1-1-2023

CME for Family Mediators

Indiana Continuing Legal Education Forum (ICLEF)

CME for Family Mediators
August 18, 2023

ICLEF Electronic Publications

Feature Release 4.1
August 2020

To get the most out of your *ICLEF Electronic Publication,* download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free Adobe Acrobat Reader® or the full retail version of Adobe Acrobat®.

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the "spyglass" icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides "jump links" to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the "INDEX" bookmark from the top left column or right-click with the mouse within the publication and select the words "*Previous View*" to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: https://iclef.org

CME FOR FAMILY MEDIATORS

August 18, 2023

www.ICLEF.org

DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

LYNNETTE GRAY
President

HON. ANDREW R. BLOCH
Vice President

SARAH L. BLAKE
Secretary

HON. THOMAS A. MASSEY
Treasurer

ALAN M. HUX
Appointed Member

LINDA K. MEIER
Appointed Member

DIRECTORS

John B. Bishop
Jean M. Blanton
Sarah L. Blake
Hon. Andrew R. Bloch
Melanie M. Dunajeski
Lynnette Gray
Alan M. Hux
Dr. Michael J. Jenuwine
Jana M. Lange
Shaunda Lynch
Hon. Thomas A. Massey
Mark W. McNeely
Linda K. Meier
Amy K Nowaczyk
F. Anthony Paganelli
Richard S. Pitts
Jeffrey P. Smith
Teresa L. Todd

ICLEF

SCOTT E. KING
Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

CME FOR FAMILY MEDIATORS

Agenda

8:30 A.M. **Registration and Coffee**

8:50 A.M. Welcome and Introduction
- *Lana Pendoski*, Program Chair

9:00 A.M. Sticking Points: Problems and How to Handle Them
- *Kathryn Hillebrands Burroughs, Robert N. Reimondo, Robert E. Shive, Jill E. Goldenberg Schuman*

11:00 A.M. **Coffee Break**

11:15 A.M. Secure Act 2.0 & Other Financial Considerations
- *Nicole McGoff, CDFA*

12:15 P.M. **Lunch (on your own)**

1:15 P.M. Preparing for Mediation / Settlement Agreements
- *Deborah Farmer Smith*

2:15 P.M. **Refreshment Break**

2:30 P.M. Seven Ineffective Beliefs that Parents Bring to Mediation
- *Dr. Kevin Byrd*

3:30 P.M. Collaborative Practice
- *Suzanne M. Wagner and Amy L. Stewart*

4:30 P.M. **Adjourn**

August 18, 2023

CME FOR FAMILY MEDIATORS

Faculty

Lana L. Pendoski - Chair
Cross | Glazier | Reed | Burroughs, PC
One Penn Mark Plaza
11595 N. Meridian Street, Suite 110
Carmel, IN 46032
(317) 669-9134
lpendoski@cgblawfirm.com

Kathryn Hillebrands Burroughs
Cross | Glazier | Reed | Burroughs, PC
One Penn Mark Plaza
11595 N. Meridian Street, Suite 110
Carmel, IN 46032
(317) 669-9134
kburroughs@cgrblaw.com

Dr. Kevin R. Byrd
Parenting Guidance Services, LLC
435 East Main Street, Suite 170
Greenwood, Indiana 46143
byrdke@gmail.com

Nicole C. McGoff
Merrill Lynch Wealth Management
510 E. 96TH STREET Suite 500
Indianapolis, IN 46240
317.706.3195
nicole.mcgoff@ml.com

Robert N. Reimondo
Capper Tulley & Reimondo
131 North Green St.
Crawfordsville, IN 47933
(765) 362-7340
rreimondo@capperlaw.com

Robert E. Shive
Emswiller, Williams, Noland & Clarke, LLC
8500 Keystone Crossing, Suite 500
Indianapolis, IN 46240
(317) 257-8787
rshive@ewnc-law.com

Jill E. Goldenberg Schuman
Cohen Garelick & Glazier
8888 Keystone Crossing Blvd., Suite 800
Indianapolis, IN 46240
(317) 573-8888
jgoldenberg@cgglawfirm.com

Deborah Farmer Smith
Cohen Garelick & Glazier
8888 Keystone Crossing Blvd., Suite 800
Indianapolis, IN 46240
(317) 573-8888
dfarmersmith@cgglawfirm.com

Amy L. Stewart
Mallor Grodner
101 West Ohio Street, Suite 1600
Indianapolis, IN 46204
(317) 453-2000
astewart@lawmg.com

Suzanne M. Wagner
Haller & Colvin PC
444 E Main St.
Fort Wayne, IN 46802
(260) 426-0444
swagner@hallercolvin.com
Indianapolis, IN 46240
(317) 573-8888
jgoldenberg@cgglawfirm.com

August 18, 2023

Lana Pendoski, Cross Glazier Reed Burroughs, PC, Indianapolis

Lana practices in all areas of family law and domestic relations including dissolution, property division, paternity, custody modification, child support, premarital agreements, guardianships, and property settlement. Lana is trained as a Parenting Coordinator and provides Parenting Coordination services in high conflict divorce and custody cases. Lana is also a registered domestic relations mediator. She is the Chair of the Indiana Continuing Legal Education (ICLEF) CLE/CME for Family Law Mediators and has lectured extensively to both attorneys and mental health professionals on the issues of divorce, child support, property division, record production, child custody, ethical issues and other family law issues. Her seminar materials on the topics of Preparing Your Client for a Custody Evaluation and 10 Hot Tips on QDRO's (Qualified Domestic Relations Orders) have been published by ICLEF Law Tips Blog. Lana is a member of the Hamilton County, Indianapolis, Indiana State, and Tennessee State Bar Associations, and a member of the Association of the Family and Conciliation Courts (AFCC). Lana serves as the Treasurer of the Indiana State Bar Association Family Law & Juvenile Law Section. She is also a member of Grievance Committee B of the Indianapolis Bar Association. Her past community activities include previously serving as a Board Member of the Hands of Hope Adoption and Orphan Care Ministry, former member of the Professional Advisory Committee for Buchanan Pastoral Counseling, and a member of the executive committee of the Women and the Law Division of the Indianapolis Bar Association. She attended Ball State University (B.S., cum laude, 1998); legal education, Valparaiso University (J.D., 1997).

Kathryn Hillebrands Burroughs, Cross Glazier Reed Burroughs, PC, Indianapolis

Kathryn Hillebrands Burroughs concentrates her practice in matrimonial and family law including premarital agreements; cohabitation agreements; dissolution of marriage; child custody, parenting time and support; and interstate disputes and modifications.

Ms. Burroughs became a Certified Family Law Specialist in 2002, the first year it was available in Indiana. Kathryn is the immediate past chair of the Indiana State Bar Association, Family and Juvenile Law Section. She also serves as a board member of the State of Indiana Independent Certification Organization, which certifies family law specialists.

Kathryn presently serves as a member of the Indiana Board of Law Examiners by appointment of the Indiana Supreme Court. She also serves on the Indiana Child Custody and Support Advisory Committee, a committee created by statute to make recommendations to the Indiana Supreme Court on the Child Support Guidelines and other terms relating to the welfare of children of families no longer intact.

Kevin R. Byrd, Ph.D., HSPP, Parenting Guidance Services, LLC, Greenwood

Kevin Byrd, Ph.D.

Parenting Guidance Services, LLC

Kevin became a licensed psychologist in 1992 and went on to build and maintain successful full-time practices in Nebraska and Ohio before arriving in Indianapolis in 2010. Kevin has also been extensively involved in university research and teaching, attaining the rank of Full Professor at the University of Nebraska at Kearney. Kevin is a member of the American Psychological Association and a member and past president of the Association of Family and Conciliation Courts - Indiana Chapter. The scope of his therapeutic practice is limited to court-involved post-divorce (or post-separation) parenting situations.

Nicole C. McGoff, CDFA®, Merrill Lynch Wealth Management, Indianapolis

Nicole McGoff, CDFA® - Financial Advisor

Nicole and her team are passionate about helping their clients live their best financial lives. Her process begins by listening to her clients' goals and needs to providing them with a thorough, educational, and transparent financial strategy.

Nicole began her financial services career in 2010 as a Financial Advisor working with successful families and business owners to build, protect, and transfer their wealth. Most recently, Nicole spent four years at Capital Group|American Funds where she educated Financial Advisors and research teams on investment processes and effective practice management. This experience has allowed her to better service the needs, wants, and wishes of her clients.

Nicole enjoys being an active member of the Assistance League of Indianapolis and other volunteer organizations within her community. She attended Western Michigan University where she played Division I Golf and earned her degree from Indiana University-Purdue University Indianapolis. Her greatest joy is spending time with her husband, Sean, two children, Colin and Maeve, and English Mastiff, Lily.

Robert N. Reimondo

Robert N. Reimondo is a partner at CAPPER TULLEY & REIMONDO in Crawfordsville. With over twenty-five years of experience, Mr. Reimondo is a tenacious advocate for his clients. Mr. Reimondo has applied his experience to a number of areas of the law, including family law matters, criminal cases, estate planning, personal injury cases, wrongful death cases, business organization, and general civil litigation. Mr. Reimondo has also been selected to Super Lawyers every year since 2021. Additionally, Mr. Reimondo has appeared as a panelist for the CME for Family Mediators each year since 2014.

Mr. Reimondo is also an experienced civil and family law mediator, and has been certified since 2010. Mr. Reimondo's insight and guidance as a mediator has helped resolve many complex cases that were thought to be too contentious to be settled. Mr. Reimondo's office layout and helpful staff assist in the mediation process. If you are in need of a civil or family law mediator for your case, call Mr. Reimondo at 765-362-7340.

Jill E. Goldenberg Schuman, Cohen Garelick & Glazier, P.C., Indianapolis

Jill Goldenberg Schuman is a divorce lawyer and family law attorney focusing on the areas of mediation, arbitration, domestic relations litigation, divorce and custody since 1993. As a certified family law specialist, as certified by the Family Law Certification Board, and a registered domestic mediator, she has helped thousands of families access the necessary resources to successfully move through the most challenging times in life.

Jill has served on executive positions within the Indianapolis and Indiana State Bar Associations, having previously served as Chair of the Alternative Dispute Resolution Section of the Indianapolis Bar Association and is currently the Chair of the Family and Juvenile Law Section of the Indiana State Bar Association. She is also co-Chair of the Family Law Certification Board and has helped draft the Certified Family Law Specialist test for the last ten years. She is one of less than 70 attorneys in Indiana who are recognized as a certified family law specialist as certified by the Family Law Certification Board.

She has been recognized as Best Lawyers®, 2007-2023 and as a Lawyer of the Year in Family Law, 2024. She has also been recognized as a Super Lawyers®, 2008-2023, as a Top 25 Women Indiana Super Lawyers, 2009-2016; 2018-2023 and a Top 50 Super Lawyers, 2011-2016; 2019-2023. She enjoys mentoring new attorneys to meet their potential.

In her free time, Jill enjoys traveling with her family and attending her kids' sports and extracurricular events.

Robert E. Shive, Emswiller Williams Noland & Clarke LLC, Indianapolis

Robert E. Shive blends a full litigation practice with substantial involvement in mediation, arbitration, parenting coordination and collaborative law. While maintaining a primary practice of high asset, high conflict family law cases, Rob also practices general civil litigation, criminal defense, and business law.

Rob also has significant experience in dealing with cases involving DCS/CPS, including CHINS actions, administrative appeals, and judicial review of DCS reports.

This breadth of experience provides Rob with the background to handle complicated legal matters from a variety of angles and seek the best possible approach for his clients. Having represented radio and television stations, internet businesses, local restaurants, national corporations, scientific laboratories, real estate developers and other commercial enterprises, he brings that experience into complicated divorce disputes and custody battles.

Rob is also a registered civil and domestic mediator having successfully mediated divorce actions, paternity cases, modifications, contempt actions, international custody disputes, property divisions, real estate litigations and construction cases. As a part of the movement towards out-of-court resolutions, Rob is also a family law arbitrator, parenting coordinator, and is trained as a collaborative law professional. He has also been a private and volunteer guardian ad litem.

Rob has been listed as a Super Lawyer since 2014 in the area of Family Law.

AREAS OF PRACTICE
- 60% Family Law
- 10% Civil Litigation
- 5% Criminal Law
- 25% Mediation/ADR

LITIGATION PERCENTAGE
- 80% of Practice Devoted to Litigation

BAR ADMISSIONS
- Indiana, 1995

EDUCATION
Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana

- J.D.

Indiana University, Bloomington, Indiana

- B.A.
- Major: English & History
- Minor: Psychology

Deborah Smith, Partner, Cohen Garelick & Glazier, P.C., Indianapolis

Deborah has been practicing family law for nearly 40 years, and loves it as much as when she began. Deb does both litigation and alternative dispute resolution, including mediation, arbitration, and collaborative practice. She is a Certified Family Law Specialist and a Registered Domestic Relations Mediator in Indiana, successfully mediating hundreds of family law matters.

Deb is passionate about making a difference in the lives of her clients and their children. She is equally experienced with both complex property division and child custody, parenting time and support. She most enjoys helping clients navigate through one of the most challenging experiences in life by providing both good legal advice and empathy.

Deb is a frequent speaker for the Indiana Continuing Legal Education Forum.

When not practicing law, Deborah enjoys traveling and going to concerts with her husband. She also loves playing the piano, having served as pianist for the Noblesville First United Methodist Church for over 30 years.

MALLOR | GRODNER
Attorneys

Amy L. Stewart

astewart@lawmg.com

Biography

Amy L. Stewart joined **Mallor | Grodner LLP,** with offices in Bloomington and Indianapolis, Indiana, in 2014. She received her J.D. from Indiana University McKinney School of Law, Indianapolis, graduating *summa cum laude*, valedictorian, and was admitted to the Indiana bar in 1999.

Known as a thoughtful, determined problem-solver, committed to finding positive, constructive approaches for resolving family legal issues, Amy practices exclusively in the firm's family and matrimonial law division. She assists her clients with a full range of family law matters, including mediation and collaborative practice.

Professional Practice

Amy brings to her clients a passion for designing creative out-of-court solutions, honed during more than 35 years of professional experience. Well-versed in each of the alternative legal processes available to families, Amy helps clients select the process that fits them best. She is a leader in Collaborative Practice in Indiana, who serves her clients as a perceptive and resourceful mediator and coach. Amy's dignified, discrete approach resonates well with her clientele, which includes business owners and professionals in the financial, legal, and medical fields, celebrities, professional athletes, and community leaders.

With her energy for problem solving, negotiation, and out-of-court settlement, Amy skillfully guides clients in identifying and achieving their interests and in maintaining healthy family relationships, protecting children from the harm of family conflict, and preserving wealth and assets from costly, prolonged litigation. While clients may begin a legal process in distress, Amy's calm and grace, combined with her wisdom and experience, allows clients to honor their values and look forward to the future.

Prior to her legal career, Amy had the opportunity to hold high-level positions in government and business. She credits that experience with teaching her the value of building trust and respect, even between people with differing views; with broadening her perspective, beyond legally-based solutions; and with giving her an unshakable belief in people's ability to be their best selves and live their best lives.

Memberships & Honors

- Named to the Indiana Super Lawyers® list, Family Law, 2004-2009, 2018-2023; Top 25 Female Attorneys, 2006
- Recognized by Best Lawyers®, Family Law 2013-2024; Collaborative Law–Family Law 2017-2024; 2020 Lawyer of the Year for Family Law, Indianapolis Area
- One of thirty professionals worldwide selected to participate in the inaugural International Academy of Collaborative Professionals' Leadership Academy, 2013-2014
- Martindale-Hubbell AV® Preeminent Peer Review Rating
- Sagamore of the Wabash, awarded by Governor Frank O'Bannon
- Member, International Academy of Collaborative Professionals

Suzanne M. Wagner

Fort Wayne, Indiana

Suzanne received her BS degree in Business Administration from Central Michigan University in 1984 and her Doctor of Jurisprudence degree from Thomas M. Cooley Law School in 1987. She has been with the law firm of HallerColvin PC since 1995. Suzanne is a registered domestic mediator. Suzanne also is an Indiana Certified Family Law Specialist, as certified by the Family Law Certification Board since 2002. Suzanne serves on the Council of the Family and Juvenile Law Section of the Indiana Bar Association, serving as past Chair. She also serves on the Council for the Alternative Dispute Resolution Section of the Indiana Bar Association. She further serves on the Executive Board for the Family Law Section of the Allen County Bar Association, and has served as past Chair on more than one occasion. Suzanne also serves as Co-Chair of the State of Indiana Family Law Independent Certification Organization, which certifies Family Law Specialists. She previously served as the Mediation Day Program Coordinator for the Allen Circuit and Superior Court. She served as Arbitrator on Family Law Matters for the Allen Circuit Court for five years. She was the prior Editor of "Domestic Help" family law publication for Allen County and "Family Matters" family law publication for the Indiana State Bar, Family Law Section from 2003-2010. She is also a trained collaborative law attorney.

Key Practice Areas:

Suzanne Wagner concentrates her practice in matrimonial and family law, including premarital agreements, cohabitation agreements, dissolution of marriage, child custody, parenting time and support, paternity matters, adoption, protective orders, child relocation, contempt and enforcement, family mediation, collaborative and cooperative law.

Community Involvement:

YWCA, current board member; Dr. Bill Lewis Center for Children, current board member; and Fort Wayne Community Band, band member.

Bar Admissions:

Indiana, 1988

Table of Contents

Section One

Sticking Points: Problems and How to Handle Them……. Kathryn Hillebrands Burroughs
Robert N. Reimondo
Robert E. Shive
Jill E. Goldenberg Schuman

Section Two

Secure Act 2.0 of 2022
New Rules to Help Boost
Your Retirement Readiness……..…….. Nicole C. McGoff, CDFA®

PowerPoint Presentation

Section Three

Preparing for Mediation Settlement Agreements……. Deborah Farmer Smith

Section Four

Section Five

Collaborative Practice
Resolving Disputes Respectfully…….. Suzanne M. Wagner
Amy L. Stewart

Section One

Sticking Points: Problems and How to Handle Them

Kathryn Hillebrands Burroughs
Cross | Glazier | Reed | Burroughs, PC
Carmel, Indiana

Robert N. Reimondo
Capper Tulley & Reimondo
Crawfordsville, Indiana

Robert E. Shive
Emswiller, Williams, Noland & Clarke, LLC
Indianapolis, Indiana

Jill E. Goldenberg Schuman
Cohen Garelick & Glazier
Indianapolis, Indiana

Section One

APPENDIX

Zoom Mediation Rules

Mediation Checklist

Letter to Clients who will be participating in Mediation

Mediation Letter & Rules

COHEN GARELICK & GLAZIER, P.C.

A Professional Corporation of Attorneys at Law

CGG Rules for Mediations beginning June 1, 2020

At Cohen Garelick & Glazier, we are having to do what everyone else is doing during this health crisis – adjust to a new reality every day, as we all learn more about the threat posed by COVID-19.

For the time being, we will have face-to-face mediations only when required; all other mediations will be conducted by Zoom. When a face-to-face mediation is scheduled, we will take every precaution to protect everyone's safety. Here is how it will work:

- **If you are experiencing symptoms (coughing, fever, fatigue, shortness of breath) or if you have been exposed to someone believed to have COVID-19, please inform your attorney so that your mediation can be postponed until a proper quarantine period has passed. This is important in order to keep everyone safe.**
- You should wait in your car until your scheduled mediation time – our reception/waiting area is closed, and parties may not arrive early, unless it is worked out in advance with the mediator.
- You should also wait for your attorney, so you and your attorney can come up to the office together.
- You should not bring anyone else with you. If someone drives you to the meeting, the driver will need to wait outside the building.
- You will be required to bring and wear a mask during your in-office mediation. Please inform your attorney if you do not have a mask, and we will provide you with a disposable surgical mask. You may wear gloves if desired.
- Your attorney will also be required to wear a mask during the mediation.
- When visiting our office, you will notice that we are maintaining social distancing. This means we will not be shaking hands, hugging or touching anyone.
- Before and after each meeting in our conference rooms, all hard surfaces will be cleaned with antibacterial wipes, and Lysol will be used on soft surfaces.
- Areas that are touched frequently (door handles, tables, etc.) are being disinfected multiple times a day.
- Our staff is practicing personal hygiene by washing their hands often and using hand sanitizer that meets CDC recommendations.
- Our employees are prohibited from coming into work if they are feeling unwell or experiencing symptoms or have been exposed to anyone believed to have COVID-19.

Please review these four questions. If your answer is Yes to any of them, please contact your attorney to reschedule mediation.

1. In the last 72 hours, have you had a fever or chills and/or taken medication for a fever? (If you are unsure, please utilize a thermometer for an accurate reading. A temperature of 100.4 or higher constitutes a fever according to medical professionals.)
2. Do you have COVID-19 symptoms such as new or worsening cough, shortness of breath, sore throat or loss of taste or smell?
3. In the past 14 days have you been in close contact (within 6 feet for longer than 15 minutes without protective equipment) with a person known/suspected to have COVID-19 and/or have you been diagnosed with COVID-19?
4. Have you or anyone in your household been tested for COVID-19 and are still awaiting test results?

Please bear with us. Meeting your legal needs is as important to us as ever. But it is just as important to keep you, and us, healthy.

Zoom mediation information:

- I have established separate breakout rooms for each party and counsel. When each person joins the meeting, they will be automatically placed in a waiting room, and I will control when they join the meeting. I will bring parties and counsel in and out of their separate breakout rooms into the meeting, so there is no interaction between parties during the mediation. When you are in a breakout room, you will be able to communicate with the other person that is in the breakout with you (party/attorney). Neither party will have access to the other party's breakout room.
- I do not record my mediations.
- You need to have your camera turned on while I am in the room.
- I need to know if there is anyone else in the room or within listening distance.
- If you get disconnected or I inadvertently disconnect you, get back on the Zoom link to rejoin the meeting. You will be routed to the waiting room and I will be notified when you arrive.
- I do not recommend that you use the Zoom "chat" function as I believe everyone can see the "chat" if it is not marked private. If you wish to communicate between party and counsel during your mediation while I am not in your room, either stay in the breakout room together so you can speak freely or call/email one another. If you wish to communicate with me during the mediation when I am in the other breakout room, text me so I know you need me, and I will come back to your room. There is also a button on the bottom of the screen that says "Ask for Help". You can click on that button and I will be notified that you want me to return to your breakout room.
- I will send the attorneys my cell phone number and ask that each attorney provide me theirs, in case we have any connection issues during the mediation. Make sure you have your client's cell number in case you get disconnected from them.

- Prior to the mediation, please email me balance sheets, relevant documents or emails and any proposals that have gone back and forth so I have time to review before we begin mediation.
- If we reach an agreement, we can finalize the written documents by email and/or by screen sharing through Zoom. I can bring both attorneys on screen to see and approve changes and/or we can email redlines back and forth. I will circulate a final agreement by email for signature, and Lisa will handle filing everything.
- Prior to mediation, please return the signed mediation agreement to Lisa's attention. Each party pays a $700 retainer prior to mediation unless the parties have worked out alternate arrangements. I will give the parties the final balance at the end of mediation before charging the cards, and the parties will receive an email receipt.

Please let me know if you have any questions.

Mediation Checklist**

** Problem Solving for Attorneys and Mediators

I. Property Issues:

A. Real Estate:

Marital Residence:

•Who will live there/own (should there be a lease or a co-ownership agreement?)

•Date of possession

•Payment of Mortgage/insurance/taxes/homeowner's association fees/utilities/routine maintenance such as mowing/snow removal/payment of non-routine items such as roof/HVAC

•Who claims mortgage interest deduction

•Who claims Real Estate taxes

•Is there a requirement to refinance

If so – are there contingencies (rate to be same or lower, time frame to refinance, costs to refinance, co-signer)

•Quitclaim Deed – when to sign and who to keep or when to file

•Consider adding in clause to sell real estate if the party fails to qualify for a refinance within a certain time frame

•Foreclosure issues and debt forgiveness

If listing:

•Choose Realtor

•Date to list real estate

•If both parties are not on title, need language to ensure other party consents to offers and counteroffers

•Consider side agreement re: dates/timeframes to reduce list price/ price range within which an offer to be accepted

•Work out in advance who pays costs to list house and appropriate reimbursement

•payment of inspection and repairs

•Division of net proceeds

•Payment of mortgage, taxes and insurance pending sale

•Will there be a credit to either party for principal reduction (if so – calculated from what date)

•Tax Consequences – Capital Gains: Consider what happens if sale does not happen for over two years and other side has purchased a home

•Contingency plan if not sold in a certain time frame?

•Consideration of Auctioning?

•Appointing a Commissioner? Duties of Commissioner. Payment to Commissioner

Commercial Leases:

•Mitigating Damages

Farms

•valuation issues

•ability to sell?

•hidden costs to sell - taxes

•equipment on farm

•livestock

Vacation Homes:

•payment of local counsel to draft and file deeds

•transfer costs associated with deeds in other states

Time shares:

•Considerations of co-ownership pending sale (payment of fees and assessments)

•Other ways to sell – Internet sources

☐ B. Retirement Accounts:

•Valuation date

•How to treat loans

•How to treat contributions after date of filing

•QDROs – who drafts?

•Have attorneys reviewed the model QDRO and QDRO procedures

•Payment of administrative fees

•Timeframe for drafting

•Pensions – is there a survivor's annuity – has it been valued?

