motion To Enforce Settlement Agreement as a final judgment, almost five months later, Jackson filed a Trial Rule 60(B)(8) "Motion For Relief From Judgment", asserting that because ADR Rule 2.7(B)(2) requires the parties as well as their attorneys to be present at a mediation,

[25] At the time of the mediation, Jackson had already incurred approximately $85,000.00 in medical expenses.

any agreement reached in the absence of a party was a nullity. The trial court agreed and granted Jackson's Motion For Relief From Judgment. The case subsequently went to trial and the jury returned a verdict for Jackson in the amount of $462,000.00.

The defendants appealed, asserting that the trial court lacked jurisdiction to grant Jackson's Motion For Relief From Judgment because it was filed too late to be granted as a motion to correct errors or for reconsideration of a final judgment; and, if it was viewed as a Trial Rule 60 motion, it stated no ground for relief under that Rule. The Court of Appeals reversed, holding that the Order To Enforce Settlement Agreement was appealable as a final judgment and also under Trial Rule 54(B); and, that therefore, the trial court lost jurisdiction over the case after 30 days when the time for filing an appeal or a motion to correct errors expired. Therefore, the Court of Appeals reinstated the trial court's Order To Enforce Settlement Agreement.

The Indiana Supreme reached the same conclusion as the Court of Appeals, but for different reasons. The Supreme Court stated that the trial court's Order To Enforce Settlement Agreement was not a final judgment because it did not end the case. The Order directed Jackson to "take all measures necessary to consummate the settlement ... within 30 days". However, this did not dismiss the case, and left open what would happen if, as in fact occurred, Jackson did not comply with the directive to consummate the settlement. According to the Supreme Court, a disposition of all claims requires more than the entry of a ruling on a motion without entry of judgment.

The Court of Appeals concluded that even if the Order To Enforce Settlement Agreement was not a final judgment, it met the requirements of an order appealable under Trial Rule 54(B) because if it had been carried out, it would have led to the entry of an ultimate determination between Jackson and the defendants. However, the Supreme Court disagreed that this was sufficient, noting that many orders, if carried out, would lead to a final judgment. According to the Supreme Court, if the Court of Appeals were correct, many orders would at least arguably be appealable even though they are plainly not final judgments and are subject to various contingencies, including whether the parties do, in fact, carry out the order.

The Supreme Court also stated that even if the court's Order To Enforce Settlement Agreement had ended all disputes between Jackson and the defendants, it still would not have been appealable under TR 54(B) because TR 54(B) certification of an order that disposes of less than the entire case must contain the "magic language of the rule" – which is intended to provide a bright line so there is no mistaking whether an interim order is or is not appealable. An order becomes final and appealable under TR 54(B) only when the trial court, in writing, expressly determines that there is no just reason for delay and, in writing, expressly directs entry of judgment. The trial court made no such finding in this case. Therefore, the Supreme Court concluded that the Order To Enforce Settlement Agreement was not a final order under TR 54(B) and was not required to be appealed. Therefore, the Supreme Court found that the issues Jackson raised

were properly before the Court in this appeal from the final judgment entered after the jury trial in this case.[26]

Jackson did not argue that his attorney lacked the actual authority to enter into a settlement of his case at the mediation. Instead, he argued that ADR Rule 2.7(B)(2), which requires parties to be present at mediation, rendered unenforceable any settlement reached in his absence. The Supreme Court agreed that ADR Rule 2.7(B)(2) required Jackson to be present at the mediation. However, the Court did not agree that his absence invalidated his attorney's agreement to settle the case.