•IRAs – IRA Transfer Orders

•401(k)'s – consider transferring to one party and using net proceeds to pay off marital debt

☐ C. Household Goods and Furnishings

•Value assigned?

•Date to pick up (consequences of not picking up set forth in Decree)

•Engagement ring and jewelry

•Photos and videos of the kids

•Division of towels, linens, kitchenware, utensils...

•Holiday decorations

•Computers – copying drives

•Storage units

•Lock boxes at banks – have parties gone there together? Make sure to address in Decree

☐ D. Vehicles/Boats/Motorcycles:

•Transfer of titles

•Requirement to refinance?

•Requirement to sell if cannot refinance?

•Leases: consider terms re: payment of excess mileage, damages, fees

•Contingencies for failure to timely pay lease or loan?

☐ E. Financial and Bank Accounts

•Who keeps

•Requirement to transfer or remove names?

•Requirement to close accounts – time frame

•overdraft fees

•stocks/bonds

☐ F. Credit Card Debt

•Has all been identified? (credit reports for both parties?)

•Requirement to close or to remove names

•Last date for charging items or responsible?

•Points and Mileage – assignment, valuation and transfer

☐ G. Property Settlement/Maintenance/Structure

•amount

•timeframe

•prepayment option

•termination clause

•modifiable?

•Security

☐ H. Business Interests

•Valuation methodology

•Valuation Date

•Division

•Buy outs

•liquidation

☐ I. Rehabilitative Maintenance

•time frame

•payment directly to party or creditor

•considerations re: a monthly amount to live on versus an "up to $xx" to pay for certain school expenses

☐ J. Stock Options

•Transferability

•Vesting Date

•valuation

•"under water" v. "in the money"

•methodology if non-transferable

☐ K. Payment of Fees

•Attorney Fees

•Mediation Fees (make sure you address retainers already paid)

•Expert Fees

•Court cost

•Litigation fees (depositions, private service, etc)

☐ L. Health Insurance Coverage

•is Cobra available or other options?

•Who pays

•Timeframe

☐ M. Life Insurance

•Use as security for property settlement obligations

☐ N. Division of Tax Refund or Payment of Tax Liability

•look at prior year's return to see if tax was paid or applied to next year's return

•Payment of accountant fee

•if one spouse self-employed – do his or her estimated taxes get taken into consideration in marital balance sheet

•address payment of tax liability from prior year

•address audit situation

☐ O. Family Pets

☐ P. Filing Status for this year

•Joint

•Married Filing Separately

•Holding Decree to be married on 12/31 or filing before?

☐ Q. Security for Property Settlement or Maintenance

•life insurance

•liens/mortgages

•stock

•retirement accounts

☐ R. Bankruptcy

II. Financial Child Related Issues:

☐ A. Child Support.

•Must attach worksheet. If deviating explain deviation

•for high income earners consider tax effecting

•double dip issue for business owners who receive passive income from business that was valued in Decree?

•how to treat distributions from tax return

•imputing income

•treatment of bonuses

•treatment of irregular income

•annual exchange of information?

☐ B. Health Insurance Coverage and Payment of Uninsured Medical Expenses

•who covers

•contingency in event one loses coverage?

•6% Rule

•definition of uninsured medical expenses

•treatment of orthodontia

•treatment of counseling expenses

•treatment of health savings accounts

☐ C. Payment of Agreed Upon Extracurricular Expenses

☐ D. Private School

☐ E. Requirement to carry life insurance

☐ F. Educational Needs Order

•payment of college and parameters

•Filing Financial Aid forms

•Obligation to Pay Student loans

•application of 529 accounts or children accounts

☐ G. Claiming the Children on Taxes

•Exemption

•Child Tax Credit

•Dependent Care Credit

•Head of Household Status

•Education Tax Credits

☐ H. Filing Status

•Head of Household status

☐ I. QDROs for Arrearages or Child Related Obligations

III. Child Related Issues:

☐ A. Custody:

☐ Legal (Education, Religious Upbringing, Medical decisions); (*consider giving one parent a tie breaking vote or one parent takes school and other takes medical)

☐ Physical

☐ B. Parenting Issues:

☐ Co-parenting Classes

☐ Parenting Coordinator

☐ C. Parenting Time. If not following Guidelines explain deviation

☐ K. Relocation

Mediation Letter to send clients participating in mediation

Please find enclosed correspondence received from the mediator. *[Name of Mediator]* has been appointed the mediator in your case. *[mediator]*'s office is located at _____; and *her/his* phone number is (___) _____. Your mediation will begin promptly at _____ a.m./p.m. on _____. I will meet you at the mediator's office. Please read and bring with you the Agreement to Mediate and Rules of Mediation that is enclosed. If at any time you need another copy, please let me know. Please note a retainer fee in the amount of $_____ is due to the mediator prior to mediation.

This letter will provide advice as to preparing and participating in mediation.

1. **Why was mediation ordered?** The purpose of mediation is to give the parties an opportunity to resolve their differences without court action. Research has shown that agreements reached by the parties generally required fewer subsequent court appearances with respect to enforcement, and such agreements are more likely to be voluntarily honored by the parties.

The processes used in mediation may differ, but generally mediation is a cooperative process for resolving conflict with the assistance of a trained, neutral third-party, whose role is to facilitate communications, to help define issues, and to assist the parties in identifying and negotiating fair solutions that are mutually agreeable. In many cases mediation succeeds in reaching agreements because it provides the parties an opportunity to present their differences and have someone attempt, in an informal setting, to craft an agreement that meets both of their wishes.

2. **Who conducts the mediation?** The mediator is a lawyer who will attempt to help you and _____ reach an agreement. Keep in mind that the mediator is not a judge, and the mediator does not decide the case. It is the parties who will reach an agreement with the help of the mediator.

3. **What is the mediation process?** In the upcoming weeks I will begin preparing your mediation statement, which will be submitted to the mediator the day before mediation or occasionally earlier. The mediation statement is a confidential document submitted to the mediator, which is not shared with the opposing side at any time. The mediation statement gives the mediator the information necessary for the mediator to effectively mediate, but is not intended to present all of the information that would be presented in court. It also isn't intended to persuade or convince the mediator, because, unlike a judge, the mediator does not make any decisions. While a mediator cannot decide your case, if a mediator sides with you it is possible the mediator will attempt to bring _____ around to seeing that your positions are

reasonable. For this reason, the mediation statement is a crucial part of the mediation process.

On the day of mediation, you and _____ will be in separate rooms with your respective attorneys. The mediator will go back and forth between the two rooms to obtain the facts of the case, identify issues, and start the negotiation process. You are asked not to draw any conclusions from the amount of time the mediator might spend in one room. One of the initial steps is to focus on the needs and interests of the parties. After focusing on these needs and interests, the mediator will try to have the two of you look at options that often include reviewing different scenarios. The goal of your mediation is to settle your case by reaching a signed agreement. If you and _____ reach an agreement and it is signed, that agreement will be binding on the court.

4. Final words of advice.

- Go into mediation open minded.
- Focus on interests and try to avoid inflexible bottom-line positions. Rather express yourself in terms of needs and interests and outcomes you would like to realize.
- View mediation as an opportunity to avoid major legal expenses.
- Reaching an agreement in mediation negates the risk of trial.
- Identify and make a list of your goals and bring that with you to mediation so you have a check list of addressing all issues.
- Lastly, please bring a book, magazine, or any work you may need to do because I cannot predict how much time the mediator will spend with _____, which can result in a lot of down time for you. Having something to occupy you during these times will help alleviate any frustrations with the process. During this time, I will review and respond to emails, voicemails, etc., on other cases. Please note that any time I spend working on other matters during your mediation session will be deducted from the time I am with you for mediation – causing you only to incur charges for time I spend directly on your case in mediation.

If you plan on bringing anyone with you to the mediation session, you must notify me in advance of the date of mediation, so I may notify the mediator of the same. It is up to the mediator to make the final decision on whether others (individuals not a party in this matter) may attend the mediation session.

Mediation can be a rewarding experience if approached with an open mind and realistic goals. If you have any questions prior to mediation, please feel free to call me. I will see you at mediation.

COHEN GARELICK & GLAZIER, P.C.

A Professional Corporation of Attorneys at Law

Jill Goldenberg Schuman
E-Mail: jgoldenberg@cgglawfirm.com
Telephone: (317) 573-8888
*Registered Family Law Mediator
*Indiana Certified Family Law Specialist, as certified by the Family Law Certification Board

AGREEMENT TO MEDIATE AND RULES OF MEDIATION

Via Electronic Mail Only

RE: Mediation date: September 24, 2020, at 9:00 a.m.

Dear Mediation Participants:

Under the Indiana Rules for Alternative Dispute Resolution, I have been selected to mediate your impending family law matter. I will be mediating this case on September 24, 2020, starting at 9:30 a.m.

Rule 2.7 requires that you be advised of certain matters before the commencement of mediation and they are set out below.

1. Definition of Mediation: Mediation 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 or more parties. This is an informal and non-adversarial 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. A copy of the ADR Rules pertaining to Mediation is attached. Please review these Rules before our first session. I would be happy to address any questions you may have when we meet.

2. Mediator Neutrality: As your mediator, I am completely neutral and do not represent or have any personal, financial or other relationship with any of the parties that could result in bias or conflict of interest.

3. Confidentiality: Mediation shall be regarded as settlement negotiations as governed by Ind. Evidence Rule 408. Mediators shall not be subject to process (i.e. being subpoenaed to testify in court) requiring the disclosure of any matter discussed during the mediation. Rather, such matters shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties. An objection to the obtaining of testimony or physical evidence from mediation may be made by any party

or by the mediator.

4. Independent Legal Advice: The parties and their attorneys shall be present at all mediation sessions involving domestic relations proceedings unless otherwise agreed. Since you are represented by competent counsel and since they will be in attendance at the session, you will receive independent legal advice from your counsel. Pursuant to ADR Rule 2.7, please be advised that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot assure 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, and believe they need legal advice. Further, the mediator will not advise any party (i) what the party should do in the specific case, or (ii) whether a party should accept an offer.

5. Time and Place of Mediation. The mediation session will be conducted in the offices of Cohen Garelick & Glazier, 8888 Keystone Crossing Boulevard, Suite 800, Indianapolis, Indiana, on **September 24, 2020, at 9:00 a.m.**

6. Mediation Fees: My services shall be billed at the rate of $350.00 per hour. A flat fee of $100.00 will be charged for administrative work, including setting up a file, sending out mediation contracts, copies, postage, and fax-filing fees. Absent an agreement otherwise, the fees shall be divided equally between the parties participating in the mediation. This will include time spent before the commencement of the mediation, time actually spent at the mediation and any time required after the mediation is closed. **A retainer of $700.00, plus $50.00 for each party's portion of the administrative fee, will be required from each party prior to mediation. The balance of your portion of the mediation fees shall be due at the close of the mediation session.**

7. 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, nonparties to the dispute may also be present.

(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 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.

I have reserved one (1) full day for our first session, although it may not be necessary to utilize all of that time. Because mediations often run long, however, it is

important to clear your calendar and make daycare/pickup arrangements for your children so as not to break the momentum if someone has to leave before settlement is reached.

At the end of the mediation process, I may prepare an agreement outlining the terms of any agreement reached for the parties and counsel to sign. Or, with the assistance of your attorneys, we will prepare the entire Settlement Agreement and Decree for signature and approval by the Court. If the mediation is court-ordered, I will submit a report to the court stating whether or not an agreement was reached by the parties.

I look forward to working with each of you and your attorneys. Should this document accurately reflect our understanding, please complete the attached form, sign where indicated and return to me with your retainer. Thank you.

Very truly yours,

COHEN GARELICK & GLAZIER, P.C.

Jill E. Goldenberg

RE: Mediation date: September 24, 2020, at 9:00 a.m.

READ, UNDERSTOOD, AND AGREED:

_____ _____

Signature Date

_____

Printed Name

Address: _____

(street address)

_____

(city, state, zip code)

Phone Number: _____

Email Address: _____

Date of Birth: _____ SSN:_____

Type of Card (please circle):

VISA MasterCard American Express Discover

Credit card account number:_____

Expiration date:_____ Security Code:_____

Indiana Rules of Court
Rules for Alternative Dispute Resolution

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

TABLE OF CONTENTS

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.

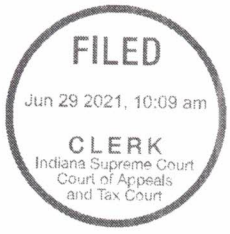
Rule 8.6. Settlement Agreement.

(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).



IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-DC-320

Russell G. Berg
Appellant (Respondent below)

–v–

Stacey L. Berg
Appellee (Petitioner below)

Argued: April 29, 2021 | Decided: June 29, 2021

Appeal from the Allen Circuit Court,
No. 02C01-1709-DC-1268
The Honorable John D. Kitch, III, Magistrate

On Petition to Transfer from the Indiana Court of Appeals,
No. 19A-DC-3038

Opinion by Justice Goff

Chief Justice Rush and Justices David, Massa, and Slaughter concur.

Goff, Justice.

Alternative Dispute Resolution (A.D.R.) plays an important role in our justice system. Because our public policy strongly favors the amicable resolution of disputes, we encourage parties to communicate openly and honestly during A.D.R. proceedings such as mediation. For this reason, communications during settlement negotiations are deemed confidential.

The question here is whether documents produced in anticipation of mediation fall under this confidentiality requirement. We conclude that they do and hold that the trial court erroneously admitted a marital balance sheet prepared for mediation to allow Wife to avoid the parties' settlement agreement. But, because the trial court also found that Husband had breached the settlement agreement, we affirm the trial court.

Facts and Procedural History

In 2017, Stacey Berg (Wife) sued Russell Berg (Husband) for dissolution of marriage. After limited discovery, Wife and Husband participated in mediation and signed a settlement agreement (the Agreement) under which each party retained all stock accounts in their respective names and Husband received all jointly held stock accounts. The Agreement contains a warranty stating, "[e]ach of the parties further represent and warrant one to the other that all assets and debts owned or owed by the parties, either individually or jointly, have been correctly and truly revealed to the other and reflected within this [A]greement." Appellant's App. Vol. 2, pp. 21–22. The trial court approved the Agreement and incorporated it into the dissolution decree.

One year later, Wife filed a Trial Rule 60(B) motion for relief from judgment, alleging that the Agreement shouldn't be enforced because it was procured through fraud, constructive fraud, misrepresentation, mutual mistake, or other misconduct. Wife's motion rested on the omission of a stock account from the balance sheet that the parties had used in determining the division of assets. Husband had identified that account to

Wife's lawyer during their exchange of information. The lawyers discussed getting together to reconcile the parties' balance sheets. When Wife's attorney gave Husband's attorney her version of the balance sheet, Husband's attorney pointed out one of Wife's accounts that was missing but said nothing about Husband's missing account. After Wife added her missing account to the balance sheet, Husband's attorney said they would use her balance sheet at mediation. Wife maintains that the parties used her sheet, which omitted Husband's account, when determining the division of assets at mediation.

Husband moved to strike the evidence submitted by Wife as inadmissible mediation evidence. The trial court overruled Husband's objection and initially denied relief to Wife. Wife then filed a motion to correct errors, which the trial court granted. Because the trial court found that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred and that Husband had breached the Agreement's warranty provision, it awarded Wife half of the value of the account.

In a 2-1 published opinion, the Court of Appeals reversed. *Berg v. Berg*, 151 N.E.3d 321 (Ind. Ct. App. 2020). In the majority's view, the evidence that Wife proffered, and which the trial court relied on in granting relief, was inadmissible because it was evidence of what transpired at mediation. *Id.* at 329. The trial court erroneously granted Wife's motion to correct errors, the majority reasoned, because the inadmissible evidence was required to avoid the Agreement and because Wife was estopped from claiming that Husband had breached the warranty. *Id.* at 331.

In dissent, Judge Crone would have affirmed the trial court on grounds that Husband cited no authority for the proposition that evidence prepared in anticipation of (rather than during) mediation is inadmissible under Evidence Rule 408. *Id.* at 331–32 (Crone, J., dissenting). *See* Ind. Appellate Rule 46(A)(8)(a) (requiring a party to support his or her arguments with "cogent reasoning" and "citations to the authorities").

Wife petitioned this Court for transfer, which we now grant, thus vacating the Court of Appeals opinion. *See* App. R. 58(A).

Standards of Review

Because we generally review a ruling on a motion to correct error for an abuse of discretion, we will only reverse "where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). But, where a ruling turns on a question of law, our review is de novo. *Id.*

An abuse-of-discretion standard likewise applies to a ruling on a Trial Rule 60(B) motion. *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 812 (Ind. 2012). "[A] court's exercise of power under Trial Rule 60(B) is subject to the limitations of the substantive law itself." *Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012). So, when a 60(B) motion involves a marital settlement agreement, the Court treats the matter "as a contract dispute, subject to the rules of contract law." *Id.* at 370–71.

Discussion and Decision

Wife argues that the trial court properly admitted her evidence to allow her to avoid the contract because the information was exchanged **before** mediation (thus falling beyond the reach of Rule 408) and because the evidence was discoverable outside of mediation under A.D.R. Rule 2.11(B)(2). She also argues that, even if the evidence isn't admissible for that purpose, it is admissible to prove that Husband breached the warranty. Husband, on the other hand, argues Wife's evidence should be excluded under Indiana A.D.R. Rule 2.11 and Indiana Rule of Evidence 408. He also characterizes the warranty as a mutual warranty and argues that Wife cannot now argue that the assets and debts weren't correctly revealed or reflected.

I. Wife's evidence was inadmissible to avoid the Agreement under Indiana Evidence Rule 408.

Because "Indiana judicial policy strongly urges the amicable resolution of disputes," we embrace "a robust policy of confidentiality of conduct

and statements made during negotiation and mediation." *Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013). This robust policy takes root in both our A.D.R. Rules and Evidence Rule 408, which govern the mediation process. As relevant here, A.D.R. Rule 2.1 provides that mediation is "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." While "[e]vidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation," A.D.R. 2.11(B)(2), the mediation itself "shall be regarded as settlement negotiations governed by Indiana Evidence Rule 408," A.D.R. 2.11(B)(1).

Evidence Rule 408, in turn, operates to foster an open exchange between the parties during settlement negotiations by excluding from evidence statements made or documents prepared for mediation. *Worman Enter. v. Boone Co. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 376 (Ind. 2004). Specifically, when a party attempts to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," Rule 408 renders inadmissible evidence of "furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim" and "conduct or a statement made during compromise negotiations about the claim." Ind. Evidence Rule 408.

A. Information exchanged specifically to assist in mediation, but disclosed prior to mediation, falls under Rule 408.

Wife acknowledges "that evidence of what transpired at mediation is deemed confidential and presumably not admissible." Pet. to Trans. at 6. She contends, however, that the evidence she submitted "did not transpire at mediation." *Id.* Rather, she insists, the evidence can't be excluded under Rule 408(a)(2) because the "exchange of information" about "marital assets and debts, the valuation of marital assets and debts," and the use of the balance sheet "all took place weeks before the mediation session." *Id.*

We disagree with Wife's reading of the rules. While the A.D.R. rules and Rule 408 don't apply when a mediation is "not instituted pursuant to judicial action in a pending case," *Vernon v. Acton*, 732 N.E.2d 805, 808 n.5 (Ind. 2000), nothing in Rule 408 limits the application of 408(a)(2) to the mediation session itself. In *Kerhof v. Kerhof*, the Court of Appeals held that an alleged statement made by the husband outside of any formal settlement negotiation fell under Rule 408. 703 N.E.2d 1108, 1112 (Ind. Ct. App. 1998). The wife in that case sought to admit evidence that, after the filing of the dissolution petition but before the final dissolution hearing, the husband told her that he would have to pay her $150,000 in the settlement. *Id.* The Court of Appeals affirmed the trial court's exclusion of that evidence, noting that there was sufficient evidence that the statement by the husband was part of settlement negotiations. *Id.*

Because Rule 408 is intended "to promote candor by excluding admissions of fact," communications to facilitate settlement "are not admissible into evidence." *Worman*, 805 N.E.2d at 376–77. And here, the contents of the balance sheet are "admissions of fact" that certain assets and debts exist and about the value of the assets and quantity of the debt. These "facts" established the point from which the parties would negotiate at the mediation itself. That the admission of fact occurred prior to the formal mediation proceeding doesn't remove it from the ambit of the mediation process if it was made for the purpose of reaching a settlement agreement.

B. The balance sheet isn't admissible as evidence discoverable outside of settlement negotiations.

While A.D.R. Rules 2.11(A) and (B)(1) make mediation confidential, A.D.R. Rule 2.11(B)(2) provides that "[e]vidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation." Contrary to Wife's argument, the evidence in the balance sheet wasn't discoverable outside of settlement negotiations. Rather, the figures on the balance sheet reflected the positions that the parties took on the value of certain property for the purpose of negotiation.

This observation is consistent with prior caselaw. In *R. R. Donnelley & Sons Co. v. North Texas Steel Co.*, our Court of Appeals applied the Fifth Circuit's interpretation of Federal Rule of Evidence 408, which is similar to our Rule 408,[1] to determine that a video produced specifically for settlement negotiations should not have been admitted at trial. 752 N.E.2d 112, 128–29, 130 (Ind. Ct. App. 2001). When the racks which R. R. Donnelley & Sons Company (RRD) had recently purchased collapsed and caused extensive damage, RRD sued North Texas Steel Company (NTS). *Id.* at 120. RRD contended that NTS defectively welded the racks. *Id.* As the parties prepared for mediation, an expert conducted and filmed a weld test to present at the mediation. *Id.* at 127. The parties didn't reach a settlement, and NTS sought admission of the video at trial. *Id.*

The trial court admitted the video over RRD's objection. *Id.* The Court of Appeals reversed the trial court. *Id.* at 140. The panel accepted the Fifth Circuit's reasoning that a document falls within the "protected area of compromise" where "the statements or conduct were intended to be part of the negotiations toward compromise." *Id.* at 129 (quoting *Ramada Development Co. v. Rauch*, 644 F.2d 1097, 1106–07 (5th Cir. 1981)). And the video in *R. R. Donnelley* was intended to be part of negotiations toward compromise, the court found, because the "expert ideas and research were being exchanged in the spirit of attempting to resolve the case through mediation." *Id.* at 130 (quotation marks omitted).[2]

---

[1] Federal Rule of Evidence Rule 408 allows the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. Fed. R. Evid. 408(a)(2).

[2] Other courts have also found that material prepared for compromise negotiations are protected by Rule 408. *See, e.g., EEOC v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009); *Affiliated Mfrs. v. Aluminum Co. of Am.*, 56 F.3d 521, 530 (3d Cir. 1995); *Blu-J, Inc. v. Kemper C.P.A. Grp.*, 916 F.2d 637, 642 (11th Cir. 1990); *Kritikos v. Palmer Johnson, Inc.*, 821 F.2d 418, 423 (7th Cir. 1987); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. 1981); *Axenics, Inc. v. Turner Constr. Co.*, 62 A.3d 754, 768 (N.H. 2013); *State ex rel. Miller v. Superior Court*, 941 P.2d 240, 244 (Ariz. Ct. App. 1997).

C. Challenging the validity of the Agreement is not a collateral matter for the purposes of 408(b)'s exception.

Evidence Rule 408 contains an exception that allows the admission of evidence "for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Evid. R. 408(b). The exception for evidence used "for another purpose" extends to evidence used "in collateral matters unrelated to the dispute that is the subject of the mediation." *Horner*, 981 N.E.2d at 1212.

In *Horner*, the husband sought to modify the maintenance provision of the settlement agreement in the dissolution of his marriage. *Id.* at 1211. During the evidentiary hearing, the husband attempted to testify about statements he made to the mediator. *Id.* The trial court excluded the testimony and ultimately denied his request for modification. *Id.* This Court affirmed the trial court. *Id.* at 1213. Because the husband sought to "avoid liability under the agreed settlement on grounds that it reflected neither his intent, nor his oral agreement during mediation," this Court found that the evidence wasn't used in a collateral matter and was inadmissible. *Id.* at 1212, 1213.

Like in *Horner*, Wife seeks to make a change to the Agreement itself. This is clearly distinguishable from the only post-*Horner* Indiana case that found that Rule 408's exception applies. *See Gast v. Hall*, 858 N.E.2d 154, 161 (Ind. Ct. App. 2006) (evidence of the mental condition of the testator at a mediation on a different matter was admissible to prove testamentary capacity).

Rule 408 applies, and Wife's evidence is inadmissible to avoid the Agreement. Because the trial court relied on this inadmissible evidence to

find that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred, this finding cannot be the basis for Wife's relief.[3]

II. A warranty clause in which "each of the parties" warrants "one to the other" doesn't preclude a party from demonstrating breach of warranty.

Wife argues that Husband breached the warranty language included in the Agreement. Under the Agreement's warranty, "[e]ach of the parties further represent one to the other that all assets and debts owned or owed by the parties, either individually or jointly, have been correctly and truly revealed to the other and reflected in this agreement." Appellant's App. Vol. 2, pp. 21–22. Husband argues that Wife is estopped from pursuing her breach-of-warranty claim because Husband and Wife **both** assumed responsibility for the factual assertions made under the "mutual warranty."[4]

"A warranty is a promise relating to past or existing fact that incorporates a 'commitment by the promisor that he will be responsible if the facts are not as manifested.'" *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 28 (Ind. 1999) (quoting 1 Samuel Williston, *A Treatise on the Law of Contracts* § 1:2, at 10 (Richard A. Lord, ed., 4th ed. 1990)). As Judge Learned Hand noted, a warranty is intended to "relieve the promisee of

---

[3] Since we find that Wife's evidence isn't admissible to attack the settlement, we don't reach her claim that she can avoid the Agreement because Husband engaged in a "gaming view of the litigation process" that constitutes constructive fraud. *See* Appellee's Br. at 16 (internal quotations omitted).

[4] Husband also maintains that neither party argued that the Agreement was breached by either party. But Wife argued before the trial court that the Agreement required each party to "correctly and truly reveal" to the other all assets and that Husband failed to meet that contractual obligation. Appellant's App. Vol. 2, p. 34. And a claim that a party failed to meet a contractual obligation is a claim that the contract was breached. *See Kaghann's Korner, Inc. v. Brown & Sons Fuel Co.*, 706 N.E.2d 556, 565 (Ind. Ct. App. 1999) ("The trial court did not err in finding that as a matter of law Brown failed to strictly perform its contractual obligations, thereby committing a breach of contract.").

any duty to ascertain the fact for himself." *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946).

The Court of Appeals held that, because Wife also warranted that all assets and debts had been "correctly and truly" revealed and reflected in the Agreement, she is "estopped from obtaining relief because Wife is disputing the truth of her own assertions." *Berg*, 151 N.E.3d at 330 & n.11. We disagree.

While the warranty does provide that the parties warrant "one to the other" that the assets and debts are reflected in the Agreement, the language doesn't preclude Wife from arguing that Husband breached the warranty. When the Court examines a contract, we look at the "contract as a whole" and "accept an interpretation of the contract that harmonizes all its provisions." *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.*, 72 N.E.3d 908, 914 (Ind. 2017) (citing *Kelly v. Smith*, 611 N.E.2d 118, 121 (Ind. 1993)). "A contract should be construed so as to not render any words, phrases, or terms ineffective or meaningless." *Id.* "A contract is ambiguous if reasonable people would find it subject to more than one interpretation." *Willey v. State*, 712 N.E.2d 434, 440 (Ind. 1999) (quoting *Haxton v. McClure Oil Corp.*, 697 N.E.2d 1277, 1280 (Ind. Ct. App. 1998)).

If we were to interpret the warranty clause as the Court of Appeals did, that clause would be meaningless because neither party would be able to enforce it. A reasonable person wouldn't find that the parties added the warranty provision without intending it to have any effect, and our case law requires that we "make every effort to avoid a construction of contractual language that renders any words, phrases, or terms ineffective or meaningless." *Ind. Gaming Co., L.P. v. Blevins*, 724 N.E.2d 274, 278 (Ind. Ct. App. 2000). Furthermore, this isn't a case where the parties merely warranted as a singular unit that the assets and debts were reflected in an agreement. Instead, "[e]ach of the parties" warranted "one to the other" that the assets were accurate. The words "each" and "one" separate the parties out. Either Husband or Wife may enforce the Agreement and allege breach of the warranty provision. Since we find that Wife is not precluded from claiming that Husband breached the warranty, we must determine whether

the trial court abused its discretion in finding that Husband did breach the warranty.[5]

While Wife's evidence wasn't admissible to challenge the validity of the Agreement under Trial Rule 60(B), it is admissible in the collateral breach-of-contract claim. "The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993). The evidence here shows that (1) each party promised that the assets and debts were "correctly and truly" reflected in the Agreement—the contract; (2) Husband's assets were not "correctly and truly" reflected in the Agreement—the breach;[6] and (3) Wife's portion of the 50/50 division of assets would have been higher if the account were included—the damage. The trial court didn't abuse its discretion in determining that Husband breached the Agreement. And Indiana has a statutory presumption of a 50/50 division of marital assets. Ind. Code § 31-15-7-5 (2018). Thus, the trial court didn't err in awarding Wife 50% of the Edward Jones account because of Husband's breach of the Agreement.

Conclusion

The trial court incorrectly determined that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred, but because the trial

---

[5] The Court of Appeals' citations to 31 C.J.S. Estoppel and Waiver § 72 (2019) and *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665, 672 (Tex. Ct. App. 1996) to support its conclusion that Wife is estopped from claiming that Husband breached the warranty clause are inapposite. *See Berg*, 151 N.E.3d at 330–31. In her claim of breach of warranty, Wife isn't arguing that the Agreement "do[es] not express [her] intentions or understanding." *See* 31 C.J.S. Estoppel and Waiver § 72, at 414. Nor is she seeking to avoid being "bound by the terms of [the] contract." *See Stevens*, 929 S.W.2d at 672.

[6] This case is readily distinguishable from *Ehle v. Ehle*, 737 N.E.2d 429 (Ind. Ct. App. 2000). In that case, the wife relied on her husband's representation as to his assets, rather than conducting her own discovery. *Id.* at 434. While the Court of Appeals stated that the wife would have been unable to recover absent the husband's fraud, the parties in that case didn't have an agreement to disclose the information and ensure that it was accurately reflected in the agreement. *Id.*

court didn't abuse its discretion in finding that Husband had breached the warranty clause of the Agreement, we affirm the trial court.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

ATTORNEYS FOR APPELLANT
Lierin A. Rossman
Christopher L. LaPan
Stucky, Lauer & Young, LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE
John B. Powell
Shambaugh Kast Beck & Williams, LLP
Fort Wayne, Indiana

Berg v. Berg (June 29, 2021) (Mediation Evidence / Disclosure Warranty Case)

HELD: Documents produced not during mediation, but in anticipation of mediation, fall under the confidential settlement communication provisions that preclude them from later being admitted into evidence at a final hearing.

HELD: A disclosure warranty provision of a property settlement agreement can be used to pursue a breach of contract claim if one spouse later determines assets were not disclosed.

FACTS AND PROCEDURAL HISTORY:

In 2017, after limited discovery, Husband and Wife participated in a divorce mediation that resulted in a signed property settlement Agreement that provided, in relevant part, that each party would keep their respective stock accounts, and Husband would retain the jointly-titled stock accounts. The Agreement also included a provision by which each party warranted full asset disclosure.

The following year, Wife filed a Trial Rule 60(B) motion seeking to set aside the Agreement on the basis that Husband had failed to disclose a stock account. The 60(B) litigation that followed focused on what financial information had been exchanged between the parties leading up to mediation. Wife successfully introduced some of those materials into evidence, after which the trial court granted Wife's relief and awarded Wife one-half of the stock account in question.

On an appeal, the Court of Appeals had split 2-1, with the majority concluding that the documents exchanged in advance of mediation were inadmissible. Judge Crone dissented based upon Husband citing no authority that evidence prepared in anticipation of mediation—rather than during mediation—is inadmissible under Evid. R. 408. Importantly, the Court of Appeals, after making this evidentiary determination, concluded that Wife was estopped from relying upon the disclosure warranty provision of the Agreement because Wife had also warranted that the Agreement fairly reflected all assets of the marriage.

Wife sought transfer, which was granted.

Relying significantly on policy reasons, the Indiana Supreme Court concluded that marital balance sheets exchanged in advance of mediation are not later admissible evidence under Rule 408. And, while Rule 408 includes an exception for the admission of evidence for another purpose, Wife's effort to challenge the validity of the Agreement did not fall under the exception.

The Court of Appeals had further concluded that the warranty language of the Agreement estopped Wife from obtaining relief under it because Wife also warranted that all assets and debts had been correctly reflected in the Agreement. On this point, the Indiana Supreme Court disagreed. Such a construction would render a disclosure warranty clause meaningless.

Thus, the Supreme Court reasoned that Rule 408 prevented Wife from attacking the validity of the parties' Agreement. However, the evidence was admissible in a collateral breach of contract claim. The evidence established that: (1) each party warranted all assets and debts were reflected in the Agreement (the contract); (2) Husband's assets were not correctly reflected in the Agreement (the breach); and (3) Wife's portion of a 50/50 division of the marital estate would have been larger without the breach (the damage).

The trial court did not abuse its discretion in determining that Husband breached the Agreement, and awarding Wife half of the omitted account to rectify the breach.

The trial court's order was affirmed on the basis that Husband had breached the warranty clause of the Agreement, setting aside the trial court's finding of fraud that was based upon inadmissible evidence.

STATE OF INDIANA	)	IN THE COURT NO.
	) SS:	
COUNTY OF	)	CAUSE NO.

IN RE THE MARRIAGE OF:)
)
,)
)
Petitioner,)
)
and)
)
,)
)
Respondent.)

NON PARTY MEDIATION CONFIDENTIALITY AGREEMENT

I hereby certify my understanding of my attendance at the mediation session for the above reference matter is subject to my agreement to hold all matters discussed, viewed, reviewed or opined in mediation as confidential. I will not discuss the offers of settlement, assets, discovery, evaluations, opinions of the parties, counsel or mediator with anyone outside the mediation session. I understand that mediation is regarded as settlement negotiations as governed by Ind.Evidence Rule 408. I further understand that Mediation sessions are closed to all persons other than the parties of record, their legal representatives, and other invited persons such as myself. As an invited person, I agree to be bound to the same rules of confidentiality as the parties. I have read and understand the terms of this Order, I agree to be fully bound by them, and I hereby submit to the jurisdiction of the County Court for the purposes of enforcement of the Order.

Dated:_____ Signature:_____

Name:_____

Section Two

Secure Act 2.0 of 2022
New Rules to Help Boost Your Retirement Readiness

Nicole C. McGoff, CDFA®
Merrill Lynch Wealth Management
Indianapolis, Indiana

Section Two

Secure Act 2.0 of 2022
New Rules to Help Boost
Your Retirement Readiness……..…….. Nicole C. McGoff, CDFA®

PowerPoint Presentation

SECURE Act 2.0 of 2022

New rules to help boost your retirement readiness

Presented by

Nicole McGoff, CDFA®

Financial Advisor

Senior Portfolio Advisor

August 18, 2023

MERRILL
A BANK OF AMERICA COMPANY

Important information

The case studies presented are hypothetical and do not reflect specific strategies we may have developed for actual clients. They are for illustrative purposes only and intended to demonstrate the capabilities of Merrill and/or Bank of America. They are not intended to serve as investment advice since the availability and effectiveness of any strategy is dependent upon your individual facts and circumstances. Results will vary, and no suggestion is made about how any specific solution or strategy performed in reality.

Merrill, its affiliates, and financial advisors do not provide legal, tax, or accounting advice. You should consult your legal and/or tax advisors before making any financial decisions

All guarantees and benefits of an insurance policy and all contract and rider guarantees for annuities, including optional benefits and any fixed crediting rates or annuity payout rates, are backed by the claims-paying ability of the issuing insurance company. They are not backed by Merrill or its affiliates, nor does Merrill or its affiliates make any representations or guarantees regarding the claims-paying ability of the issuing insurance company.

Trusts should be drafted by an attorney familiar with such matters in order to take into account income and estate tax laws. Failure to do so could result in adverse treatment of trust proceeds.

It's important to know that qualified plans such as 401(k) accounts or an IRA are intended to provide for tax deferral of earnings. Therefore, an annuity contract should only be used to fund an IRA or qualified plan to benefit from an annuity's features other than tax deferral. The other benefits may include the lifetime income options and possibly a guaranteed minimum death benefit.

Merrill Lynch, Pierce, Fenner & Smith Incorporated (also referred to as "MLPF&S" or "Merrill") makes available certain investment products sponsored, managed, distributed, or provided by companies that are affiliates of Bank of America Corporation ("BofA Corp."). MLPF&S is a registered broker-dealer, registered investment adviser, Member SIPC and a wholly owned subsidiary of BofA Corp. Merrill Lynch Life Agency Inc. ("MLLA") is a licensed insurance agency and a wholly owned subsidiary of BofA Corp.

Investment products offered through MLPF&S and insurance and annuity products offered through MLLA:

Are Not FDIC Insured	**Are Not Bank Guaranteed**	**May Lose Value**
Are Not Deposits	**Are Not Insured by Any Federal Government Agency**	**Are Not a Condition to Any Banking Service or Activity**

MERRILL
A BANK OF AMERICA COMPANY

SECURE 2.0 ACT OF 2022
Setting **E**very **C**ommunity **U**p for **R**etirement **E**nhancement

Opportunities that may help you strengthen your retirement plan

LONGEVITY

Help your savings last longer in retirement

ACCESS

Incent employers to expand retirement plan access and options

FLEXIBILITY

Granting you more access to retirement savings if needed

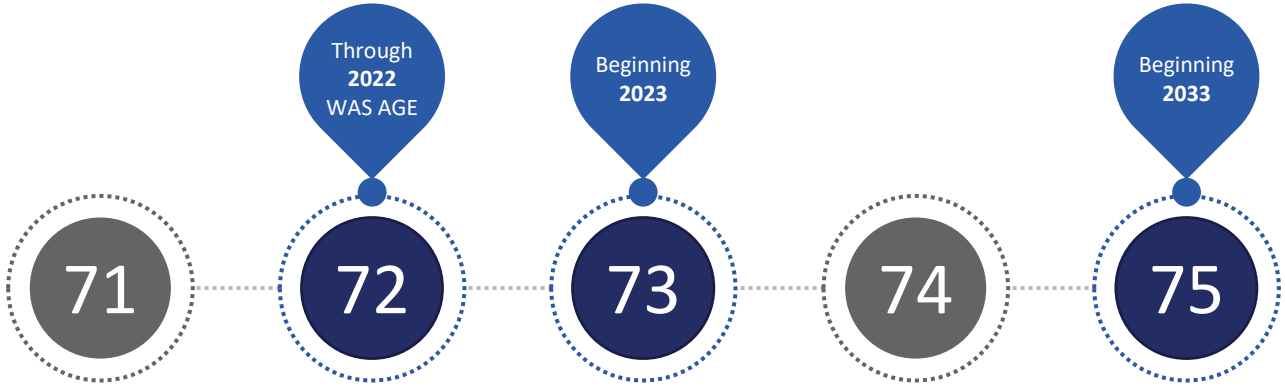
Overview of SECURE Act 2.0 impact

Stay invested longer

The age at which you must begin taking RMDs from retirement accounts has been **changed from the year in which you turn age 72 to the year in which you turn age 73**. (This will change to 75 in 2033.) *Note: This does not apply to Roth IRAs, since they are after-tax savings, which don't require any RMDs.*

Reduction of Penalties for Failure to take Distributions: Missed RMD excise tax reduced from 50% to 25% with opportunity to reduce to 10%. Please see your tax advisor regarding your specific situation.

If you don't need to rely on Required Minimum Distributions (RMDs) for income, the SECURE Act provides more time for your savings to continue growing tax-deferred.



Required minimum distributions (RMDs)

Changes to IRA contributions (catch up contributions)

Catch up Contributions

Under current law, the limit on IRA contributions is increased by $1,000 (not indexed) for individuals who have attained age 50, also referred to as a “catch up” contribution.

The catch up contribution limit for individuals over age 50 will be indexed in $100 increments beginning in tax year 2024.

Excess Contributions

Current law requires a corrective distribution of an excess contribution to an IRA, along with any earnings on the excess contribution. The corrective distribution is subject to the 10% early withdrawal penalty.

The act changes this and exempts corrective distributions and corresponding earnings from the 10% early withdrawal penalty.

Lifetime income options

SECURE 2.0 Act of 2022 includes provisions that address lifetime income from annuities.

SECURE 2.0 changed the rules around some retirement income products.

Eliminated barriers to life annuities, Qualified Lifetime Annuity Contracts and certain Exchange Traded Funds.

The rules have changed around calculating RMD amount for retirement accounts that hold an annuity.

For accounts that hold an annuity and other assets, it allows owner to aggregate for purposes of determining the RMD amount.

Image purchased - GettyImages-1187298372

Qualified Longevity Annuity Contracts (“QLACs”)

These are deferred income annuities designed primarily to guard against outliving your retirement savings. A QLAC purchased within a qualified plan account or IRA in the early stages of retirement can create a specific future income stream as late as age 85 as part of a decumulation strategy.

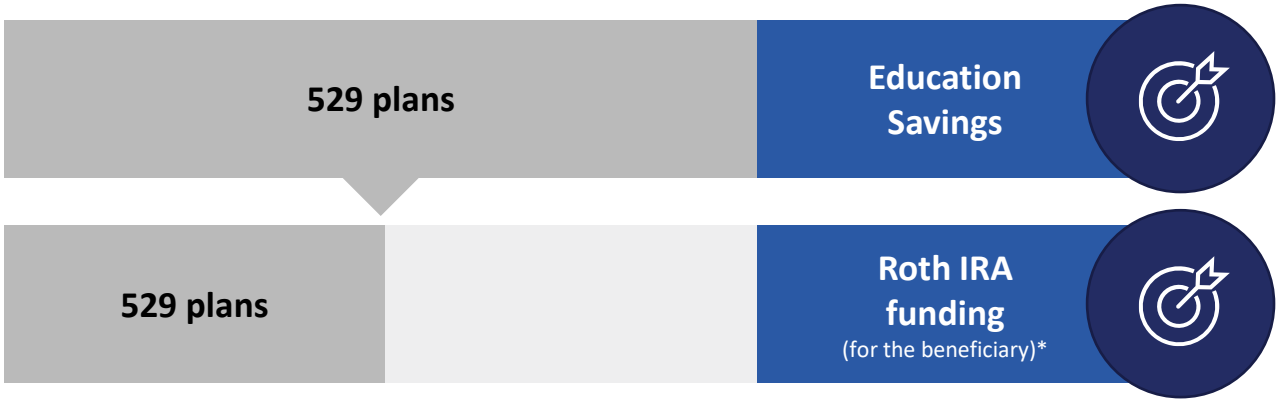
Existing regulation originally limited the premiums an individual can pay for a QLAC to the lesser of $125,000 (indexed) or 25% of the individual’s IRA account balance.

The SECURE 2.0 Act eliminates the IRA 25% limit and increases the dollar limit to $200,000 (indexed).

Excess 529 assets can now help fund retirement

SECURE 2.0 creates special rules for certain distributions from long-term qualified tuition programs (529 Plans) to Roth IRAs. It amends the Internal Revenue Code to allow for tax and penalty-free rollovers from 529 accounts to Roth IRAs, under certain conditions.

Establishing 529 plans for each child may also help jumpstart the beneficiary's retirement savings.

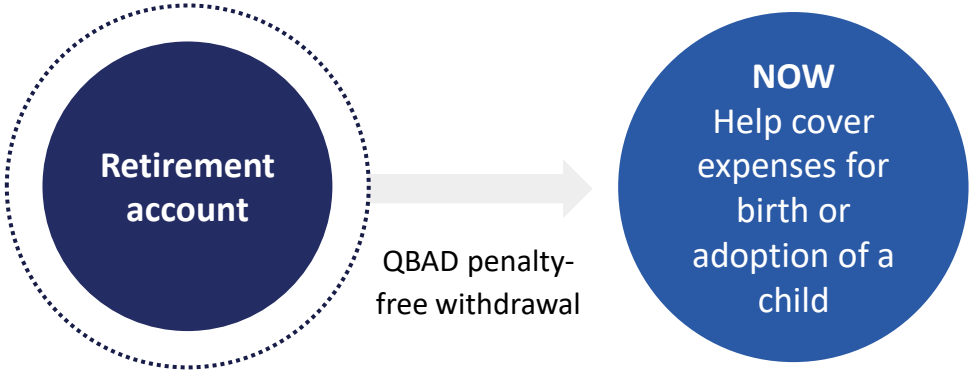


* Must meet eligibility criteria.

Qualified birth or adoption expenses

- Since the passage of the first SECURE Act in 2019, you have been able to make Qualified Birth or Adoption (QBAD) **penalty-free withdrawals** from your retirement accounts (up to $5,000) to help cover **childbirth or adoption** expenses.[1] The funds can be recontributed to the IRA or a qualified plan at a later date within 3 years and are not subject to the 60-day rollover rule. Repayment period is limited to within 3 years of the date the distribution was received.
- Keep in mind income tax will still be owed on the taxable portion of the withdrawal and any withdrawals will likely slow their savings momentum.

By allowing more penalty-free withdrawals of retirement funds, the SECURE Act seeks to encourage greater plan participation.



[1] Withdrawals must be made within a one-year period from the child's birth (or legal adoption) date.

Other early withdrawal exceptions

Domestic Abuse	Permits certain penalty-free early withdrawals to victims of domestic abuse in an amount not to exceed the lesser of $10,000 (indexed) or 50% of the value of the employee's vested account under the plan. This is considered an in-service distribution event for 401(k), 403(b) and governmental 457(b) plans.[1]
Terminal Illness	Creates an exception to the 10% early withdrawal penalty for distributions to individuals whose physician certifies that they have an illness or condition that is reasonably expected to result in death in 84 months or less.[2]
Emergency Withdrawal	Allows one penalty-free withdrawal of up to $1,000 per year for "unforeseeable or immediate financial needs relating to personal or family emergency expenses." The withdrawal may be repaid within three years.[3]
Long Term Care Premiums	Permits retirement plans to distribute up to $2,500 per year (adjusted for inflation beginning in 2025) for the payment of premiums for certain specified (high-quality coverage) long-term care insurance contracts for the participant (or their spouse or certain other family members).[4]

[1] Effective for distributions made after December 31, 2023.

[2] Effective upon enactment, December 29, 2022.

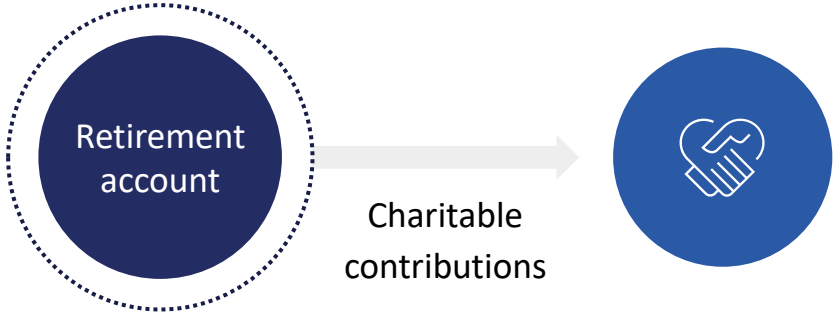
[3] Effective for distributions after December 31, 2023.

[4] Effective December 29, 2025.

Using IRA assets for charitable contributions

You can still make qualified charitable distributions (QCDs) from your IRAs to help reduce taxable income by giving up to $100,000 directly to charities starting at age 70½. Ability to leverage IRAs for charitable contributions has been expanded.

SECURE 2.0 added a one-time election for qualified charitable distribution to a split interest entity. The provision would expand the IRA charitable distribution provision to allow for a one-time, $50,000 distribution to charities through charitable gift annuities, charitable remainder unitrusts and charitable remainder annuity trusts.



Key provisions impacting plan participants

Increased Contributions

Catch up contributions for those ages 60, 61, 62 and 63 increased to the greater of $10,000 or 150% of the age 50 catch up amount, whichever is greater. Indexed for inflation.

Effective 2024

Roth Plan Distribution Rules

Eliminated RMDs for Roth employer accounts during the lifetime of the owner.

Effective 2024

Catch up Contribution Classification

Catch up contributions must be made on a Roth basis.

EXCEPTION: Eligible participants whose prior year wages do not exceed $145,000.

Effective 2024

Timeline for Implementation of Certain Provisions

2023

- RMD age pushed to 73 (for those born 1951-1959)
- Roth for SEP and SIMPLE IRAs permitted

2024

- RMDs no longer required for Roth assets in employer-sponsored plans
- Limited 529 rollovers to Roth IRAs permitted
- Student loan repayments characterized as elective deferral for employer match

2025

Enhanced catch up contributions for those age 60–63

2026

Penalty-free withdrawals for long-term care premiums (technically effective 12/29/25)

2033

RMD age pushed to 75 (for those born 1960 or later)

Nicole McGoff, CDFA®
Financial Advisor
Senior Portfolio Advisor
NMLS ID #1805444

Merrill Lynch Wealth Management
Biel, Hancock & Associates
Merrill Lynch, Pierce, Fenner & Smith Inc.
510 E. 96th St. Suite 500 Indianapolis IN 46240
T 317.706.3195 F 317.218.7262
nicole.mcgoff@ml.com
https://www.linkedin.com/in/nicole-mcgoff-cdfa

Named to the 2023 Forbes "Best-in-State Wealth Management Teams" list as a member of the Biel, Hancock & Associates team

Published on January 12, 2023. Rankings based on data as of March 31, 2022.