The Supreme Court noted that to permit a party to avoid an agreement by failing to attend a mediation would be rewarding disregard of the rules. The Court also noted that there are several purposes for requiring parties and their attorneys to be present at a mediation. In addition to assuring that the authority to settle is available, the purposes also include facilitating settlement by creating an environment in which the parties and their attorneys receive and hopefully appreciate the points of view of the other parties and the mediator, exploring areas of compromise, reducing misunderstandings and identifying points or areas of agreement. According to the Supreme Court, if a settlement agreement is reached at mediation, these purposes have been fully served despite a party's unexcused absence. For that reason, coupled with the strong policy in favor of settlements, the Supreme Court held that "although the agreement may be vulnerable to other attacks, if an attorney agrees in writing at a mediation session to settle a claim, neither the presence of the client nor ratification by the client is required to bind the client to the settlement agreement".

The Supreme Court stated that an attorney faced with an absent client "can of course refuse to agree". The Court noted that this would create exposure to the penalties for nonattendance or lack of authority set out in ADR Rule 2.10, but stated that that course would ordinarily be preferable to incurring an obligation on the part of the client to which the client did not agree. In addition, the Court stated that when, as in this case, the issue is not lack of authority, but a mistaken assumption that led the client to confer actual authority, the grounds for relief from that circumstance are found in bodies of law other than the ADR Rules.

Jackson also challenged the validity of the settlement agreement because it was not signed by the parties, based on the fact that ADR Rule 2.7(E)(2) states that "[I]f an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel". However, the Supreme Court rejected that argument, stating that "where the agent of the party is cloaked with the authority to enter into the settlement agreement, and the party's presence [sic] is unexcused, the attorney's signature is sufficient".

In sum, the Supreme Court's holding in this case was that "when an attorney attends a mediation under the ADR Rules and executes a settlement agreement, that is sufficient to bind the client who

[26] The Supreme Court also noted that the defendants were incorrect in asserting that any motion for "reconsideration" had to be filed within 30 days – because a trial court may reconsider previous orders until final judgment is entered.

fails to attend without excuse."[27] Therefore, the case was remanded to the trial court with instructions to enter judgment pursuant to the terms of the written settlement agreement signed by the attorneys at the mediation.[28]

B&R Oil Company, Inc. v. Stoler
45 N.E. 3d 1279
(Ind. Ct. App. 2016-unpublished opinion)

Oil company and eighteen gas station tenants were involved in legal disputes over their leases. After three years of litigation, the parties met for a court ordered mediation in February, 2014. There was some dispute over whether the representatives attending this mediation had settlement authority. During this mediation session, one of the tenants settled their claims with the oil company and signed a written settlement agreement. The remaining tenants were unable to reach an agreement and litigation continued. On November 4, 2014, the parties met again to try to settle the case. After this mediation, but before a written agreement was finalized, unrelated legal disputes arose between the oil company and two of the tenants. Additional negotiations continued but the oil company refused to sign the written agreement. The tenants filed a motion to enforce the settlement agreement and, following a hearing, the trial court entered judgment in favor of the tenants. The trial court concluded that an enforceable oral argument was reached at the November, 2014 mediation and that the settlement was limited to the issues raised in the claims presented at the mediation. The Court of Appeals affirmed, relying upon the general law of contracts. There was no discussion regarding Vernon v. Acton or Horner v. Carter.

Carisa Coffman v. Theodore Brown, Toyota Material Handling Midwest, Inc.
2017 WL 510940 (Ind. Ct. App. 2017-unpublished opinion)

Coffman was involved in a motor vehicle collision with Brown while he was working for Toyota Material Handling Midwest, Inc. Coffman sued and after mediation, the parties entered into a settlement agreement which provided:

> This case is settled for $17,500. Plaintiff agrees to pay Farm Bureau and Anthem liens as well

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[27] The Supreme Court stated that it saw no reason to reward or create an incentive to disregard the rules by permitting the improperly absent party, Jackson, to turn his absence to his advantage. The Court also noted that in this case, it seemed that Jackson's presence at the mediation would have made no difference because at the time of the mediation both Jackson and his attorney thought that the defendants' policy limits were $100,000.00; and, Jackson offered no reason to believe that if he had been present at the mediation there would have been no agreement or that he would not have signed the written settlement agreement along with this attorney.