MERRILL
A BANK OF AMERICA COMPANY

Section Three

Preparing for Mediation Settlement Agreements

Deborah Farmer Smith
Cohen Garelick & Glazier
Indianapolis, Indiana

Section Three

Preparing for Mediation Settlement Agreements……. Deborah Farmer Smith

Jane Smith v. John Jones							Significant difference in values
CAUSE NO. 00C01-2210-DN-004000							Modest difference in values
Date of Marriage: 1-1-20							One one balance sheet only
Date of Filing: 10-1-22							
Mediator's Marital Balance Sheet							
Assets and Debts	**W's Value**	**W's Debt**	**W's Net**	**H's Value**	**H's Debt**	**H's Net**	**Notes**
Real Estate							
123 Elm Street, Anytown, USA	$ 400,000.00		$ 400,000.00	$ 400,000.00		$ 400,000.00	Appraisal by John Smith
Mortgage on 123 Elm Street		$ (100,000.00)	$ (100,000.00)		$ (90,000.00)	$ (90,000.00)	Wife's balance DOF, Husband's balance current, Husband has made payments
456 Lake Avenue, Smith Lake, IN	$ 250,000.00	$ (50,000.00)	$ 200,000.00	$ 325,000.00	$ (50,000.00)	$ 275,000.00	Appraisals by John Smith and Mike Jones
Personal Property							
Contents of marital home	$ 5,000.00		$ 5,000.00	$ 15,000.00		$ 15,000.00	
Contents of lake home	$ 5,000.00		$ 5,000.00	$ 10,000.00		$ 10,000.00	
2023 Harley Davidson	$ 25,000.00		$ 25,000.00	$ 15,000.00		$ 15,000.00	
2020 Honda Pilot	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	
2020 Chevy Equinox	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	
Wife's jewelry	$ 3,000.00		$ 3,000.00	$ 30,000.00		$ 30,000.00	
Cash and Investment Accounts							
Hometown Bank checking #xx123 (W)	$ 5,000.00		$ 5,000.00	$ 25,000.00		$ 25,000.00	$25K at DOF, Wife has spent on bills and legal fees
Hometown Bank savings #xx456 (W)	$ 10,000.00		$ 10,000.00	$ 10,000.00		$ 10,000.00	
Yourtown Bank checking #xx789 (Jt)	$ 5,000.00		$ 5,000.00	$ 5,000.00		$ 5,000.00	
Yourtown Bank savings #xx001 (Jt)	$ 40,000.00		$ 40,000.00	$ -		$ -	Husband contends this is son's college account
Mytown Bank checking #xx007 (H)	$ 70,000.00		$ 70,000.00	$ -		$ -	Opened post-filing with Husband's bonus, which Wife contends was earned pre-filing
MyMom's Investment Account #xx002 (W)	$ -		$ -	$ 50,000.00		$ 50,000.00	Wife's inheritance
Cryptocurrency (H)	$ 200,000.00		$ 200,000.00	$ 50,000.00		$ 50,000.00	Husband's value DOF, Wife's value current
Retirement, 401(k)'s, IRA's, etc.							
ABC Company 401(k) (W)	$ 30,000.00		$ 30,000.00	$ 33,000.00		$ 33,000.00	Wife's value DOF, Husband's value current
IRA #xx234 (W)	$ 25,000.00		$ 25,000.00	$ 25,000.00		$ 25,000.00	
XYZ Company 401(k) (H)	$ 100,000.00		$ 100,000.00	$ 80,000.00		$ 80,000.00	Husband's value DOF, Wife's value current and includes contribution from Husband's bonus check
IRA #xx678 (H)	$ 25,000.00		$ 25,000.00	$ 25,000.00		$ 25,000.00	
Rollover IRA #xx987 (H)	$ 250,000.00		$ 250,000.00	$ 200,000.00		$ 200,000.00	Wife's value current, Husband's value DOF
Tax Refunds/Liabilities							
2022 tax refund - federal	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	Deposited into joint checking and spent
2022 tax refund - state	$ 3,000.00		$ 3,000.00	$ 3,000.00		$ 3,000.00	
Liabilities							
Student loans (H)	$ -		$ -	$ (75,000.00)		$ (75,000.00)	Incurred before marriage
American Express (H)		$ (5,000.00)	$ (5,000.00)		$ (5,000.00)	$ (5,000.00)	
Capital One (W)		$ (5,050.00)	$ (5,050.00)		$ (50.00)	$ (50.00)	Wife's attorney fee retainer paid at DOF
Medical bills		$ (25,000.00)	$ (25,000.00)		$ -	$ -	Wife's pre-filing cosmetic surgery
Total Marital Estate	**$ 1,511,000.00**	**$ (185,050.00)**	**$ 1,325,950.00**	**$ 1,286,000.00**	**$ (145,050.00)**	**$ 1,140,950.00**	

CAPTION

VERIFIED WAIVER OF FINAL HEARING

Pursuant to I.C. 31-15-2-13, the parties waive final hearing and request that the Court enter a Summary Decree of Dissolution of Marriage. The Mediated Final Settlement Agreement of the parties, that settles all contested issues in this case, is being filed contemporaneously herewith and is incorporated by reference herein.

We, and each of us, affirm under penalties for perjury that the foregoing representations are true.

_____ _____

, Petitioner , Respondent

CAPTION

MEDIATED FINAL SETTLEMENT AGREEMENT

This Mediated Final Settlement Agreement ("Agreement") is made and entered into by and between _____ ("Wife") and _____ ("Husband") this _____ day of _____, 20____.

RECITALS and DEFINITIONS

The parties were married on _____. Each party was, for more than six (6) consecutive months prior to the filing of the Petition for Dissolution of Marriage ("the Petition"), a resident of _____ County, Indiana.

_____ filed the Petition on _____.

The parties are the parents of _____ (____) child(ren), _____, born _____, and _____, born _____, ("the child(ren)"). Wife is not now pregnant.

The marriage of the parties is irretrievably broken and should be dissolved.

The parties have accumulated property and incurred obligations during their marriage, of which there should be a just and reasonable division.

The parties desire and intend by this Agreement to resolve all issues between themselves, fully and finally, whether or not arising out of their relationship as Husband and Wife, including but not limited to child custody and parenting time, child support, division of property, payment of obligations, payment of attorney fees, spousal maintenance, and interspousal torts.

"Decree" means the Summary Decree of Dissolution of Marriage which will be entered in this case, upon the filing with this Court of the parties' Verified Waiver of Final Hearing and this Final Settlement Agreement.

"Filing Date" means _____.

"Marriage Date" means _____.

"Marital Residence" means the improved real estate located at _____.

"Lake Home"/"Rental Home" means the improved real estate located at _____.

"Indemnify and hold harmless" means, with respect to any financial obligation, to pay the obligation in full, to pay the obligation timely, and to comply with all requirements of any instrument by which the obligation was created or which governs the terms of the obligation. The requirement to indemnify and hold harmless includes the obligation to pay the other party's costs (including professional fees) to defend against any claim for payment of the obligation by the other party, and may include the obligation to pay the other party's damages, which may include damage to credit-worthiness, which result from the obligated party's failure to pay the obligation time and in full.

"Joint legal custody" means that the parties share, equally, the authority and responsibility for making major decisions concerning the children's upbringing, including matters of education, health care and religious training.

"Pro Rata Shares" means the parties' respective incomes, as determined from line 2 of their Child Support Obligation Worksheet in effect, from time to time. The parties' initial Pro Rata Shares are _____% for Husband and _____% for Wife.

NOW, THEREFORE, in consideration of the mutual agreements contained herein, the

ARTICLE 1
ISSUES SETTLED

1.01 Issues Settled. The subject matter of this Agreement is the settlement of all issues which exist between Husband and Wife, attendant upon the dissolution of their marriage,

including without limiting the generality thereof, the following:

(a) The respective rights of the Husband and Wife to property, whether personal, real, or mixed, now or hereafter in their name or possession, both jointly and severally; and

(b) Any and all claims or causes of action Husband and Wife may have against each other or arising out of the marital relationship or the circumstances of that relationship, or otherwise.

ARTICLE 2
CUSTODY AND PARENTING TIME

2.01 Custody. The parties shall share joint legal custody of the child(ren). _____ shall provide the primary residence for _____.

2.02 Parenting Time. _____ shall have parenting time with _____ as the parties may agree, but in no event less than according to the Indiana Parenting Time Guidelines ("IPTG").

2.03 Holiday, Special Day and Extended Parenting Time. The parties shall have holiday, special day and extended parenting time alternate holidays according to the IPTG, with _____ having the holidays stated or implied for the custodial parent, and _____ having the holidays stated or implied for the non-custodial parent.

2.04 General Rules Applicable to Parenting Time. The parties shall abide by the General Rules Applicable to Parenting Time of the IPTG. The Opportunity for Additional Parenting Time shall be offered when either parent requires childcare, which will not be provided by a parent or a responsible household family member, for more than _____ hours. This is not intended to prohibit either parent from permitting the children to spend occasional

nights with friends and/or relatives.

2.05 Future Relationships. The future relationships between the parties and the children will be determined with the following in mind, that: the welfare of the children is of paramount importance; the children need stability and discipline; the children should have free access to both parents and both parents should encourage such access; the children should be treated as individuals, interested in and affected by their relationship with their parents; the children should grow up in a home and other environments which will assure the best opportunity to mature responsibly and well; the children need attention, care and regular presence in their lives by both parents; the parents should provide constant love and guidance; and support by each parent of the efforts of the other on behalf of the children is of utmost importance.

2.06 Illness or Injury. In the event of illness of or injury to a child, the party exercising parenting time shall notify the other party as soon as reasonably possible, under the circumstances.

2.07 Non-Disparagement. Each party shall refrain from discussing the other with a child except in a manner which is supportive of or complimentary to the other. Each party shall refrain from any effort to alienate the children from the other party, the absolute aim of the parties to be a healthy, respectful relationship between the children and each party. Disputes between the parties shall be resolved directly between themselves, and neither shall involve the children in any way in such disputes. The parties will communicate with each other, either verbally or by e-mail, regarding plans for the children before discussing such plans with the children.

2.08 Requirement of Mediation. The parties agree that if any disagreement arises

concerning the non-financial portion of this Agreement concerning the children that cannot be settled directly between themselves by negotiation, they will first attempt in good faith to mediate the dispute with the services of a mutually agreeable professional mediator before initiating any legal action, unless mediation cannot be scheduled before a decision must be made.

2.09 Notice to Relocate Residence. Each party acknowledges that he/she is required to file a Notice of Intent to Relocate if he/she intends to move outside a child's school district, or to a distance of more than twenty (20), in accordance with I.C. 31-17-2.2-1 et seq.

ARTICLE 3
CHILD SUPPORT

3.01 Support. _____ shall pay child support to _____ in the amount of $_____ per week, for the support of _____. A child support worksheet is attached hereto and incorporated by reference herein as Exhibit "A". The amount of support to which the parties have agreed is computed in accordance with the Indiana Child Support Guidelines and Rules ("ICSG"). Child support shall be paid via Income Withholding Order, which ____'s counsel shall prepare and submit to the Court. _____shall pay the Controlled Expenses as defined in the ICSG.

3.02 Health Insurance and Uninsured Healthcare Expenses (current Child Support Guidelines). _____ shall maintain medical and dental insurance coverage on the children so long as they are eligible to be covered as _____'s dependents under _____ employee group coverage. _____ shall pay the first $_____ per calendar year of the child(ren)'s uninsured health care expenses, (or the prorated portion thereof for the remainder of the current year) which shall include medical, dental, ophthalmological, optical, orthodontic, prescription medicine and psychological expenses. For all such expenses which exceed the

annual threshold, each party shall pay his/her Pro Rata Share. (revised Child Support Guidelines) Each party shall pay his/her Pro Rata Share of the children's uninsured healthcare expenses.

The party who pays or incurs an uninsured healthcare expense for a child shall provide documentation thereof to the other party. The other party shall reimburse, or pay directly, as the case may be, his/her Pro Rata Share, within _____ days.

3.03 Extracurricular Activities. Each party shall pay his/her Pro Rata Share of the cost of the children's participation in extracurricular activities, provided the parties have agreed on the child's participation, in advance of a child being registered for an activity. Neither party shall unreasonably withhold consent for a child to participate in an extracurricular activity. There shall be a presumption that a child shall be permitted to participate in school-sponsored activities such as debate, drama, athletics, choir, band, yearbook, etc. The costs of participating in elective school activities such as sports, performing arts and clubs, including the costs of participating in related extracurricular activities, are "Other Extraordinary Expenses" according to the ICSG.

3.04 Life Insurance. Each party shall name the children, in equal shares, or a trust for their benefit, as beneficiary of life insurance, to secure his/her support obligation. The obligation to do so shall continue with respect to each child until the party's obligation of child support and/or educational support has terminated. Father's death benefit shall not be less than $____ per child, and Mother's death benefit shall not be less than $_____ per child. Within sixty (60) days of entry of the Decree, and annually thereafter upon request, each party shall provide to the other documentation of compliance with this Section 3.04.

3.05 Tax Credits. Beginning with the tax year _____, for the purpose of claiming tax credits attributable to the children, each child shall be deemed to be the dependent of either party, as follows: For odd-numbered tax years, _____ shall be deemed to be Wife's dependent and _____ shall be deemed to be Husband's dependent; and for even-numbered tax years, _____ shall be deemed to be Wife's dependent and _____ shall be deemed to be Husband's dependent. _____'s right to claim tax credits for a child is conditioned upon _____ being at least ninety-five percent (95%) current in all child support obligations as of January 31 of the year following the year for which he/she will claim the tax credits. Each party shall, upon request, sign any documents reasonably necessary to substantiate the other's claim to tax credits, including IRS Form 8332.

3.06 Post-High School Education. The parties anticipate and hope that the children will possess the aptitude for and an interest in a post-high school education, and the parties herein affirm their commitment to contribute financially to the cost thereof (not to exceed the cost of a four-year undergraduate degree at a state-supported institution) in proportion to their then-current incomes. At the time each child enters his junior year of high school, the parties shall begin to discuss in good faith that child's higher education and the specific allocation between the parties and the child of the costs thereof. Failing agreement, either party may present this issue to the Court for resolution. There shall be a presumption that the child shall be required to contribute to the cost of his/her post-high school education, and that merit-based scholarships and financial aid shall be applied to the child's share.

3.07 _____ is the custodian of the children's 529 accounts, and _____ shall provide account statements to _____ annually, or in the alternative may provide the username and

password so that _____ can access the statements online. Unless the parties agree otherwise, confirmed in writing, the children's 529 accounts shall be used only for qualified post-high school education expenses.

ARTICLE 4
SPOUSAL MAINTENANCE

4.01 Neither party is disabled. Neither party is the parent of a disabled child. Neither party is entitled to an award of spousal maintenance from the other.

ARTICLE 5
DIVISION OF PROPERTY

5.01 Personal Property. The parties have made a satisfactory division of their furniture and household goods and furnishings. Wife shall have as her sole property all such items in her possession, and Husband shall have as his sole property all such items in his possession. Each party shall have as his/her sole property his/her respective clothing, jewelry, personal items and effects.

5.02 Vehicles. Husband shall have, as his sole property, the _____. Wife shall have, as her sole property, the _____. Each party shall, promptly upon request, sign over vehicle and/or watercraft titles, according to this Section 5.02.

5.03 Marital Residence. The parties own the Marital Residence as tenants by the entireties. Effective with the entry of the Decree, a new interest shall arise, granting to _____ all right, title and interest in and to the Marital Residence, subject to the indebtedness secured thereby, which _____ shall assume and pay and from which _____ shall indemnify and hold _____ harmless. _____ shall within _____ from the entry of the Decree, take all action reasonably necessary to assume or refinance the

indebtedness secured by the Marital Residence, and to obtain _____'s release from liability thereon. _____ shall, promptly upon request, sign a quit-claim deed, conveying to _____ all _____ ownership interest in and to the marital residence.

OR

The Marital Residence shall be sold at its fair market value. From the proceeds of sale, the expenses of sale (including reasonable realtor's commission and repair/maintenance expenses upon which the parties have agreed) shall first be paid. Pending the sale of the Marital Residence, _____ shall have the exclusive right to reside therein. Pending the sale of the Marital Residence, the ownership and occupancy expenses of the Marital Residence shall be paid as follows: _____. At closing of the sale of the Marital Residence, the then-current mortgage indebtedness (not including any delinquent payments which either party was obligated to pay, which delinquent payments shall come entirely out of that party's share of the proceeds and not "off the top") shall be paid. The remaining proceeds of sale shall be distributed as follows:

5.04 Bank Accounts. The parties' bank accounts shall be distributed as follows, and each party shall cooperate in their distribution by promptly executing all documents reasonably necessary to transfer or confirm ownership or close accounts:

a.

All overdraft lines of credit for which the parties are jointly liable shall be closed .

5.05 Life Insurance. Wife shall have as her sole property all term life insurance policy(ies) on her life. Husband shall have as his sole property all term life insurance policy(ies) on his life.

5.06 Payment of Debts. The parties shall pay the debts of the marriage as follows:

a.

b.

c. Each party shall pay and be responsible for any other consumer debts in his/her individual name, including any consumer debts incurred after the filing of the Petition for Dissolution of Marriage.

5.07 Retirement Accounts. The parties' respective retirement accounts shall be divided as follows:

a.

b. **OPTIONAL:** _____ shall receive an interest in and to ____'s _____ IRA ending #xx____. ____'s interest shall be conveyed to her via direct rollover from said account into an account established by ____. This Settlement Agreement is intended to be an IRA Rollover Order such that the transfer from ____'s _____ IRA ending #xx___ into an account established by Wife shall be a non-taxable event. The transfer shall be in the amount of $_____as of _____, plus or minus market force and investment gains and/or losses from _____, to the date of transfer. If _____ requires the execution of any documents other than this _____ in order to effectuate such transfer, each party shall execute all such documents promptly upon request. Absent agreement to the contrary, the transfer to _____ shall be taken, pro rata, from each investment in the account.

5.08 Tax Returns. The parties shall file joint/separate _____ income tax returns. In the event there is a refund, it shall be _____. If taxes are

owed, they shall be paid by _____. (OPTIONAL) If taxes are owed, ____ shall indemnify and hold ____ harmless therefrom, and ____ shall not be required to sign, or authorize the electronic filing of, tax returns without proof of payment by ____.

5.09 Indemnification. For each debt for which a party is responsible, that party shall indemnify and hold the other party harmless. Neither party shall make any additional charges on any account for which the other party has any remaining liability.

5.10 Social Media and Privacy of Information. The parties acknowledge that they have exchanged private financial (and business) information about each other. Each party agrees that he/she shall not disclose or share the financial and business information obtained in this action (whether or not through formal discovery) for purposes other than enforcement of this Agreement and/or consultation with attorneys and other professional advisors.

Each party shall receive his/her respective e-mail address and ownership of social media or other on-line accounts primary used by that respective party. Each party shall cooperate with the other, to take any action necessary to transfer ownership of e-mail addresses and/or on-line accounts accordingly.

Neither party shall access the private information of the other, including without limitation all information or data that is in any way password protected. This prohibition applies to, without limitation, e-mail accounts, social media accounts, credit monitoring accounts, voicemail accounts, bill payment accounts, bank and investment account, computer/phones, etc.

ARTICLE 6
MISCELLANEOUS

6.01 Disclosure. This Agreement is based upon each party's REPRESENTATION and WARRANTY that:

a. He/she has supplied to the other, upon request, complete and accurate financial information;

b. This Agreement specifically provides for all assets of the marriage as defined in the Indiana Code; and

c. He/she, on the date of the filing of the petition for dissolution of marriage, had no interest, legal or equitable, tangible or intangible, direct or indirect, in any asset or thing of value not specifically provided for in this Agreement

6.02 Effective Date and Enforceability. This Agreement has been reached in mediation. This Agreement is binding and enforceable, upon its execution by both parties and their respective counsel. This Agreement will be submitted to the Court for approval. If approved, it will be incorporated into the Decree. If either party attempts to repudiate this Agreement, this Agreement is admissible into evidence in any proceeding to enforce it.

6.03 Voluntary Execution. Each party makes this Agreement FREELY and VOLUNTARILY. Each party acknowledges that he/she has not been the subject or victim of coercion, duress or undue influence. Each party has been represented by counsel of his or her choice in the negotiations leading to this Agreement.

6.04 Entire Agreement. This Agreement is the entire agreement between the parties. Neither party has made or relied upon any promise or representation, whether made in writing or orally, not contained in this Agreement. No such other written or oral promise or representation can in any way vary, add to, or subtract from the terms contained in this Agreement.

6.05 Modification or Waiver. A modification or waiver of any provision of this Agreement shall be effective and enforceable only if:

a. made in writing;

b. signed by both parties;

c. submitted to the Court for approval; and

d. approved by the Court.

6.06 Non-Performance. Failure of either party to insist upon strict performance of any term of this Agreement shall not operate as a waiver of any subsequent default of the same or similar nature.

6.07 Attorney Fees and Litigation Expenses. _____

6.08 Execution of Additional Documents. Each party shall, promptly upon request, execute any and all instruments necessary to carry out the terms and intent of this Agreement.

6.09 Waiver of Beneficiary Status. Absent an express provision in this agreement to the contrary, each party waives any beneficiary interest that he or she may have in any life insurance policies, annuities, brokerage accounts, pay-on-death bank accounts, interests and trusts established by the other party, individual retirement accounts, or other instruments containing a beneficiary designation that are owned, or were established, by the other party. The parties expressly intend this provision to operate as a waiver of beneficiary status, and the right to receive any funds, proceeds, death benefits, or other property interests, pursuant to that beneficiary status even - and especially - in the event that either party fails to remove the other as designated beneficiary of any of the above-referenced property or expectancy interests following the entry of the Decree.

6.10 Transfer of Property. The transferor of any property hereunder, at the time of the transfer, shall supply the transferee with records sufficient to determine the adjusted basis and holding period of the property as of the date of the transfer. In addition, in the case of a transfer of property that carries with it a potential liability for investment tax credit recapture, the transferor shall, at the time of the transfer, supply the transferee with records sufficient to determine the amount and period of such potential liability.

6.11 Interpretation. This Agreement is the product of negotiations between the parties. Neither party (or that party's attorney) is the principal author of its terms. Consequently, this Agreement shall not be construed in favor of or against either party.

6.12 Electronic Signatures. This Agreement may be executed, via electronic or e-mail signatures with the same force and effect of original signatures.

_____	_____
_____	_____
Dated_____	Dated_____

APPROVED AS TO FORM:

By_____	By_____
Attorney for	Attorney for
Attorney No.: _____	Attorney No.: _____

CAPTION

SUMMARY DECREE OF DISSOLUTION OF MARRIAGE

This case is submitted to the Court on the Verified Petition for Dissolution of Marriage ("Petition"), filed on _____ by Petitioner, ____. Petitioner and Respondent, ___, have submitted their Verified Waiver of Final Hearing and Mediated Final Settlement Agreement. The Court, being duly advised, now finds and orders as follows:

The Court further finds as follows:

1. Petitioner is a resident of Indiana, and has been for at least six (6) months prior to and including the date of filing of the Petition.

2. The parties were married on *. Final separation, as defined by statute, occurred on _____.

3. There were * children born of the marriage, namely *, and Wife is not pregnant.

4. The parties' marriage is irretrievably broken.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that:

(A) The existing marital relationship between the parties is irretrievably broken and dissolved, and the parties are restored to the state of unmarried persons;

(B) The parties' Mediated Final Settlement Agreement is APPROVED and made an ORDER of this Court; and

(C) Wife's former name _____ is restored to her.

SO ORDERED & APPROVED ON _____.

_____

Judge, _____ Court #___

Copies to:

Deborah Farmer Smith
dfarmersmith@cgglawfirm.com

PREPARING FOR MEDIATION/SETTLEMENT AGREEMENTS

Attorney Deb Farmer Smith

Cohen Garelick & Glazier, P.C.

HAVE THE FILE PREPARED

- Mediation agreements signed
- Retainer/credit card
- Mediator’s report prepared

IN PERSON VS. ZOOM

- Zoom: email address for everyone
- Different time zones/arrival times
- Hybrid – both sides consent

INFORMATION FROM COUNSEL

- Time constraints
- Other persons present

INFORMATION FROM COUNSEL-CONT'D

- With whom to start
- With what issues to start

BALANCE SHEETS

- Obtain in Excel®
- Obtain in advance
- Ask permission to share

CREATE SHARED BALANCE SHEET

Include everything on each party's balance sheets

Insert each party's values

HELPFUL HINTS

TAX-DEFERRED RETIREMENT ASSETS SEPARATE

COLOR CODING – SAME VALUES, SIMILAR VALUES, ITEMS ON ONLY ONE BALANCE SHEET

Jane Smith v. John Jones
CAUSE NO. 00C01-2210-DN-004000
Date of Marriage: 1-1-20
Date of Filing: 10-1-22

Significant difference in values
Modest difference in values
One one balance sheet only

Mediator's Marital Balance Sheet

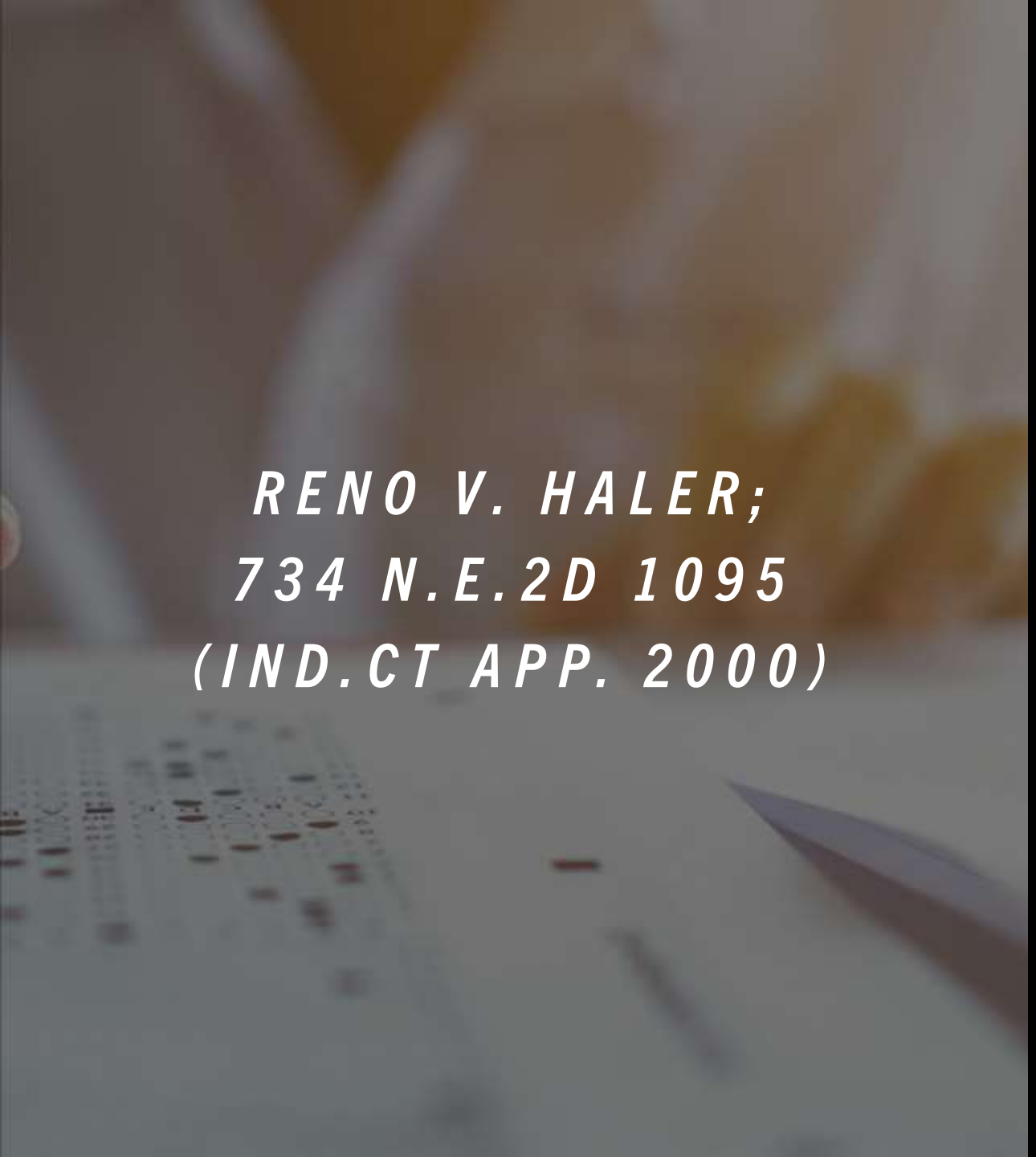
Assets and Debts	W's Value	W's Debt	W's Net	H's Value	H's Debt	H's Net	Notes
Real Estate							
123 Elm Street, Anytown, USA	$ 400,000.00		$ 400,000.00	$ 400,000.00		$ 400,000.00	Appraisal by John Smith
Mortgage on 123 Elm Street		$ (100,000.00)	$ (100,000.00)		$ (90,000.00)	$ (90,000.00)	Wife's balance DOF, Husband's balance current, Husband has made payments
456 Lake Avenue, Smith Lake, IN	$ 250,000.00	$ (50,000.00)	$ 200,000.00	$ 325,000.00	$ (50,000.00)	$ 275,000.00	Appraisals by John Smith and Mike Jones
Personal Property							
Contents of marital home	$ 5,000.00		$ 5,000.00	$ 15,000.00		$ 15,000.00	
Contents of lake home	$ 5,000.00		$ 5,000.00	$ 10,000.00		$ 10,000.00	
2023 Harley Davidson	$ 25,000.00		$ 25,000.00	$ 15,000.00		$ 15,000.00	
2020 Honda Pilot	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	
2020 Chevy Equinox	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	
Wife's jewelry	$ 3,000.00		$ 3,000.00	$ 30,000.00		$ 30,000.00	
Cash and Investment Accounts							
Hometown Bank checking #xx123 (W)	$ 5,000.00		$ 5,000.00	$ 25,000.00		$ 25,000.00	$25K at DOF, Wife has spent on bills and legal fees
Hometown Bank savings #xx456 (W)	$ 10,000.00		$ 10,000.00	$ 10,000.00		$ 10,000.00	
Yourtown Bank checking #xx789 (Jt)	$ 5,000.00		$ 5,000.00	$ 5,000.00		$ 5,000.00	
Yourtown Bank savings #xx001 (Jt)	$ 40,000.00		$ 40,000.00	$ -		$ -	Husband contends this is son's college account
Mytown Bank checking #xx007 (H)	$ 70,000.00		$ 70,000.00	$ -		$ -	Opened post-filing with Husband's bonus, which Wife contends was earned pre-filing
MyMom's Investment Account #xx002 (W)	$ -		$ -	$ 50,000.00		$ 50,000.00	Wife's inheritance
Cryptocurrency (H)	$ 200,000.00		$ 200,000.00	$ 50,000.00		$ 50,000.00	Husband's value DOF, Wife's value current
Retirement, 401(k)'s, IRA's, etc.							
ABC Company 401(k) (W)	$ 30,000.00		$ 30,000.00	$ 33,000.00		$ 33,000.00	Wife's value DOF, Husband's value current
IRA #xx234 (W)	$ 25,000.00		$ 25,000.00	$ 25,000.00		$ 25,000.00	
XYZ Company 401(k) (H)	$ 100,000.00		$ 100,000.00	$ 80,000.00		$ 80,000.00	Husband's value DOF, Wife's value current and includes contribution from Husband's bonus check
IRA #xx678 (H)	$ 25,000.00		$ 25,000.00	$ 25,000.00		$ 25,000.00	
Rollover IRA #xx987 (H)	$ 250,000.00		$ 250,000.00	$ 200,000.00		$ 200,000.00	Wife's value current, Husband's value DOF
Tax Refunds/Liabilities							
2022 tax refund - federal	$ 20,000.00		$ 20,000.00	$ 20,000.00		$ 20,000.00	Deposited into joint checking and spent
2022 tax refund - state	$ 3,000.00		$ 3,000.00	$ 3,000.00		$ 3,000.00	
Liabilities							
Student loans (H)	$ -		$ -	$ (75,000.00)		$ (75,000.00)	Incurred before marriage
American Express (H)		$ (5,000.00)	$ (5,000.00)		$ (5,000.00)	$ (5,000.00)	
Capital One (W)		$ (5,050.00)	$ (5,050.00)		$ (50.00)	$ (50.00)	Wife's attorney fee retainer paid at DOF
Medical bills		$ (25,000.00)	$ (25,000.00)		$ -	$ -	Wife's pre-filing cosmetic surgery
Total Marital Estate	**$ 1,511,000.00**	**$ (185,050.00)**	**$ 1,325,950.00**	**$ 1,286,000.00**	**$ (145,050.00)**	**$ 1,140,950.00**	

PREPARING SETTLEMENT AGREEMENTS

- ADR Rule 2.7(F)(1) – The mediator may prepare “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”

PREPARING SETTLEMENT AGREEMENTS CONT'D

- ADR 2.7(E)(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."



RENO V. HALER; 734 N.E.2D 1095 (IND.CT APP. 2000)

- A mediated agreement need not be the final mediated agreement, it may be a term sheet, if all the terms are included and all parties and counsel sign it.

WHEN SHOULD A SIGNED TERM SHEET BE SUBMITTED TO THE COURT?

NOTES ON MEDIATION TERM SHEET

MORTGAGE NEEDS TO BE REFINANCED

HOME TO BE SOLD

VEHICLE/WATERCRAFT TITLES AND LOANS

NOTES ON MEDIATION TERM SHEET CONT'D

CASH ACCOUNTS

INVESTMENT ACCOUNTS

NOTES ON MEDIATION TERM SHEET CONT'D

- Retirement accounts
- Date of division
- Market gains/losses
- Who prepares QDRO/IRA Transfer Order
- Cash vs. equities

Jane Smith v. John Jones
CAUSE NO. 00C01-2210-DN-004000
Date of Marriage: 1-1-20
Date of Filing: 10-1-22

Mediation Term Sheet

Assets and Debts	To Wife	To Husband	Notes
Real Estate			
123 Elm Street, Anytown, USA	X		Wife to keep home. Husband to sign QC deed. Wife to refinance w/in 120 days, or home to be listed for sale with Jim Doe, and Wife to receive proceeds of sale. Utilities transferred into Wife's name w/in 30 days.
Mortgage on 123 Elm Street	X		Wife to pay all payments timely until Husband is released from liability.
456 Lake Avenue, Smith Lake, IN		X	Husband to keep. Wife to sign QC deed. Wife to remove her clothing and personal items w/in 60 days
Personal Property			
Contents of marital home	X		Husband to have items on attched list.
Contents of lake home		X	
2023 Harley Davidson		X	
2020 Honda Pilot	X		Wife to take over payments as of Decree. All payments to be made timely.
2020 Chevy Equinox	N/A	N/A	To be titled to adult son.
Wife's jewelry	X		Wife to preserve engagement ring for daughter at age 21.
Cash and Investment Accounts			
Hometown Bank checking #xx123 (W)	X		
Hometown Bank savings #xx456 (W)	X		
Yourtown Bank checking #xx789 (Jt)	Half	Half	Account to be closed and split. Neither to write any checks against account. All auto-debits to be transferred to separate accounts w/in 30 days.
Yourtown Bank savings #xx001 (Jt)	See note	See note	Account to remain in joint names, and used only for son's college expenses. Any balance remaining after educational support obligation ends to be divided equally.
Mytown Bank checking #xx007 (H)		X	Husband to keep account, and to pay W $15K from it w/in 10 days of Decree. Wife's name to be removed from account.
MyMom's Investment Account #xx002 (W)	X		Wife's inheritance
Cryptocurrency (H)	Half	Half	Each party to receive half. Wife's half to be all in Bitcoin, transferred to a Coinbase account in Wife's name. Half to be determined, based on the value of all cryptocurrency as of COB the business day prior to transfer.

Jane Smith v. John Jones
CAUSE NO. 00C01-2210-DN-004000
Date of Marriage: 1-1-20
Date of Filing: 10-1-22

Mediation Term Sheet

Assets and Debts	To Wife	To Husband	Notes
Other Terms			
Boilerplate			Standard boilerplate - full disclosure, voluntary execution, reached via mediation, zipper clause, each to have his/her own social media, etc.
Preparation of settlement agreement			Wife's lawyer to prepare, w/in 48 hours, and send to Husband's lawyer. Counsel and mediator to have phone call, w/in 7 days, if disagreement regarding language.
Term sheet			Admissible into evidence, as the parties' agreement, if there is disagreement about settlement agreement language.
Preparation of IRA Transfer Order			Husband's counsel to prepare, if settlement agreement is insufficient.
Automobile titles and QC deeds			Titles to be signed w/in 7 days of request. Each party's counsel to prepare QC deed for the home awarded to his client. QC deeds to be signed w/in 7 days of request.
Education tax credits			Husband to have unless phased out, then Wife to have.
Wife's signature			
Wife's counsel's signature			
Husband's signature			
Husband's counsel's signature			
Mediator's signature			

Jane Smith v. John Jones
CAUSE NO. 00C01-2210-DN-004000
Date of Marriage: 1-1-20
Date of Filing: 10-1-22

Mediation Term Sheet

Assets and Debts	To Wife	To Husband	Notes
Retirement, 401(k)'s, IRA's, etc.			
ABC Company 401(k) (W)	X		
IRA #xx234 (W)	X		
XYZ Company 401(k) (H)		X	
IRA #xx678 (H)		X	
Rollover IRA #xx987 (H)	See note	See note	Wife to have 35%, as of filing date, via IRA transfer order, +/- market gains/losses from filing date to transfer. Each to sing all documents required by Fidelity to effectuate transfer. Each to pay 50% of any expenses related to transfer. To be done w/in 30 days. Husband to have remainder of account.
Tax Refunds/Liabilities			
2022 tax refund - federal	N/A	N/A	Already deposited into joint checking account distributed, above.
2022 tax refund - state	N/A	N/A	Already deposited into joint checking account distributed, above.
Liabilities			Each to return the other party's credit cards, and make no further charges. Any accounts on which the parties are joint obligors shall be paid in full by the responsible party w/in 60 days, and the account closed.
Student loans (H)		X	Husband to pay and hold Wife harmless.
American Express (H)		X	Husband to pay and hold Wife harmless.
Capital One (W)	X		Wife to pay and hold Husband harmless.
Medical bills	X		Wife to pay and hold Husband harmless.

CONCLUDING MEDIATION WITH FINAL AGREEMENT

- The Tentative Agreement Plus Two Rule
- What can be done to shorten this

K I S S (S)

- Keep it Short
- Keep it Simple
- Say it once

DEFINITIONS

- Filing date
- Marriage date
- Decree

DEFINITIONS CONT'D

- Indemnify and hold harmless
- Marital residence
- Other real estate
- Pro Rata Shares


“WORDS ARE THE BUILDING BLOCKS OF THE LAW” – CHIEF JUSTICE JOHN G. ROBERT, JR.

LEGAL WRITING 101

- Sentences, not clauses – 

- Active tense, not passive
- Plain English

NO LEGALESE!

- Is not pregnant, NOT is not now pregnant
- During, NOT during the course of
- Ownership interest, NOT right, title and interest

NO LEGALESE! CONT'D

- Before, NOT prior to
- After, NOT subsequent to
- If, NOT in the event that
- Indiana, NOT the State of Indiana

BOILERPLATE

- Disclosure
- Effective date/enforceability
- Voluntary execution

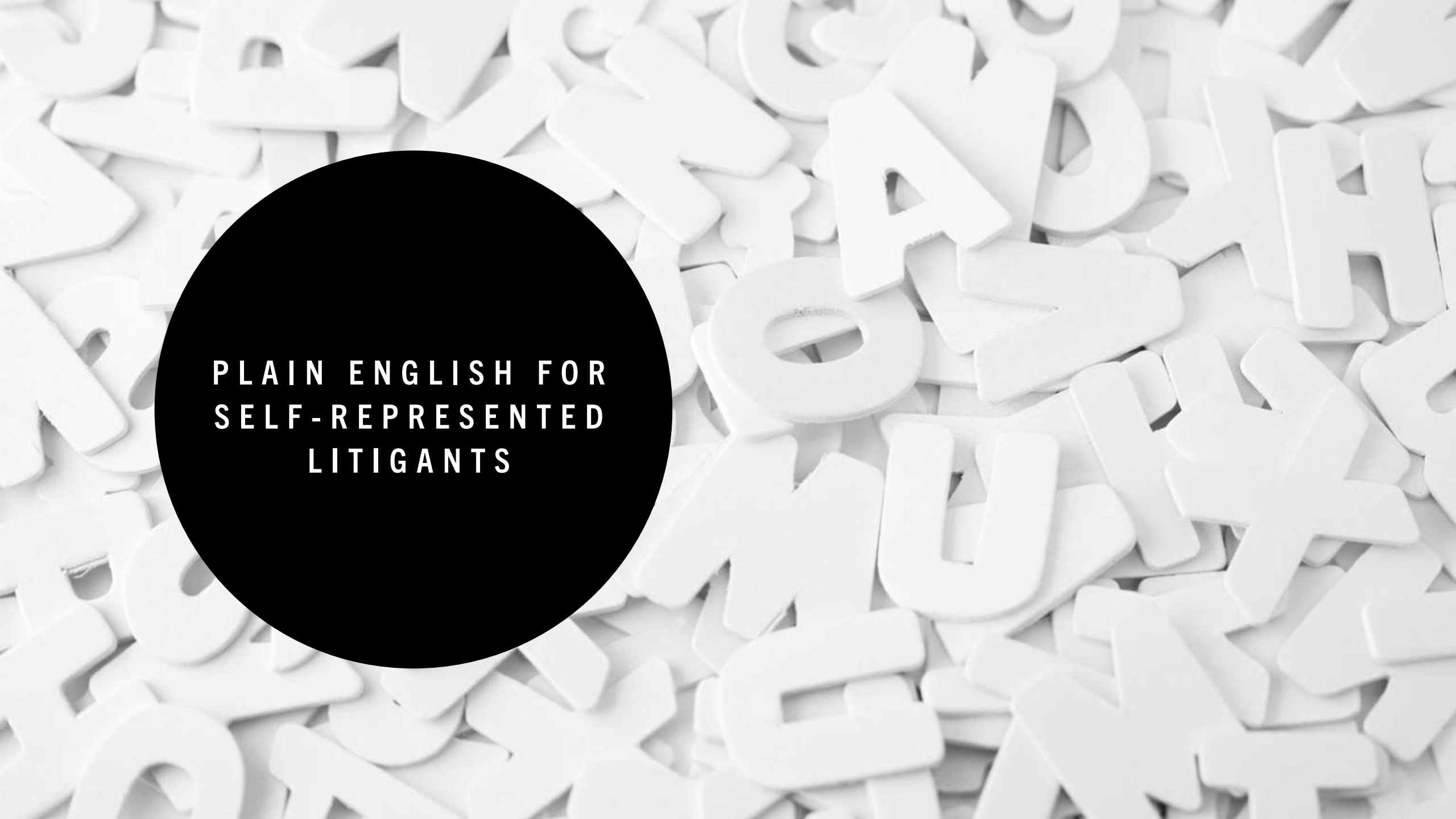
BOILERPLATE CONT'D

Zipper clause

Modification or waiver

WHAT CAN BE OMITTED?

- Execution of additional documents
- Waiver of beneficiary status
- Transfer of property


PLAIN ENGLISH FOR
SELF-REPRESENTED
LITIGANTS

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

Issues Settled. The subject matter of this Agreement is the settlement of all issues which exist between Husband and Wife, attendant upon the dissolution of their marriage, including the following:

(a) Each party's rights to property, regardless of the type of property, and

(b) All claims or causes of action Husband and Wife may have against each other, resulting from their marital relationship or otherwise.

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

Termination of Educational Support Obligations. Each party's obligation to contribute to a child's post-high school education, including the obligation to provide health insurance for the child and to pay the child's uninsured health care expenses, and including the obligation to keep life insurance in effect, shall end when the child receives an undergraduate degree, dies, marries, enlists in the uniformed armed forces, drops out of school, or reaches age ___.

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

Social Media and Privacy of Information. Neither party shall disclose the private financial information of the other party, except to enforce this Agreement or to consult with lawyers or other professionals.

Each party shall receive his/her respective e-mail address and ownership of social media or other on-line accounts primary used by that respective party. Each party shall do whatever is necessary to transfer ownership of e-mail addresses and/or on-line accounts accordingly.

Neither party shall access the private information of the other, including all information or data that is in any way password protected. This prohibition applies to e-mail accounts, social media accounts, credit monitoring accounts, voicemail accounts, bill payment accounts, bank and investment account, computer/phones, etc.

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

Disclosure. Each party promises that he or she has disclosed every asset he/she owns, or has any ownership interest in, and that this Agreement specifically lists all assets and debts which existed on the Filing Date.

Effective Date. This Agreement will be filed with the Court. If approved, it will be incorporated into the Decree and become a Court Order. This Agreement has been reached in mediation, so each party understands that it is a binding contract between them, as soon as each party and the mediator has signed it.

Voluntary Execution. Each party makes this Agreement FREELY and VOLUNTARILY. Each party agrees that no one has coerced or threatened him/her into signing this Agreement.

Entire Agreement. This Agreement is the entire agreement between the parties. There are no "side deals." Neither party has made any promise, that isn't stated in this Agreement, to induce the other party to sign this Agreement.

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

Modification or Waiver. The only way any provision of this Agreement can be changed is by another written agreement, signed by both parties, filed with the Court, and approved by the Court. Verbal agreements do not modify this Agreement.

Non-Performance. If a party fails to comply with any part of this Agreement, and the other party doesn't object at that time, but later there is another failure to comply with this agreement, the other party may still object, and enforce the Agreement.

PLAIN ENGLISH FOR SELF-REPRESENTED LITIGANTS

- Waiver of Beneficiary Status. When the Decree is issued, all beneficiary designations during the marriage are void. This applies to life insurance policies, annuities, brokerage accounts, bank accounts, individual retirement accounts, or anything else that can have a beneficiary designation. If either party wants to designate the other party as a beneficiary of anything, after the divorce, he/she needs to sign a new beneficiary designation, naming the other party, as "my former spouse." Neither party shall try to collect anything he or she is not entitled to according to this agreement, if the other party dies and has not revoked a beneficiary designation that was made during the marriage.
- Counterparts and Electronic Signatures. This Agreement may be signed on separate signature pages, or it may be signed with email or electronic signatures, and this will be the same as "wet" signatures on a single signature page.
-

Section Four

Seven Irrational and Ineffective Beliefs That Parents Bring to Mediation

Dr. Kevin R. Byrd, Ph.D.
Parenting Guidance Services, LLC
Greenwood, Indiana

Section Four

Seven Irrational and Ineffective Beliefs That Parents Bring to Mediation…….. Dr. Kevin R. Byrd, Ph.D.

PowerPoint Presentation

SEVEN IRRATIONAL AND INEFFECTIVE BELIEFS THAT PARENTS BRING TO MEDIATION

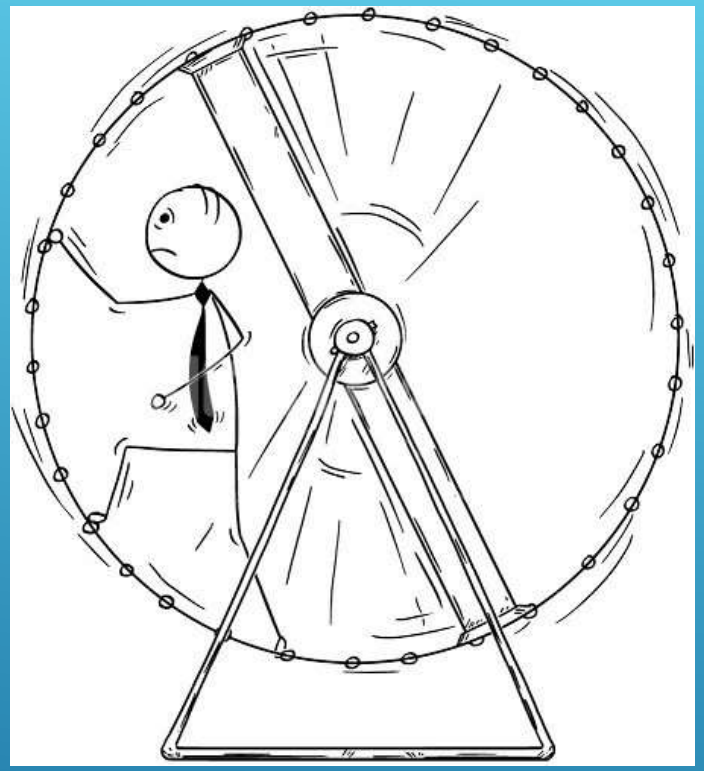
CME for Family Mediators, ICLEF, August 18, 2023

Kevin Byrd, Ph.D., Parenting Guidance Services, LLC

byrdke@gmail.com

WHAT IS IRRATIONAL?

- The only objective person in this photo is sitting in the "high chair" on the left. Try to instill this idea in the parents.
- To the extent a coparent believes that he or she can be objective in a custody or parenting time dispute, that person is likely being guided by irrational beliefs. This is often seen when a parent eschews the recommendations of experienced professionals - psychologists, counselors, PCs, GALs, mediators, their own attorney, and even judicial officers.
- There is a reason why therapists cannot treat family members – they cannot be objective.



INEFFECTIVENESS

We all know the colloquial definition of insanity: expecting different results from the same behavior. I have said many times at this conference in previous years that when this pattern emerges, we are often confronting mini-personality disorders (the symptoms only emerge in relation to the other parent).

Look at the Mycase record or similar database. If the court has been unable to stabilize the family system after several iterations of orders, motions, and petitions, then the parents' rigid, irrational, and ineffective belief systems are likely preventing improvement in the coparent relationship. Usually, each parent has his or her own set of dysfunctional beliefs.

- Example 1
  - Parent 1: Mary and I had a great time at the amusement park.
  - Parent 2: You will not be able to buy her love with amusements.
- Example 2
  - Parent 1: I will be about 15 minutes late to pick up John.
  - Parent 2: You never prioritize your parenting time.
- Example 3
  - Parent 1: Mary helped me with lawn care and I paid her $10.
  - Parent 2: You did not want to pay a professional so you exploited our daughter.

1. ASSUMING THE WORST. IF I FEEL SUSPICIOUS OF MY EX'S PARENTING BEHAVIOR, THEN HER INTENTIONS MUST BE BAD.

- Interventions
  - I can see how you might see things going in that direction. However, let's take a look at the (comment, situation) at face value. (Extract it from the history of the relationship). If you forget the source, does the statement sound (intimidating, aggressive, et cetera)?
  - Do you generally respond better to a peer who provides support or one who is always critical? Why would that be different with an ex?

1. ASSUMING THE WORST. IF I FEEL SUSPICIOUS OF MY EX'S PARENTING BEHAVIOR, THEN HER INTENTIONS MUST BE BAD.

- Example 1
  - Parent 1: How did Mary skin her knee?
  - Parent 2: Its none of your business, I took care of everything.
- Example 2
  - Parent 1: What did the doctor recommend for John's infection?
  - Parent 2: I have legal custody and therefore there is no reason to share that with you.
- Example 3
  - Parent 1: How did Mary do at soccer practice?
  - Parent 2: Why don't you ask her yourself?