[28] The Supreme Court stated that it recognized that enforcing the settlement agreement gave the defendants' insurer a windfall due to opposing counsel's misunderstanding as to the applicable insurance limits. However, the Court pointed out that the only issues that were raised in this appeal were those relative to Jackson's absence from the mediation; and, that it was not presented on appeal with the contentions that Jackson advanced to the trial court for avoiding the settlement agreement because of the misunderstanding as to the amount of insurance coverage carried by the defendants.

as any other liens and hold Defendants harmless. Each party to pay one-half of mediation expense.

After the mediation, Toyota submitted a check to Coffman's counsel and requested that the check not be deposited pending negotiation and signature of the release. During the negotiation of the contents of the release, Coffman refused to agree to a term in the Release that provided that Toyota denied liability and that the settlement payment was "not to be construed as an admission of liability on the part of any party." Almost six months after the mediation settlement, the parties continued to litigate Coffman's motion to set aside the settlement agreement. Toyota ultimately agreed to remove the offending language concerning denial of liability, but Coffman continued to oppose the enforcement of the agreement. The case was submitted to mediation again one year after the original mediation, but the parties failed to reach an agreement. A year and a half after the original mediation, the Court granted Toyota's motion to enforce the settlement agreement.

On appeal, Coffman argued that the terms of a Release were essential terms of the agreement and, without release terms there was no enforceable settlement agreement; the Court of Appeals disagreed. The Court noted that the agreement itself did not mention the necessity of a release and that there was no evidence that the release was a necessary term of the agreement, noting that Toyota was willing to dispense with the language of the release to which Coffman objected. In a footnote, the Court stated: "We note that the settlement agreement here, though enforceable, is very spare; a more detailed agreement might have foreclosed the present dispute entirely".

SANCTIONS

Failure to Attend Mediation

Smith v. Archer
812 N.E.2d 218 (Ind. Ct. App. 2004)

Archer sued Smith for personal injuries and property damage arising from an automobile accident. Smith was insured by State Farm. Parties were ordered to mediation. Smith did not appear at the mediation but her attorney and an adjuster did. The mediation ended with no settlement. Archer then filed a motion for costs, attorney fees, and a second mediation conference, contending that Smith and State Farm had failed to abide by the ADR rules because Smith failed to appear at the mediation. The trial court granted Archer's motion for sanctions.

The Court of Appeals reversed, holding that although Smith's non-appearance may have technically violated ADR Rule 2.7(b)(2) (all parties...shall be present at each mediation conference...), Archer failed to demonstrate how her non-appearance had any impact on the mediation. In this case, Archer's demand for settlement did not exceed the State Farm policy limits and, therefore, State Farm would ultimately decide whether to settle the case within the limits of the policy. Nevertheless, had Archer's demand exceeded the policy limits, Smith's presence at the mediation would have been more necessary.

Dismissal as Sanction for Failure to Mediate

Office Environments, Inc. v. Lake States Insurance Company
833 N.E.2d 489 (Ind. Ct. App. 2005)

Office Environments filed a breach of contract and bad faith claim against Lake States in Marion Superior Court and requested a jury trial. Pursuant to Marion County Local Rule 16.3(C)(1), the parties were ordered to complete mediation at least sixty days prior to the trial date. The parties mutually agreed on John Trimble as the mediator. Over a period of three years, the case was set and reset for trial and set and reset for mediation.

Prior to the final date scheduled for mediation, counsel for Office Environments had withdrawn and new counsel appeared. New counsel wrote to Trimble advising him that he would not be responsible for Office Environments' mediation expenses. Thereafter, Trimble requested that the parties each pay a retainer before the mediation. Office Environments refused to pay the retainer and Trimble cancelled the mediation.