2. IF I SHARE INFORMATION ABOUT MY CHILDCARE WITH MY EX, HE WILL USE IT AGAINST ME. WHAT HAPPENS AT MY HOUSE STAYS AT MY HOUSE.

- Interventions:
  - I can understand your need to keep Mr. Jones at a distance. Is that also meeting John's needs?
  - What would be more helpful to Mary in building healthy relationships with both parents – when both parents share the same information about her or if each parent has only half of that information?

2. IF I SHARE INFORMATION ABOUT MY CHILDCARE WITH MY EX, HE WILL USE IT AGAINST ME. WHAT HAPPENS AT MY HOUSE STAYS AT MY HOUSE.

- Example 1
  - Parent 1: Can we trade weekends next April? I have a conference out of town when I am supposed to have John.
  - Parent 2: No way, we need to stick to the IPTG.
- Example 2
  - Parent 1: We disagree about whether Mary has a peanut allergy. Can we ask her doctor to weigh in?
  - Parent 2: No. I have researched online and she definitely has a peanut allergy.
- Example 3:
  - Parent 1: Could you pick up some of John's favorite cereal on the way to the exchange point? I cannot get away from the office early.
  - Parent 2: No. You have to learn to be more responsible.

3. I CANNOT LET ANY CONFLICT GO OR DO ANY FAVORS FOR MY EX, NO MATTER HOW TRIVIAL, OR SHE WILL LEARN THAT SHE CAN TAKE ADVANTAGE OF ME

- Interventions
  - I appreciate that you want the rules of coparenting to be strict. However, showing some goodwill and flexibility on occasion will create a better atmosphere for Mary.
  - I am concerned that you will use up all your energy and strength on small matters such as who buys the gym shorts.

3. I CANNOT LET ANY CONFLICT GO, OR DO ANY FAVORS FOR MY EX, NO MATTER HOW TRIVIAL, OR SHE WILL LEARN THAT SHE CAN TAKE ADVANTAGE OF ME

- Example 1
  - Parent 1: Since, according to the IPTG, you have John three weekends in a row, could I take him to dinner once during one of those weekends?
  - Parent 2: There you go again – trying to reduce my parenting time.
- Example 2
  - Parent 1: Mary has a cough.
  - Parent 2: We share legal custody, so I want to be informed about Mary's cough every hour. If you do not do so, I will file a motion for contempt.
- Example 3
  - Parent 1: My sister supervised John while I went to get groceries.
  - Parent 2: I am informing my attorney that you denied me an opportunity for additional parenting time.

4. IT IS ALWAYS IN MY CHILD'S BEST INTEREST TO FIGHT FOR MY "PARENTAL RIGHTS"- BROADLY DEFINED.

- Interventions
  - Your rights are certainly important and should always be taken into consideration. At the same time, we must always bear in mind that every conflict and battle between you and you ex creates a toxic environment for raising a child.
  - Perhaps we can find a way for you to feel your rights as a parent are being respected without having to “fight” for them.

4. IT IS ALWAYS IN MY CHILD’S BEST INTEREST TO FIGHT FOR MY “PARENTAL RIGHTS”- BROADLY DEFINED.

- Example 1
  - Parent 1: I will give you John's medications at the exchange.
  - Parent 2: I do not want to get near you during the exchange.
- Example 2
  - Parent 1: There are security cameras at the exchange point. When we get there can you tell me how Mary behaved on the way?
  - Parent 2: You will try to bully me into concessions regarding make-up parenting time.
- Example 3
  - Parent 1: I will say "hi" to you at John's baseball game just to be civil.
  - Parent 2: No. The last time you did that you took my greeting as an invitation to sit near each other.

5. IF I TALK TO MY EX DURING EXCHANGES OR EXTRACURRICULAR ACTIVITIES, IT WILL LEAD TO AN ARGUMENT OR SHE WILL TRY TO INTIMIDATE ME.

- Interventions
  - You are right, an interaction could lead to an argument. But would that not depend on the topics and the manner in which you discuss them? Could some ground rules be set beforehand?
  - How would it make you child feel to see her parents interacting casually?
  - What message does it send to the child that his parents cannot talk to one another, even briefly?

5. IF I TALK TO MY EX DURING EXCHANGES OR EXTRACURRICULAR ACTIVITIES, IT WILL LEAD TO AN ARGUMENT OR SHE WILL TRY TO INTIMIDATE ME.

- Example 1
  - Parent 1: Can we talk about Mary's grades?
  - Parent 2: No. We cannot talk for two minutes without fighting.
- Example 2
  - Parent 1: Can I exercise some make-up time with John since he was sick last week?
  - Parent 2: No, the last time you had make-up time you returned him half an hour late.
- Example 3
  - Parent 1: I would like to use Our Family Wizard for communicating about Mary.
  - Parent 2: No. During the divorce you said mean and hurtful things with email.

6. THE BEST PREDICTOR OF FUTURE BEHAVIOR IS PAST BEHAVIOR. (IN MOST CASES, THE BEST PREDICTOR OF FUTURE BEHAVIOR IS *INTENTION*).

- Intervention
  - I can see where your expectations are realistic given the past. However, circumstances have changed and therefore your ex's behavior is also likely to change. It is human nature to overlook the fact that circumstances dictate behavior more than character.
  - Let's find out how your ex *intends* to respond to the situation in question and then you will have more information on which to base your choices.

6. THE BEST PREDICTOR OF FUTURE BEHAVIOR IS PAST BEHAVIOR. (IN MOST CASES, THE BEST PREDICTOR OF FUTURE BEHAVIOR IS EITHER *INTENTION* OR *CURRENT CIRCUMSTANCES*).

- Example 1
  - Parent 1: I think it would be better if you were out of the room when Mary and I are video chatting.
  - Parent 2: There you go again, blaming me for your inability to communicate with your daughter.
- Example 2
  - Parent 1: John is sad that you will not allow him to sign up for baseball.
  - Parent 2: It is your fault for getting him interested in it to begin with.
- Example 3
  - Parent 1: It is not helpful when you use name-calling and accusations when we disagree.
  - Parent 2: It is the only way I can get through to you. Besides, I am only expressing how I feel – I have a right to do that.

7. IF I EXAMINE MY OWN CONTRIBUTION TO THE COPARENTING PROBLEMS, IT WILL WEAKEN MY RESOLVE TO "WIN" IN COURT.

- Intervention
  - When you are in litigation or headed in that direction, it is very hard to take an honest look at how your behavior is affecting the situation.
  - If you can stop thinking in terms of winning or losing, it will help you see more options and keep Mary's best interests in mind.

7. IF I EXAMINE MY OWN CONTRIBUTION TO THE COPARENTING PROBLEMS, IT WILL WEAKEN MY RESOLVE TO "WIN" IN COURT.

SUMMARY

- State at the outset that it is virtually impossible for parents to be objective about child care in a divorce, however, the struggle to prove one's perspective "correct" is toxic to the system, especially the children.
- When behavior appears to stem from an irrational belief, identify it and validate why it may appear to be true.
- Gently challenge the belief by providing alternative versions of reality. Do not declare the belief "wrong."

Section Five

Collaborative Practice
Resolving Disputes Respectfully

Suzanne M. Wagner
Haller & Colvin PC
Fort Wayne, Indiana

Amy L. Stewart
Mallor Grodner
Indianapolis, Indiana

Section Five

Collaborative Practice
Resolving Disputes Respectfully…….. Suzanne M. Wagner
Amy L. Stewart

COLLABORATIVE PRACTICE

Resolving Disputes Respectfully

COLLABORATIVE PRACTICE:
A Better Way to Separate

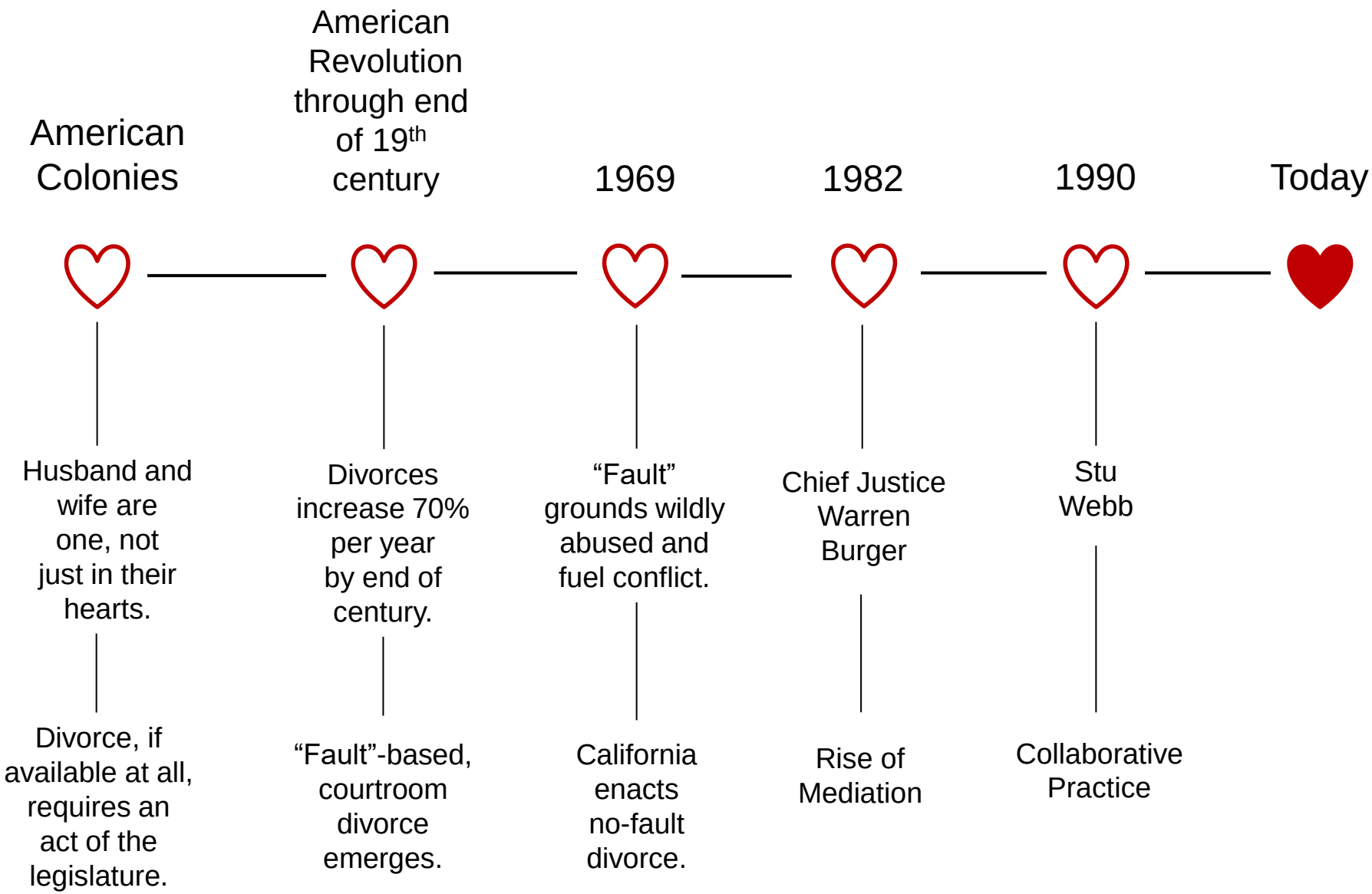
Presented by:

Suzanne M. Wagner

Haller Colvin PC, Fort Wayne

Amy L. Stewart

Mallor Grodner LLP, Indianapolis


American Colonies
American Revolution through end of 19th century
1969
1982
1990
Today
Husband and wife are one, not just in their hearts.
Divorce, if available at all, requires an act of the legislature.
Divorces increase 70% per year by end of century.
“Fault”-based, courtroom divorce emerges.
“Fault” grounds wildly abused and fuel conflict.
California enacts no-fault divorce.
Chief Justice Warren Burger
Rise of Mediation
Stu Webb
Collaborative Practice

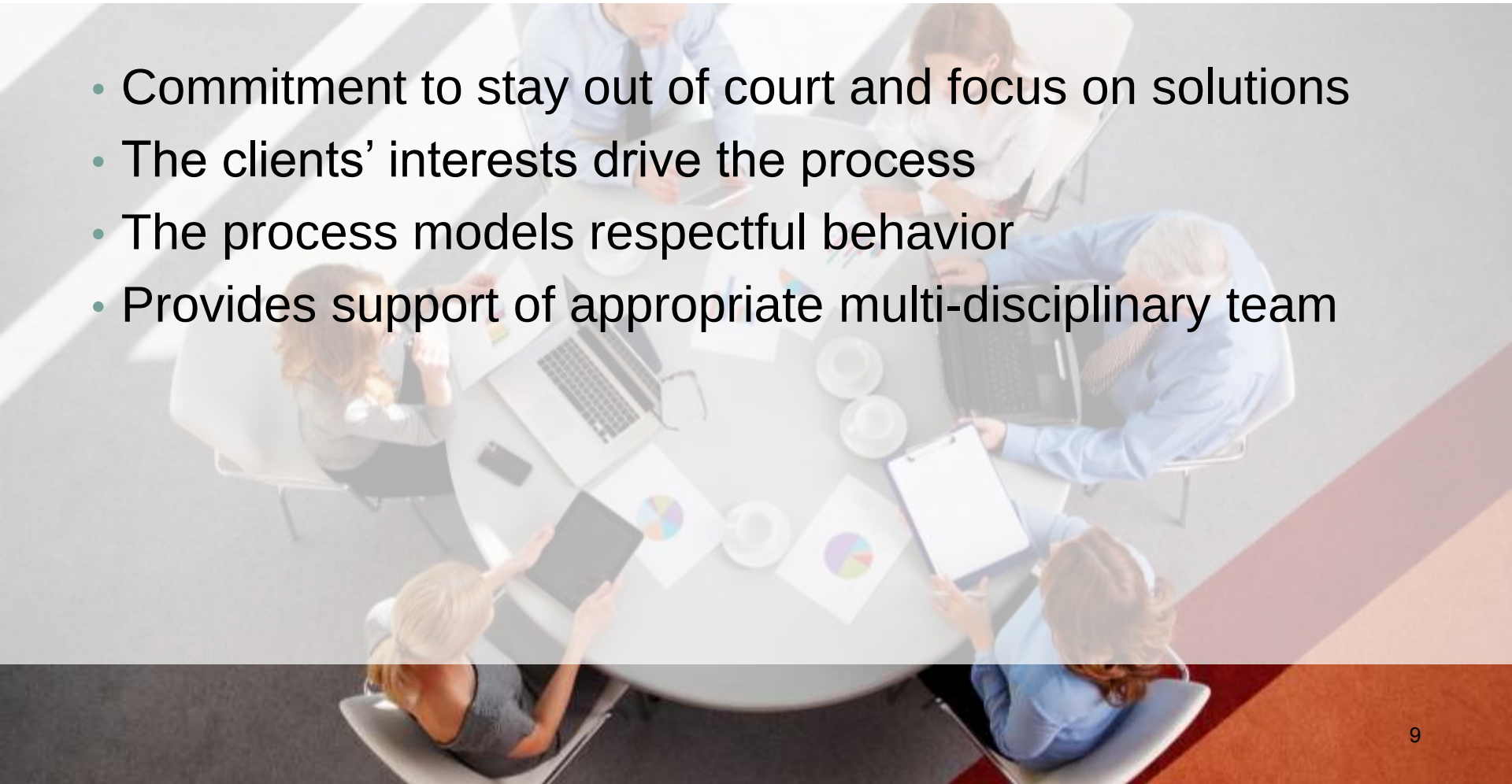
CONFLICT RESOLUTION OPTIONS: KITCHEN TABLE

CONFLICT RESOLUTION OPTIONS: ATTORNEY SETTLEMENT

CONFLICT RESOLUTION OPTIONS: MEDIATION

CONFLICT RESOLUTION OPTIONS: COURT

CONFLICT RESOLUTION OPTIONS: COLLABORATIVE PRACTICE



- Commitment to stay out of court and focus on solutions
- The clients' interests drive the process
- The process models respectful behavior
- Provides support of appropriate multi-disciplinary team

DIVORCE PROCESS: A COMPARISON

First meeting with attorney

TRADITIONAL

- Preliminary Hearing
- Discovery
- Custody Evaluation
- Court-ordered mediation
- Final hearing

COLLABORATIVE

- Form the team
- Discover and develop clients' interests
- Clients problem-solve with neutral family specialist and financial professional
- Team meetings focused on clients' interests
- Final meeting/agreement signed

DISTINGUISHING FEATURES

- Divorce is a breach in social fabric. Collaborative process alone attends to and attempts recognition and repair.

- Collaborative process redefines what it means to win and lose (i.e., winning together)

- Only process where experts in each field are reliably involved in supporting and guiding the couple in the process

DISTINGUISHING FEATURES

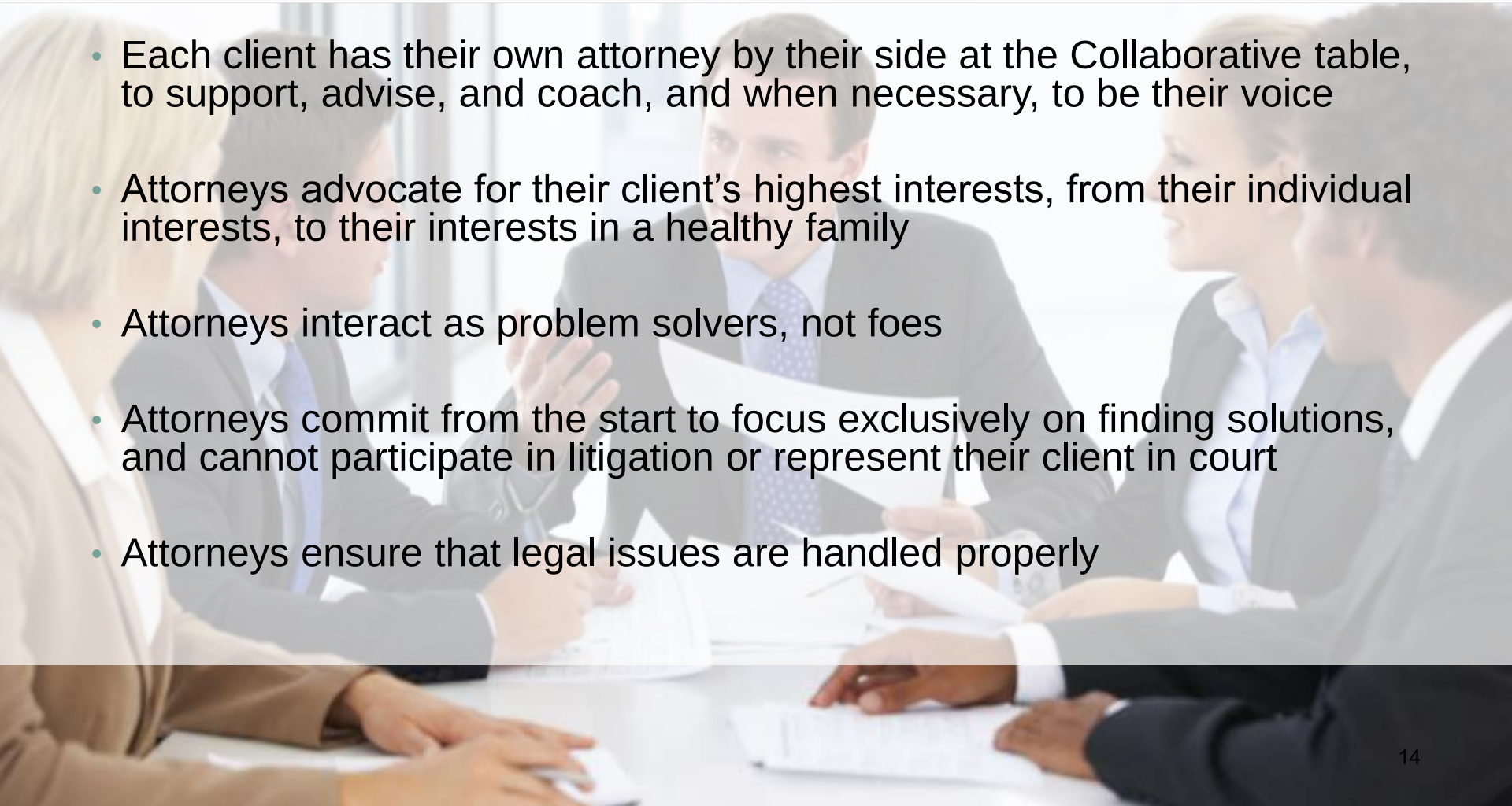
- Collaborative process benefits children of divorcing parents
  - Parents model a healthier, more prosocial form of addressing conflicts
  - More likely to be in the middle of a loving solution rather than an ongoing conflict
  - More likely to continue to maintain a relationship with both parents long-term
  - Reduced likelihood of ongoing distress from future costly court battles

MEET THE TEAM

COLLABORATIVE

PRACTICE

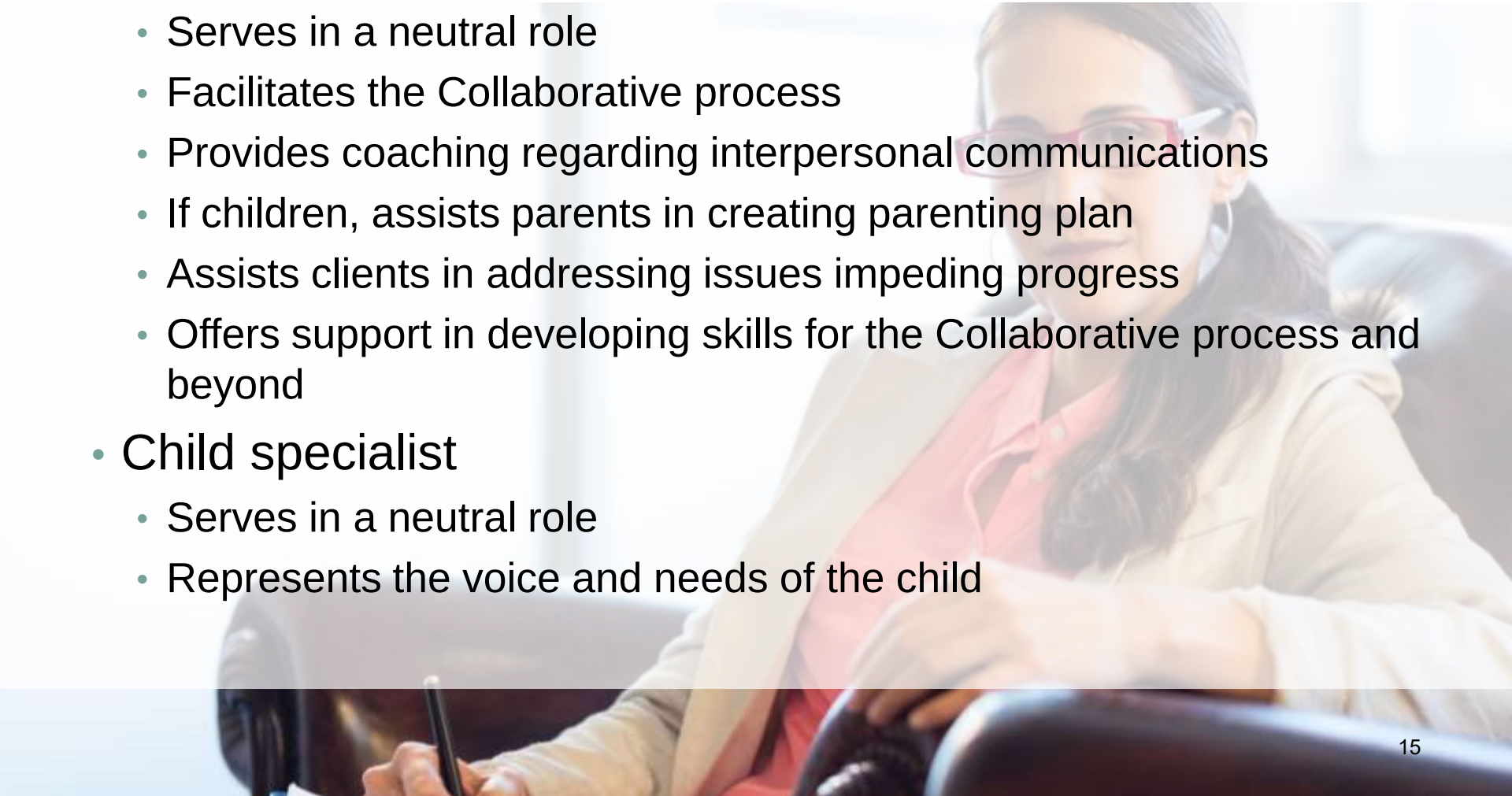
ATTORNEYS



- Each client has their own attorney by their side at the Collaborative table, to support, advise, and coach, and when necessary, to be their voice
- Attorneys advocate for their client's highest interests, from their individual interests, to their interests in a healthy family
- Attorneys interact as problem solvers, not foes
- Attorneys commit from the start to focus exclusively on finding solutions, and cannot participate in litigation or represent their client in court
- Attorneys ensure that legal issues are handled properly

MENTAL HEALTH PROFESSIONALS

- Family specialist
  - Serves in a neutral role
  - Facilitates the Collaborative process
  - Provides coaching regarding interpersonal communications
  - If children, assists parents in creating parenting plan
  - Assists clients in addressing issues impeding progress
  - Offers support in developing skills for the Collaborative process and beyond
- Child specialist
  - Serves in a neutral role
  - Represents the voice and needs of the child



FINANCIAL PROFESSIONALS

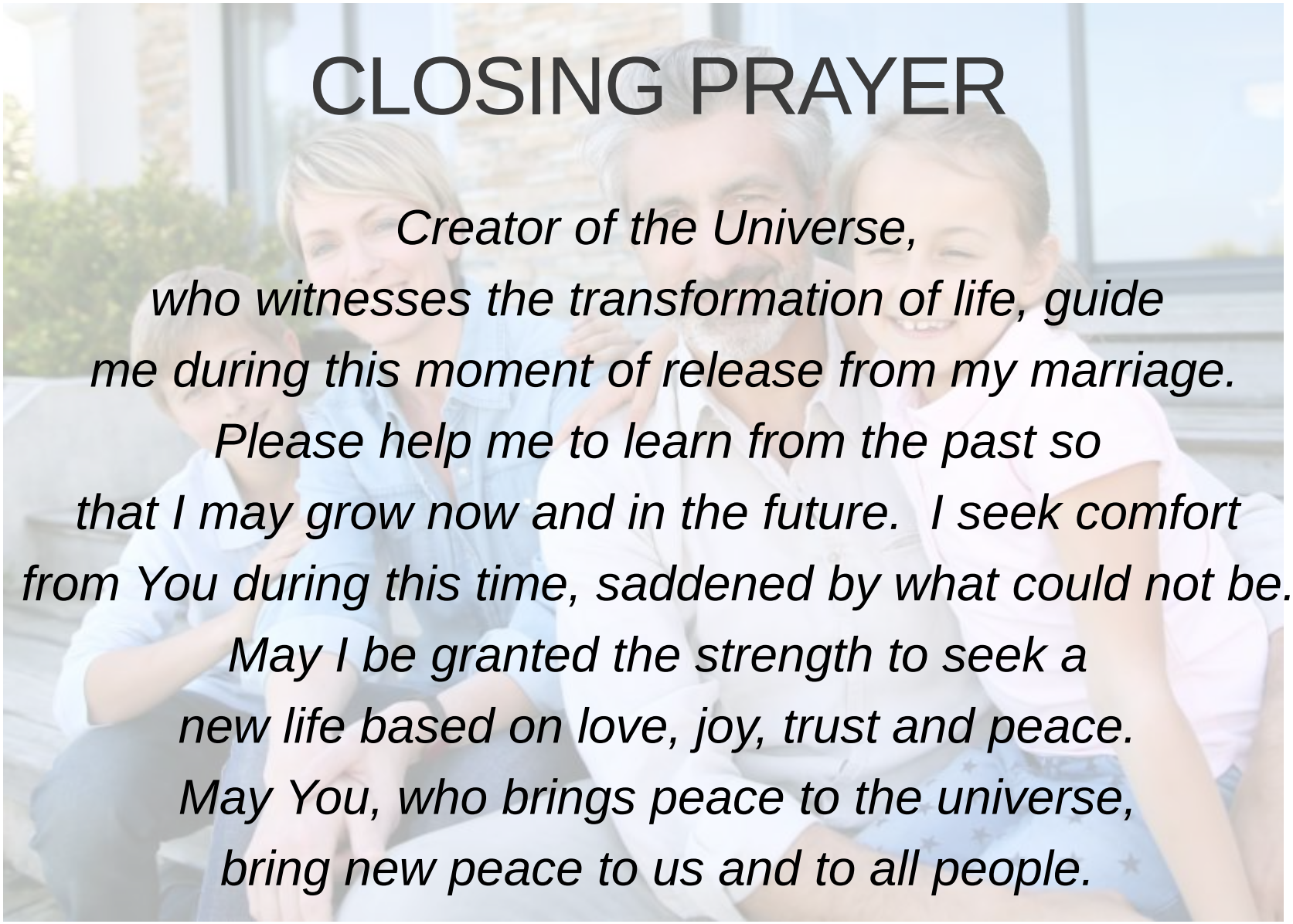
- Financial Specialist
  - Serves in a neutral role
  - Facilitates gathering and synthesis of financial information
  - Supports couple in developing creative financial options, unfettered by the limitations of litigation, with the goal of creating optimal “win/win” versus “winner take all” solutions
  - Helps the couple understand current and future impact of financial decisions
  - Requires knowledge in tax and financial planning; relies heavily on soft skills, including communication, listening, and teamwork

QUALIFICATIONS

- Completion of Introductory Collaborative Practice training meeting International Academy of Collaborative Professionals (IACP) standards
- At least one 30-hour training in client-centered facilitative conflict resolution (such as mediation training)
- Additional training (varies by profession) in interest-based negotiation, communication, coaching, advanced Collaborative Practice or mediation, etc.
- Adherence to IACP Standards and Ethics
- Additional credentials, licensure, and training as appropriate to individual profession
- Commitment

WHY DO THIS WORK?

- Desire to have positive impact on families and future generations
- Improved client experience and outcomes
- Diversify professional practice
- Quality of life and practice
- Personal and professional learning and growth
- Interest in working within supportive professional team
- Reduced accounts receivable



CLOSING PRAYER

Creator of the Universe,
who witnesses the transformation of life, guide
me during this moment of release from my marriage.
Please help me to learn from the past so
that I may grow now and in the future. I seek comfort
from You during this time, saddened by what could not be.
May I be granted the strength to seek a
new life based on love, joy, trust and peace.
May You, who brings peace to the universe,
bring new peace to us and to all people.

And If You're Ready For More . .

- Get all the training you can
- Inform all clients of all process options
- It's a paradigm shift for everyone
- Learn about interest-based negotiation
- Understand the value of the team and the neutral professionals
- It's not just for kumbaya cases – or all cases
- Provides better experiences and outcomes – not shorter or cheaper divorces
- Professionals control the process – clients control the outcomes
- All impasse is emotional
- When the content gets rough, focus on the process
- Lends itself well to virtual format
- Be committed

RESOURCES

International Academy of Collaborative Professionals
www.collaborativepractice.com

Bloomington Association of Collaborative Professional, Inc.
www.bloomingtoncollaborative.org

Central Indiana Association of Collaborative Professionals
www.collaborative-divorce.org

Collaborative Solutions, Inc.
www.collaborativesolutionsindiana.com

CLIENT QUESTIONNAIRE
(from The Collaborative Way to Divorce, by Stuart Webb and Ronald Ousky)

	(1) Strongly Agree	(2) Disagree	(3) Neutral	(4) Agree	(5) Strongly Agree
My ability to achieve a successful outcome in the divorce primarily will depend on the decisions I make during the process	☐	☐	☐	☐	☐
In order to achieve my most important goals, I am willing to let go of some smaller short-term issues, even though it may be very hard to do so	☐	☐	☐	☐	☐
I am capable of making the emotional commitment necessary to achieve the best possible outcome	☐	☐	☐	☐	☐
I am not afraid of or intimidated by my spouse	☐	☐	☐	☐	☐
I believe it is possible for my spouse and me to restore enough trust in each other to achieve a successful outcome	☐	☐	☐	☐	☐
I am willing to commit myself fully to resolving the issues through the collaborative process by working toward common interests rather than simply arguing in favor of my positions	☐	☐	☐	☐	☐
It is important to me that my spouse and I maintain a respectful and effective relationship after the divorce	☐	☐	☐	☐	☐
I have accepted the fact that this divorce is going to happen	☐	☐	☐	☐	☐
I believe that it is very important that our children maintain a strong, healthy relationship with both parents	☐	☐	☐	☐	☐

COLLABORATIVE COMMITMENTS

GOOD FAITH

Always be honest and forthright in your dealings with the other participants in the process.

Treat the other participants with respect. Do not demean, disparage or undermine the other person, whether in the course of collaboration or outside of it.

Accept responsibility for your actions. Be open to suggestions about how to alter behavior that may not be consistent with collaboration. Make known any apologies you need to make for any actions you have taken which have hindered progress toward shared goals.

If another participant expresses an apology and you accept it, assure them that it will not be brought up again, used against that person, or allowed to remain as an impediment to reaching a resolution.

Be true to your word. Realize that while people may sometimes need to reevaluate matters which have been discussed tentatively, once you have given your word you risk losing the trust of the other participants if you go back on it. Appreciate that the collaborative attorneys' word to each other is "their bond" and that your attorney will likely be placed in a difficult position if you are not willing to honor what you have agreed to.

Once an agreement is reached, cooperate in a full and prompt fashion in taking all actions which might be needed to carry out the agreement. If any participant wants a verbal agreement documented in writing and signed, accept that choice and sign the agreement.

COMMUNICATION

Listen actively. Wait until that person has finished expressing himself or herself and try to avoid interrupting. Strive to really understand the person speaking and what they are trying to communicate.

When expressing yourself, address others in a courteous and respectful manner.

Consider your choice of words, tone of voice and body language.
Speak for yourself. Use "I" statements. Do not assume what someone thinks or feels, speak for them, or attempt to read their mind. Let them speak for themselves.

Explain yourself and what the other participants in the process need to know about you to help you be the best participant you can be in the process.

PREPARATION

Be familiar with the agenda for collaborative conferences. Honestly consider whatever your true interests might be, as relevant to issues which are scheduled to be discussed, prior to the collaborative conference.

Come to collaborative conferences with any assignments you were responsible for completed. If you are not able to complete an assignment and that will undermine the ability to proceed effectively, advise the other participants prior to the conference.

Bring your calendar to collaborative conferences so that additional conferences can be scheduled if needed.

FOCUS OF NEGOTIATION

Focus on the future and on resolving conflict, and avoid unnecessary discussions of the past.

Avoid attempts to fix blame, find fault, or render judgment. Avoid language which is critical, accusatory, sarcastic or inflammatory. Attack the problem at hand and not each other.

Strive to always consider and keep in mind both your interests and those of the other party in seeking solutions. Be steadfast in asserting your interests, but remain mindful of the interests of the other party. Be open-minded in seeking creative solutions which meet both of your interests and represent the "win-win" outcome.

Commit to developing the fullest possible range of choices and alternatives. Recognize that the process is enhanced by doing so.

Remain focused on the shared goals you identified when selecting the collaborative process. Measure your conduct throughout the process by whether or not that conduct is effective in moving toward those goals.

PACE & TIMING

Make the process a priority. Be willing to commit the time to meet regularly. Make whatever arrangements may be required to participate in collaborative conferences and complete any assignments you agree to complete.

Be patient. Delays in the process are not uncommon even with everyone acting in good faith.

Pull together. Remember that you may not be at identical places when it comes to accepting emotionally what is occurring. Recognize that in order for the process to work,

each participant must be prepared to allow meetings to proceed at the pace of the slowest participant, so long as that person is attempting to participate in good faith.

CONDUCT OF COLLABORATIVE CONFERENCES

Listen carefully to the agenda and shared goals of each conference, and act to further those shared goals.

Ensure that the only persons present for collaborative conferences are the parties and collaborative professionals, and such other collaborative team members or others who everyone has agreed in advance will participate.

Be familiar with time constraints and commit to being available at the times agreed upon.

If things are not working for you or you do not understand something and need advice, ask to take a break.

Avoid stating positions. Attempt to express yourself in terms of your interests.

If at any time you feel overwhelmed by anger, grief, fear or other difficult emotions during the process, commit to requesting that everyone take a brief break or "time out" to allow time for you to compose yourself. Agree that all other participants have the same right, and do not attempt to communicate with anyone who needs to take a break.

When a final agreement is ready to be consummated, be willing to participate in a collaborative conference at which necessary documents are signed and the significance of the occasion is memorialized by means of a ritual that the parties would agree will allow both of them the most comfort and peace about the choices that have been made. Celebrate the achievement and the potential for the collaborative experience to be transformative.

COLLABORATIVE PRACTICE GROUND RULES

1. Attack the problem and concern at hand. Do not attack each other.

2. Avoid taking positions; rather, express yourself in terms of your own needs and interests and the outcomes you would like to realize.

3. Work for what you believe is the most constructive and acceptable agreement for both of you and for your family.

4. During the group meetings with your team, remember the following:

    a) Do not interrupt when another is speaking. You will have a full and complete opportunity to speak on every issue presented for discussion.

    b) Do not use language that blames, judges, or finds fault with the other. Use noninflammatory words. Be respectful of others.

    c) Speak only for yourself and not for the other. Make "I" statements. Use each other's first name and avoid "he" or "she."

    d) If you share a complaint, raise it as your concern and follow it up with a constructive suggestion as to how it might be resolved.

    e) If something is not working for you, please tell a team member so your concern can be addressed.

    f) Listen carefully and try to understand what the other is saying without being judgmental about the person or the message.

    g) Talk with a team member about anything you do not understand. Your team can provide clarification for you.

5. Be willing to commit the time required to meet regularly. Be prepared for each meeting.

6. Be patient – the process takes time, even with everyone acting in good faith.

COLLABORATIVE PRACTICE PARTICIPATION AGREEMENT

Among:

_____, Participant – Husband/Father

_____, Participant – Wife/Mother

_____, Attorney for Husband

_____, Attorney for Wife

_____, Neutral Family Specialist

_____, Neutral Financial Specialist

1.0 GOALS

1.1 We, the Participants, believe that it is in our best interests and the best interests of our minor children to reach an agreement through the Collaborative process instead of through the litigation process.

1.2 We agree to use the Collaborative process to resolve our issues and differences. Collaborative Practice is based upon:

- honesty;
- satisfying both of our interests;
- cooperation;
- integrity;
- professionalism;
- dignity;
- respect; and
- candor.

1.3 Collaborative Practice focuses on our **future** well-being and the future well-being of our children.

1.4 Collaborative Practice does **not** rely on Court-imposed solutions.

1.5 Our goals are:

- to resolve our differences in the best interests of our children;
- to eliminate the negative economic, social, and emotional consequences of litigation; and
- to find solutions that are acceptable to both of us.

2.0 WE WILL NOT GO TO COURT

2.1 **Out-of-Court**. We commit ourselves to settling this case without going to Court.

2.2 **Disclosure**. We agree to give full and complete disclosure of all information whether requested or not. Any request for disclosure of information will be made informally. We will provide this information promptly.

We acknowledge that by using the Collaborative process we are giving up certain investigative procedures and methods that would be available to us in the litigation process. We give up these measures with the specific understanding that we will make full and fair disclosure of all assets, income, debts, and other information necessary for a fair settlement. Participation in the Collaborative Practice process, and the settlement reached, is based upon the assumption that we have acted in good faith and have provided complete and accurate information to the best of our ability. We may be required to sign a sworn statement containing a full and fair disclosure of our incomes, assets, and debts.

2.3 **Settlement Conferences**. We agree to engage in informal discussions and conferences to settle all issues and to rely on the process of interest-based negotiation, as opposed to positional bargaining. All communication during settlement meetings will focus on the property, financial, and parenting issues involved in the dissolution of our marriage and the constructive resolution of those issues. We are free to discuss issues related to the dissolution of our marriage with each other outside of the settlement meetings, if we both agree and are comfortable doing so. We also are free to insist that these discussions be reserved for the settlement meetings where our professional team is present.

Each of us promises not to spring discussions on the other in unscheduled telephone calls or in surprise conversations.

We understand and acknowledge that the costs for settlement meetings are substantial and require everyone's cooperation to make the best possible use of available resources. To achieve this goal, we agree not to engage in unnecessary discussions of past events.

To further the development of healthy, constructive resolution of family conflict, we agree, with advance notice, to allow other professionals the opportunity to observe our settlement conferences, in order to support their learning regarding the Collaborative process. However, we understand that any such professional who is not a member of our professional team will only observe silently and will not participate in our settlement conferences and that no more than one such observer will attend any single settlement conference.

2.4 **Communication**. We acknowledge that inappropriate communications regarding these matters can be harmful to our children. Communication with our children regarding these matters will occur only if it is appropriate and done by mutual agreement or with the advice of our professional team. We specifically agree that our children will not be included in any discussion regarding these matters except as described in this Agreement.

3.0 CAUTIONS

We understand and acknowledge the following:

3.1 **Commitment**. There is no guarantee that we will successfully resolve our differences using the Collaborative Practice process. Success is primarily dependent upon our commitment to the process. We also understand that this process cannot eliminate concerns about any disharmony, distrust, or irreconcilable differences that have led to the dissolution of our marriage.

3.2 **Legal Issues**. The Collaborative Practice process is designed to resolve the following legal issues:

- Parenting plans;
- Financial support of our children, including health care and child care costs, if any;
- Insurance (health, life);
- Spousal maintenance, if any;
- Division of assets and debts;

- Professionals' fees and costs;
- and other issues we may agree to address.

This process is not designed to address therapeutic or psychological issues. When these or other nonlegal issues arise, our team may refer us to appropriate experts or consultants.

3.3 **Attorney Role**. Although we pledge to be respectful and to negotiate in an interest-based manner, we each are entitled to assert our respective interests, and our attorneys will help us to do this in a productive manner. We understand that our attorneys each have a professional duty to represent his or her own client diligently and that he/she is not the attorney for the other spouse, even though our attorneys share a commitment to the Collaborative process.

3.4 **Neutral Collaborative Family Specialist.** We understand that the neutral Collaborative Family Specialist is a skilled mental health professional, who is trained to manage a wide variety of emotions and issues that arise during divorce, transition, and family conflict. Their role is not to provide legal advice or therapy, but rather to assist with communication, sharing of interests, development of parenting plans, and facilitation of a process aimed at achieving the best possible outcomes and resolutions for our children, our family as a whole, and for us as individuals. The Family Specialist shall not serve as an individual or joint therapist for either of us or our children during or after the conclusion of the Collaborative process, but with the consent of both of us, may provide services following the resolution of the process, so long as those services are consistent with their role in the Collaborative process.

3.5 **Neutral Financial Specialist**. We understand that the neutral Collaborative financial specialist is an experienced financial professional who assists both of us in gathering all financial information regarding our family, in a supportive and cooperative manner. Each of us is expected to assist in financial disclosure and documentation of the income, expenses, assets, and debts of our family. The neutral financial specialist focuses on our family as a system, listening and helping us to understand the overall picture created by our family's particular financial situation, along with each of our individual interests and needs, so as to create, individually and collectively, the best possible financial circumstances moving forward. The knowledge that we gain, with the assistance of the neutral financial specialist, through the data collection and synthesis, can aid each of us in achieving the financial settlement that we desire. The Financial Specialist shall not have an ongoing business or professional relationship, other than as our Collaborative Neutral Financial Specialist, with either of us during or after the conclusion of the Collaborative process, but with the consent of both of us, may provide services following the resolution of the process, so long as

those services are consistent with their role in the Collaborative process (such as assisting us in completing the tasks specifically assigned to us by our written, final agreement).

4.0 PROFESSIONALS' FEES AND COSTS

We agree that our professional team is entitled to be paid for their services and that our initial task in a Collaborative matter is to ensure payment to each of them. We agree to make funds available for this purpose.

5.0 PARTICIPATION WITH INTEGRITY

5.1 We will respect each other.

5.2 We will work to protect the privacy and dignity of everyone involved in the Collaborative process.

5.3 We will maintain a high standard of integrity and specifically shall not take advantage of any miscalculations or mistakes of others, but shall immediately identify and correct them.

5.4 The professional members of our Collaborative team certify that they meet the requirements of the International Academy of Collaborative Professionals (IACP) Minimum Standards for Collaborative Practitioners and that they agree to abide by the IACP Ethical Standards for Collaborative Practitioners.

6.0 EXPERTS

6.1 We agree to use neutral experts for any issue that requires expert advice and/or recommendation.

6.2 We will retain any expert jointly unless we agree otherwise in writing.

6.3 We will agree in advance as to the source of payment for the experts' retainers or other fees.

6.4 We agree to direct all experts to assist us in resolving our differences without litigation.

6.5 Unless otherwise agreed in writing, the neutral experts and any report, recommendation, or documents generated by, or any oral communication from, the

neutral experts shall be shared with each of us and our respective attorneys and covered by the confidentiality clause of this Agreement.

7.0 CHILDREN'S ISSUES

7.1 We agree to act quickly to resolve differences related to our children.

7.2 We agree to promote a caring, loving, and involved relationship between our children and each parent.

7.3 We agree to work for the best interests of the family as a whole.

7.4 We agree not to involve our children in our differences.

7.5 We agree not to remove our minor children from the State of Indiana without the prior written consent of the other while the Collaborative process is pending.

8.0 WE WILL NEGOTIATE IN GOOD FAITH

8.1 We acknowledge that each attorney represents only one client in the Collaborative process.

8.2 We understand that this process will involve good faith negotiation, with complete and honest disclosure.

8.3 We will be expected to take a balanced approach to resolving all differences. Where our interests differ, we will each use our best efforts to create proposals that are acceptable to both of us.

8.4 None of us will use threats of litigation as a way of forcing settlement, although each of us may discuss the likely outcome of going to Court.

9.0 RIGHTS AND OBLIGATIONS PENDING SETTLEMENT

We agree to discuss filing a Joint Verified Petition for Dissolution of Marriage and the timing of its filing. In addition, during the pendency of our dissolution action, we agree that:

(1) Neither of us will transfer, encumber, conceal, sell, or otherwise dispose of any property of either of us or any asset of the marriage, except in the

usual course of business or for the necessities of life, without the written consent of both of us.

(2) Neither of us may harass, pressure, threaten, or intimidate the other.

(3) All currently available insurance coverage must be maintained without change in coverage or beneficiary designation.

10.0 ABUSE OF THE COLLABORATIVE LAW PROCESS

We understand that both attorneys must withdraw from this case if either attorney learns that either of us has taken unfair advantage of this process. Some examples are:

- abusing our children;
- planning or threatening to flee the jurisdiction of the Court with our children;
- disposing of property without the consent of the other;
- withholding or misrepresenting relevant information;
- failing to disclose the existence or true nature of assets, income, or debts;
- failing to participate collaboratively in this process; or
- any action to undermine or take unfair advantage of the Collaborative process.

We also understand that should our attorneys have to withdraw, we will be responsible for payment of any outstanding professional fees.

11.0 ENFORCEABILITY OF AGREEMENTS

11.1 **Temporary Agreements.** In the event either of us requires a temporary agreement for any purpose, so long as both of us agree, the agreement will be put in writing and signed by us and our attorneys. Any written temporary agreement is considered to be made pursuant to a commenced dissolution proceeding and therefore can be submitted to the Court as a basis for an Order and be enforced, if necessary.

11.2 **Permanent Agreement.** Any final, permanent agreement (sometimes called a Settlement Agreement) that we sign shall be submitted to the Court as the basis for entry of a Decree of Dissolution of Marriage.

11.3 **In Case of Withdrawal.** If either of us or either attorney withdraws from the Collaborative process, any written temporary agreement may be presented to the Court as a basis for an Order pursuant to the dissolution proceeding, which we agree the Court may make retroactive to the date of the written agreement. Similarly, in the event of a withdrawal from the Collaborative process, any signed final agreement may be presented to the Court as a basis for entry of a Decree of Dissolution of Marriage.

12.0 LEGAL PROCESS

12.1 **Pleadings.** Other than a Stipulation and Order Regarding Collaborative Practice and the pleadings filed prior to the signing of this Participation Agreement, neither of us or our attorneys will permit any motion or document to be served or filed that would initiate court intervention during the Collaborative process pending final agreement.

12.2 **Stipulation.** After we reach a final agreement, our attorneys will prepare a Decree of Dissolution, Waiver of Final Hearing, and Settlement Agreement for review and signature by our attorneys and us.

12.3 **No Court**. None of us will involve the Court during the Collaborative Practice process.

12.4 **Participant Withdrawal from Collaborative Practice Process**. If one of us decides to withdraw from the process, s/he shall provide prompt written notice to his or her attorney, who in turn will promptly notify the other attorney in writing.

12.5 **Attorney Withdrawal**. If one of our attorneys decides to withdraw from the process, s/he will promptly notify their client and the other attorney in writing.

12.6 **Waiting Period**. Upon withdrawal from the process, there will be a thirty (30) day waiting period, absent an emergency, before the scheduling of any court hearing, to permit us to retain new counsel and to make an orderly transition.

12.7 **Previous Agreements**. All temporary agreements will remain in full force and effect during the thirty (30) day period.

12.8 **No Surprise**. The intent of this section is to avoid surprise and prejudice to the rights of the non-withdrawing participant.

12.9 **Presentation to Court**. Accordingly, we agree that either of us may bring this provision to the attention of the Court in requesting the continuance of a hearing scheduled by the other or his/her attorney during the thirty (30) day waiting period.

13.0 DISQUALIFICATION

13.1 **Withdrawal of Attorney**. If either Collaborative attorney withdraws from the case, the other attorney must also withdraw unless a withdrawing attorney is replaced by another Collaborative attorney who agrees in writing to comply with this Participation Agreement.

13.2 **Disqualification in Subsequent Matters**. After termination of the Collaborative process, whether by settlement or termination before settlement, neither attorney, nor any member of either attorney's firm, shall represent his or her client in a subsequent non-Collaborative matter against the other party.