Lake States filed a motion to dismiss the complaint under Trial Rule 41(E) for its refusal to comply with the court's order that the case be mediated in accordance with the Local Rules. The trial court dismissed the complaint under Trial Rule 41(E).

On appeal, Office Environments argued that dismissal of the complaint is not a proper sanction under ADR Rule 2.10. The Court of Appeals determined that the trial court was not sanctioning Office Environments for failure to comply with the mediation rules but was dismissing the complaint for Office Environments' failure to comply with the trial court's order to mediation the case. The Court of Appeals determined that once the parties begin the process of mediation, Rule 2.10 is controlling.

Sanctions Against Governmental Entity

Lake County Trust Company v. Advisory Plan Commission of Lake County
904 N.E.2d 1274 (Ind. 2009)

The Trust Company filed an application for primary subdivision approval with the Plan Commission. The Plan Commission denied approval which was appealed by writ of certiorari to the Lake County Superior Court. The trial court ordered the parties to mediation. After mediation, the parties signed a settlement agreement calling for the Trust Company to submit a revised plan encompassing all of the agreements reached at mediation which would be approved by the Plan Commission at the next meeting. Trust Company submitted the revised plan, but at the next meeting, the Plan Commission failed to approve it. Trust Company filed a Motion to Enforce Mediated Settlement Agreement and requested cost and attorney fees for the mediation.

After a hearing, the trial court determined that: the Plan Commission attorney had authority to bind the Plan Commission, the Plan Commission was ordered to approve the primary plat plan, the Plan Commission acted in bad faith in failing to approve the plan, the Plan Commission was immune from sanctions, but that the Plan Commission acted with gross negligence or in bad faith in making the decisions brought up for review, and accessed the cost of

mediation to be reimbursed to the Trust Company in the amount of $1,578.55.

The Court of Appeals reaffirmed its holding in *State v. Carter*, 658 N.E.2d 618 (Ind. Ct. App. 1995), that the state is not liable for punitive damages. Further, although sanctions against a governmental entity may be enforced if provided by specific court rule (see *Noble County v. Rogers,* 745 N.E.2d 194) (Ind. 2001), since there are no specific provisions in the ADR rules, the Plan Commission is immune from sanctions. The Court also concluded that the term "costs" does not encompass attorney fees and, therefore, such an award could not be assessed against the Plan Commission.

Finally, the Court reviewed whether the Plan Commission acted in bad faith in refusing to comply with the settlement agreement due to the requirements of the Open Door Law. The court observed that there was significant confusion among the parties as to the requirements of the Open Door Law as it applied to mediation. The Court determined that "The better practice is to include language in a settlement agreement that the agreement is contingent upon compliance with the Open Door Law and that it must be approved at an open meeting." Finding no evidence of "conscious doing of wrong" because of "dishonest purpose or moral obliquity" the court concluded that the Plan Commission was not acting in bad faith in failing to implement the plan.

The Supreme Court reversed the Court of Appeals in part, concluding that the A.D.R. Rules do not exempt governmental entities and apply to all civil and domestic relations litigation in Indiana Courts (See A.D.R. 1.4). Additionally, Rule 2.7(E)(3) allow sanctions for "any" breach or failure to perform under a mediated settlement agreement and Rule 2.10 allows sanctions against "any" attorney or party representative who fails to comply, with no exception granted to governmental entities or their attorneys. In determining that the A.D.R. rules provided for sanctions against a governmental entity, the Court reasoned as follows:

> In contrast to the punitive damages rationale employed in *Carter*, we find that the sanctions authorized by the A.D.R. Rules are more analogous to the exercise of inherent judicial authority than to the imposition of punitive damage awards in civil lawsuits. Like other parties to litigation who may be involved in a mediation proceeding, governmental entities are equally obligated to comply with the applicable rules and thus should be equally subject to the sanctions authorized to encourage compliance. We therefore disapprove of the portion of *Carter* that expresses a contrary view, and we now hold that governmental entities are not immune from the power of courts to impose sanctions under the A.D.R. Rules, particularly Rules 2.7(E)(3) and 2.10.

Concerning the Open Door Law, the Court concluded that this law required

final approval of the mediated settlement agreement by a majority of the commission members and an open door meeting. Concluding that the settlement agreement from the mediation was not, therefore, final until approved by the Plan Commission at a public meeting, the Commissioner's failure to promptly approve the subdivision did not constitute bad faith conduct warranting sanctions.

Attorney Fees and "Prevailing Party" in Mediation

Reuille v. E.E. Brandenberger Construction Inc.
888 N.E.2d 770 (Ind. 2008)

The parties entered into a residential construction contract that contained the following provision: "In any action at law or in equity, including enforcement of an award from Dispute Resolution, or in any Dispute Resolution involving a claim of $5,000 or more, the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees." The contract did not define "prevailing party".

The parties went to mediation following a suit for breach of contract, breach of warranty, and negligence. The parties reached agreement on all issues except for attorney fees which was reserved for judicial resolution. After a hearing, the trial court entered an order in favor of the defendant finding that the plaintiff was not a "prevailing party." The Court of Appeals affirmed. 877 N.E.2d 116 (Ind. Ct. App. 2007).

The Supreme Court, in noting that the term "prevailing party" was not defined in the contract, relied upon the common definition that contemplates a trial on the merits and entry of a favorable judgment in order to be determined the prevailing party. Additionally, the court reasoned that "it seems unlikely that parties entering into a contract would intend for a settlement reached during mediation to result in either party obtaining prevailing party status. One of the purposes of mediation is to provide an atmosphere in which neither party feels that he or she has "lost" or "won" a case. Mediation is meant to remove some of the contentiousness of formal litigation in order to facilitate the negotiation process. The judgment of the trial court was therefore affirmed.

Mediation as Prerequisite to Trial

Fuchs v. Martin
845 N.E. 2d 1038 (Ind. 2006)

On a putative father's claim for paternity, the Trial Court entered a final judgment detailing the parties' obligations regarding custody, support and counseling. The Court also ordered that regarding any further disputes, the parties were to attempt settlement themselves and, failing that, they were ordered to submit to mediation with two named mediators, and were not to return to Court for adjudication of any further disputes without first submitting to the mediation.

The Court of Appeals reversed the Trial Court's mandatory mediation provision as being outside the Marion County Rules. *Fuchs v. Martin*, 836 N.E.2d 1049 (Ind.App. 2005). The Supreme Court reversed the Court of Appeals, holding that Indiana Courts are authorized to refer cases to mediation without the request of a party and before proceeding to a contested hearing. The Court determined that this did not violate the free and open access to Court provision

of Article I, Section 12 of the Indiana Constitution. Although the Court noted that there is no authority for Courts to impose mediation as a prerequisite to filing an action, it determined that the Trial Court's judgment was consistent with the Indiana law allowing mediation prior to obtaining a contested hearing.

to the terms in the loan agreement.

The trial court concluded that (1) there was a valid agreement between Edwards and LoanPoint, (2) that the arbitration provision of the loan agreement was not unconscionable, and (3) the arbitration provision contained in the loan agreement was null and void as impossible to perform because the forum selected to serve as arbitrator is no longer available to serve in that capacity. LoanPoint brought interlocutory appeal challenging the conclusion that the arbitration provision fails due to impossibility and thus could not appoint a replacement arbitrator pursuant to 9 U.S.C. § 5. The Court of Appeals held that the express designation of the NAF as the arbitration provider in addition to the use of mandatory contractual language demonstrates that the parties intended the NAF to be integral to the arbitration agreement. As the NAF was integral to the arbitration agreement and since it was no longer available to conduct consumer arbitrations, the arbitration provision is null and void because of impossibility.

[Note: These materials were prepared in approximately 2017.]