14.0 CONFIDENTIALITY

14.1 **Confidentiality**. All settlement proposals exchanged within the Collaborative process will be confidential and without prejudice. If subsequent litigation occurs, we agree:

a. That we will not introduce, as evidence in Court, any information produced, shared, or disclosed during the Collaborative process for the purpose of reaching a settlement, except only for documents specifically required by law, such as Verified Financial Declarations;

b. That we will not introduce, as evidence in Court, information disclosed during the Collaborative process with respect to the other's behavior or legal position during the process, except as it may relate to a request that the Court award attorneys fees or impose sanctions for abuse of the Collaborative process;

c. That we will not attempt to depose either attorney or neutral expert, or ask or subpoena either attorney or any neutral expert to testify in any court proceeding with regard to matters discussed or disclosed during the Collaborative process, except as it may relate to abuse of the Collaborative process; and

d. That we will not require the production at any court proceeding of any notes, records, or documents in either attorney's possession or in the possession of any neutral expert. However, once discharged, the attorneys shall return the file to their respective clients, excluding attorney work product.

14.2 **Applicability**. We agree this Confidentiality provision applies to any subsequent litigation, mediation, arbitration, or any other method of alternative dispute resolution.

15.0 ACKNOWLEDGMENT

15.1 We acknowledge that we have read this Agreement, understand its terms and conditions, and agree to abide by them.

15.2 We understand that by agreeing to this alternative method of resolving the issues related to our dissolution of marriage, we are giving up certain rights, including the right to formal discovery, formal court hearings, and other procedures provided by the adversarial legal system.

15.3 We have chosen the Collaborative Practice process to reduce emotional and financial costs, and to generate a final agreement that addresses our interests. We agree to work in good faith to achieve these goals.

16.0 PLEDGE

WE HEREBY PLEDGE TO COMPLY WITH AND TO PROMOTE THE SPIRIT AND WRITTEN WORD OF THIS PARTICIPATION AGREEMENT.

_____ _____

Wife/Mother Husband/Father

Dated:_____ Dated: _____

First Collaborative Meeting Agenda
_____, Husband/Father
_____, Wife/Mother
_____, Attorney for Husband/Father
_____, Attorney for Wife/Mother
_____, Family Specialist
_____, Neutral Financial Specialist
DATE

1. Introductory Issues
   a. Identify amount of time available for meeting
   b. Determine responsibility for recording minutes of meeting

2. Review and Signature of Collaborative Participation Agreement

3. Review and signature of Collaborative Stipulation and Order

4. Discuss Filing of Joint Petition for Dissolution of Marriage
   a. Venue
   b. Timing

5. Review of Collaborative Ground Rules and Collaborative Commitments.

6. Identification of Goals and Interests.
   a. Shared goal and interests
   b. Husband's individual goals and interests
   c. Wife's individual goals and interests

7. Identify other team members that may be necessary.

8. Discussion of current children's issues.

9. Discussion of current living arrangements.

10. Identify immediate issues requiring resolution, if any.

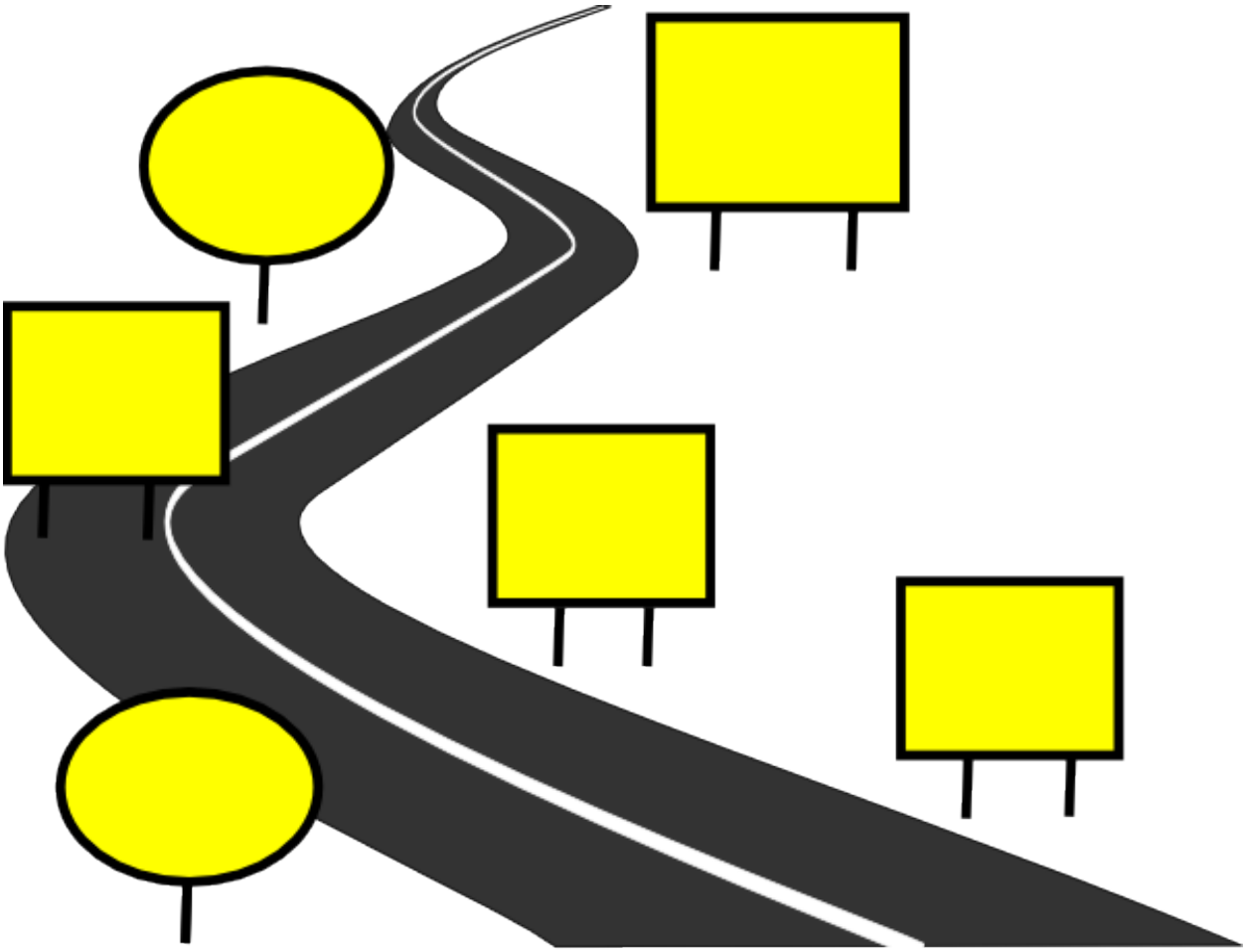
11. Identify long-term issues requiring resolution.

12. Next steps/homework assignments.

13. Future meeting(s)
   a. Dates/times/places of future meeting(s)
   b. Agenda for next meeting(s)

FORMING REALISTIC EXPECTATIONS FOR THE COLLABORATIVE PRACTICE PROCESS

What Collaborative Practice is:	*What Collaborative Practice is not:*
A non-adversarial approach to conflict resolution	A conflict-free approach to conflict resolution
Centered on interest-based negotiation (focus on "why")	Centered on positional bargaining (focus on "what")
An opportunity for your own growth	A promise of happiness or a chance to change the other person
Demanding work, both for clients and the professional team	A short-cut to divorce
A cost-effective investment of client resources and professional services	Simple or cheap
Clients learn problem-solving skills, to apply in resolving future disputes	A magic cure – problems and conflicts still will occur in the future
A process that moves at the clients' and team's pace	Always faster than litigation
Tailored to the needs of each client and family, within an established framework	The same cookie-cutter process for everyone
A divorce	Pleasant or easy
A process providing for equal input from both clients	A way to manipulate the process or outcome for your own motives
A foundation for a healthy future co-parenting relationship	A guarantee of a perfect future co-parenting relationship



[CAPTION]

STIPULATION AND ORDER RE: COLLABORATIVE PRACTICE

The parties each stipulate as set forth below, and further stipulate that Orders shall be entered as follows which shall remain in effect until and unless modified by written agreement signed by both parties or further Court Order, whichever first occurs. This Stipulation is intended to be a binding Court Order upon being signed by the parties and the Court.

Attorney Representation

Attorney Amy L. Stewart has been retained by Co-Petitioner, _____, to advise him/her during the course of this proceeding, and Attorney _____has been retained by Co-Petitioner, _____, to advise him/her during the course of this proceeding. The parties acknowledge that there is no privity of contract by virtue of the execution of this Stipulation and Order. Each attorney represents only his or her client; neither attorney represents his or her client's spouse. While the respective attorneys are committed to negotiation in an atmosphere of honesty and integrity, the parties understand and agree they cannot rely upon the attorney representing their spouse to provide representation, legal advice or information. Furthermore, the parties understand and agree that the attorneys, by virtue of this agreement, do not have an affirmative obligation to disclose confidential information the client requests remain confidential, and that this agreement does not in any way affect an attorney's obligation not to reveal confidential information, which the attorney's client requests remain confidential. Each party shall rely exclusively upon the legal advice and representation provided to them by his or her own counsel and shall have no right to claim that he or she received legal advice or representation from the other party's counsel. Each attorney agrees to be fully bound by the terms and provisions of this Stipulation and Order. Each

attorney, and any attorney associated in a law firm with each attorney, is forever disqualified from appearing as attorney of record for either party in any contested matter in this proceeding or in any other contested family law matter involving both parties. This disqualification shall survive the duration of this Stipulation and Order.

Notwithstanding the above, the attorneys named above may appear as counsel of record for purposes of carrying out the terms of this Stipulation and Order Re: Collaborative Practice and filing all documents necessary to give effect to the agreements of the parties in reaching a resolution of their Collaborative dissolution of marriage.

Collaborative Process

Both parties and attorneys agree to treat this matter as a Collaborative dissolution of marriage. Both parties and attorneys acknowledge and agree that he or she has read and understands the document entitled, "Collaborative Practice Participation Agreement," which is attached hereto as Exhibit "A" and incorporated herein, and both parties and attorneys agree to act in good faith to comply with the terms and principles set forth in that document. For so long as this Stipulation and Order is in effect, the parties and attorneys agree to devote all of their efforts to obtain a negotiated settlement in an efficient, cooperative manner pursuant to the terms of this Stipulation and agree that neither party nor attorney named in this Stipulation will file any document requesting intervention by the Court, except as the Court's involvement may be requested to support the parties' settlement efforts, as mutually agreed on in writing by all concerned, or except to review and approve agreements reached between the parties.

Restraining Orders

Both parties agree that, immediately:

1. Each is restrained from cashing, borrowing against, canceling, transferring, disposing of, or changing the terms or beneficiaries of any insurance coverage including life, health, automobile and/or disability insurance held for the benefit of the parties or their minor children, without the consent of both parties or the Order of the Court;

2. Each party shall notify the other of any proposed extraordinary expenditures at least five (5) business days prior to incurring the extraordinary expenditure and shall account to the other party for all extraordinary expenditures;

3. Except for uninsured healthcare expenses for the parties' child, neither party shall incur any debts or liabilities for which the other may be held responsible;

4. Each party is restrained from transferring, encumbering, concealing, selling, or otherwise disposing of any property of the parties or asset of the marriage, except in the usual course of business or for the necessities of life, without the written consent of both parties or the Order of the Court;

5. Each party is restrained from creating, modifying, or revoking a non-probate transfer of property, in a manner which affects the disposition of property subject to the transfer, or eliminating a right of survivorship to property, without the written consent of both parties or Order of the Court; and

6. Each party is restrained from removing the minor child of the parties from the State of Indiana, without the prior written approval of the other party or the Order of the Court.

The foregoing orders may be modified by mutual written agreement, approved by the Court.

Consultants

Unless otherwise agreed in writing, any consultants or experts retained or employed in the Collaborative process shall be retained jointly by both parties.

Except upon the mutual written agreement of the parties to the contrary, or as required to effect the "Attorney Fees" section below, any person or firm retained by either party or attorney, or whose work product is used by either party or attorney, during the term of this Stipulation and Order, is forever disqualified from appearing as an expert or witness for either party, the parties' child, or the Court, to testify as to any matter related to such person's or firm's work product in the Collaborative process. Unless the parties agree otherwise in writing, all notes, work papers, summaries and reports shall be inadmissible as evidence in any proceeding involving these parties, but shall be furnished to successor counsel. Such persons or firms include, but are not limited to, accountants, financial professionals, attorneys, mental health professionals, mediators, personal or real property valuation experts, vocational consultants, private investigators, medical professionals, or any other persons retained or employed in the Collaborative process.

Disclosure and Discovery

Both parties shall timely provide his or her respective Verified Financial Declarations and shall provide each other with any written authorizations requested or which may be required in order to obtain information or documentation, or to prepare Qualified Domestic Relations Orders or other Orders facilitating agreements reached. The parties and attorneys acknowledge and understand that honesty and the full disclosure of all relevant financial information is an integral factor in the success of the Collaborative process.

All discovery requests shall be made informally. No Motion to Compel or Motion for Sanctions is available for any discovery requests made during the term of this Stipulation and Order. Unless otherwise agreed in writing, responses to any discovery requests made during the

term of this Stipulation and Order should be made in the manner prescribed, and within the time limits prescribed by the Indiana Rules of Trial Procedure. All responses to discovery requests shall be verified under oath by the party responding and subject to penalty of fraud and perjury, if false.

Attorney Fees

The Court may award attorney fees and impose sanctions in the event that any party or attorney has (i) used the Collaborative process in bad faith for the purpose of unilateral delay, or (ii) engaged in any concealment, misrepresentation, or perpetuation of the same in any way that materially and adversely affects the rights of the other party.

Statements of Parties and Attorneys

All documents, notes, work papers, and other materials shall be inadmissible for any purpose in any subsequent contested litigation between the parties, except as otherwise agreed upon in writing between the parties. Statements made by either party during the joint meetings shall be protected as if the statements were made in mediation, and no such communications shall be deemed a waiver of any privilege by any party. However, statements made during joint meetings that indicate an intent or disposition to do any of the following actions are not privileged: To endanger the health or safety of the other party, or of the child; to conceal or change the residence of the child; to commit irreparable economic damage to the property of either party; or to conceal income or assets.

Termination of Collaborative Status

Either party may unilaterally and without cause terminate the Collaborative process by giving written notice of such election to the other spouse and the other spouse's attorney, and by

filing a copy of their written notice of termination with the Court. Upon notice of termination by either party, both attorneys shall file motions to withdraw as counsel of record for the parties.

Either attorney may withdraw from this matter unilaterally by giving written notice of such election to the other attorney and by filing their Motion to Withdraw Appearance with the Court, after providing notice to the attorney's own client. The withdrawal of an attorney does not terminate the Collaborative process; a party losing his or her attorney may not continue with the Collaborative process without an attorney but may continue in the Collaborative process with a new attorney who will agree in writing to be bound by this Stipulation and Order and the Collaborative Practice Participation Agreement. If such new attorney is not retained, the Collaborative process shall terminate, at which point, the remaining attorney shall withdraw as counsel of record. Upon termination of the process or withdrawal of any counsel, such affected attorney will promptly cooperate to facilitate the transfer of the client's matter to successor counsel. Absent an emergency, no Court hearing shall be scheduled within thirty (30) days of a party's notice of termination or an attorney's notice of withdrawal, in order to allow the parties to retain new counsel and to allow for an orderly transition.

The parties do not waive their right to seek the assistance of the Court; however, any resort to litigation results in the automatic termination of the Collaborative process and the disqualification of the undersigned attorneys, effective the date any application to the Court for its orders or otherwise is made.

In the event of the termination of the Collaborative process, the action between the parties shall remain pending in this Court as a non-Collaborative action.

Verification

I affirm under the penalties for perjury that the representations contained in the foregoing *Stipulation and Order* are true.

_____	_____
, Husband	, Wife
Dated:_____	Dated:_____
_____	_____
	Amy L. Stewart, #21405-49
Attorney for Husband	Attorney for Wife
Dated:_____	Dated:_____

[CAPTION]

ORDER

BASED UPON the Stipulation of the parties, which has been approved by their counsel,

IT IS HEREBY ORDERED that the terms and conditions of the parties' Stipulation and Order Re: Collaborative Practice are approved and made an Order of the Court. Each party is ordered to comply with all of the foregoing terms and conditions.

SO ORDERED this date:

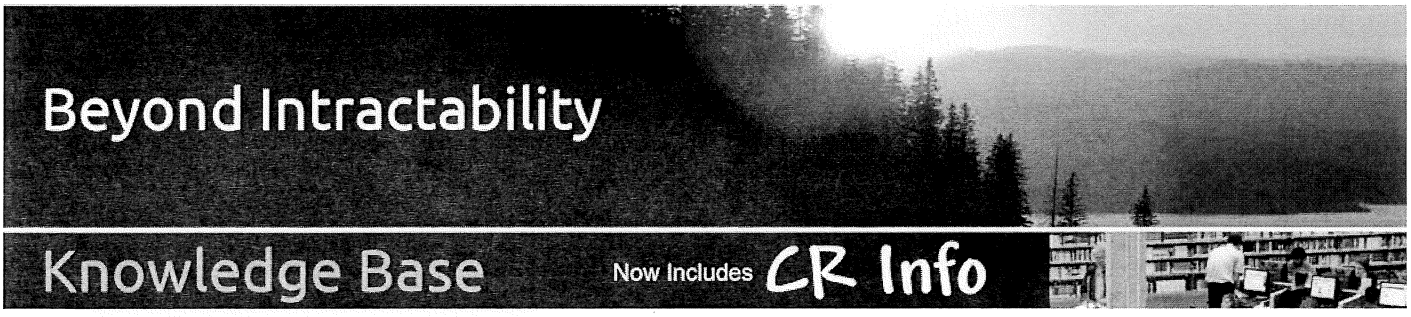
_____

JUDGE, _____County Superior Court

DISTRIBUTION:

Amy L. Stewart, Esq.
MALLOR GRODNER LLP
101 W. Ohio St., Ste. 1600
Indianapolis, Indiana 46204
Attorney for

Attorney for



The Hyper-Polarization Challenge to the Conflict Resolution Field: A Joint BI/CRQ Discussion

BI and the *Conflict Resolution Quarterly* invite you to participate in an **online exploration** of what those with conflict and peacebuilding expertise can do to help defend liberal democracies and encourage them live up to their ideals.

Follow BI and the Hyper-Polarization Discussion on BI's New **Substack Newsletter**.

Integrative or Interest-Based Bargaining

By
Brad Spangler

June 2003

What is Integrative or Interest-Based Bargaining?

Integrative bargaining (also called "interest-based bargaining," "win-win bargaining") is a **negotiation strategy** in which parties collaborate to find a "**win-win**" solution to their dispute. This strategy focuses on developing mutually beneficial agreements based on the interests of the disputants. Interests include the **needs**, desires,

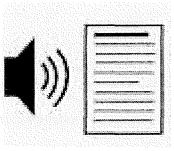
concerns, and **fears** important to each side. They are the **underlying reasons** why people become involved in a conflict.

"Integrative refers to the potential for the parties' interests to be [combined] in ways that create joint value or enlarge the pie."[1] Potential for integration only exists when there are multiple issues involved in the negotiation. This is because the parties must be able to make trade-offs across issues in order for both sides to be satisfied with the outcome.

Why is Integrative Bargaining Important?

Integrative bargaining is important because it usually produces more satisfactory outcomes for the parties involved than does **positional bargaining**. Positional bargaining is based on fixed, opposing viewpoints (positions) and tends to result in **compromise** or no agreement at all. Oftentimes, compromises do not efficiently satisfy the true interests of the disputants. Instead, compromises simply split the difference between the two positions, giving each side half of what they want. Creative, integrative solutions, on the other hand, can potentially give everyone all of what they want.

There are often many interests behind any one position. If parties focus on identifying those interests, they will increase their ability to develop win-win solutions. The classic example of interest-based bargaining and creating joint value is that of a dispute between two little girls over an orange. Both girls take the position that they want the whole orange. Their mother serves as the moderator of the dispute and based on their positions, cuts the orange in half and gives each girl one half. This outcome represents a compromise. However, if the mother had asked each of the girls why she wanted the orange -- what her interests were -- there could have been a different, win-win outcome. This is because one girl wanted to eat the meat of the orange, but the other just wanted the peel to use in baking some cookies. If their mother had known their interests, they could have both gotten all of what they wanted, rather than just half.



William Ury tells how he managed to build trust with the leaders in Venezuela and through shuttle diplomacy and focusing on their interests got them working together to prevent violence.

Integrative solutions are generally more gratifying for all involved in negotiation, as the true needs and concerns of both sides will be met to some degree. It is a collaborative process and therefore the parties actually end up helping each other. This prevents ongoing ill will after the negotiation concludes. Instead, interest-based bargaining facilitates constructive, positive relationships between previous adversaries.

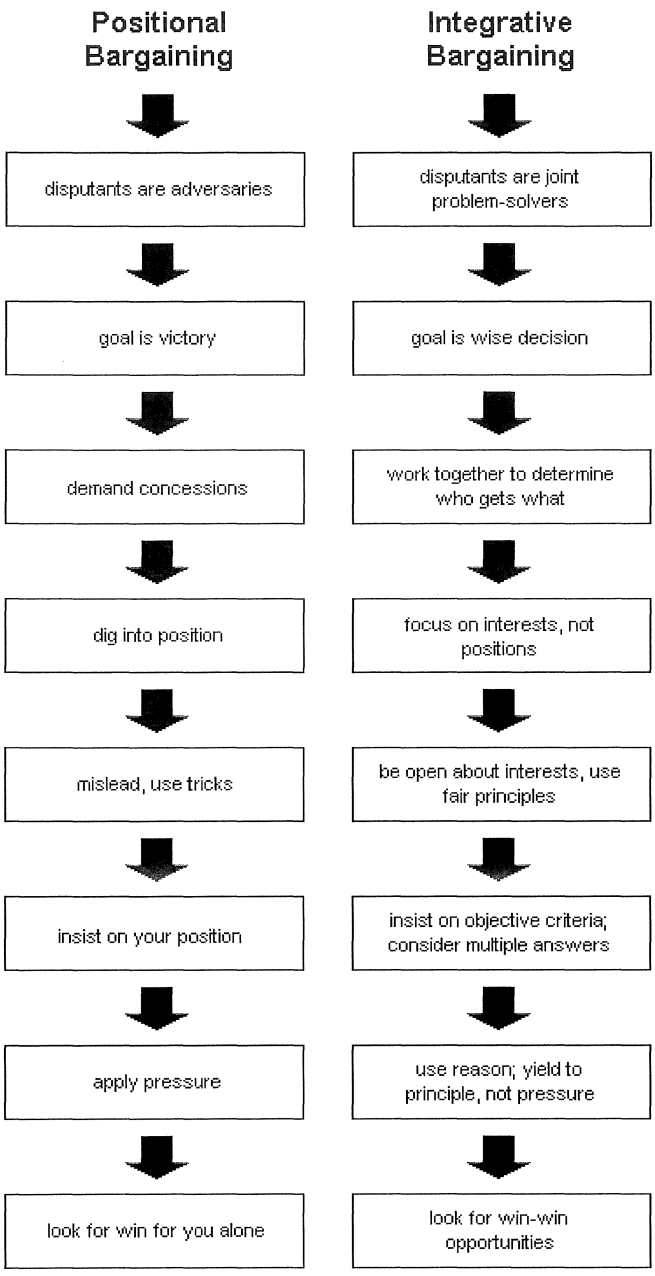
Identifying Interests: The first step in integrative bargaining is identifying each side's interests. This will take some work by the negotiating parties, as interests are often less tangible than positions and are often not publicly revealed. A key approach to determining interests is asking "Why?" Why do you want that? Why do you need that? What are your concerns? Fears? Hopes? If you cannot ask these questions directly, get an intermediary to ask them.

The bottom line is you need to figure out *why* people feel the way they do, *why* they are demanding what they are demanding. Be sure to make it clear that you are asking these questions so you can understand their interests (needs, hopes, fears, or desires) better, not because you are challenging them or trying to figure out how to beat them.

Next you might ask yourself how the other side perceives your demands. What is standing in the way of them agreeing with you? Do they know your underlying interests? Do you know what your own underlying interests are? If you can figure out their interests as well as your own, you will be much more likely to find a solution that benefits both sides.

You must also analyze the potential consequences of an agreement you are advocating, as the other side would see them. This is essentially the process of weighing pros and cons, but you attempt to do it from the perspective of the other side. Carrying out an empathetic analysis will help you understand your adversary's interests. Then you will be better equipped to negotiate an agreement that will be acceptable to both of you.

There are a few other points to remember about identifying interests. First, you must realize that each side will probably have multiple interests it is trying to satisfy. Not only will a single person have multiple interests, but if you are negotiating with a group, you must remember that each individual in the group may have differing interests. Also important is the fact that the most powerful interests are basic human needs - security, economic well being, a sense of belonging, recognition, and control over one's life. If you can take care of the basic needs of both sides, then agreement will be easier. You should make a list of each side's interests as they become apparent. This way you will be able to remember them and also to evaluate their relative importance.[2]



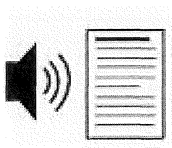
This chart was derived from a more complex chart in *Getting to Yes* [2]

Creating Options

After interests are identified, the parties need to work together cooperatively to try to figure out the best ways to meet those interests. Often by "brainstorming" -- listing all the options anyone can think of without criticizing or dismissing anything initially, parties can come up with creative new ideas for meeting interests and needs that had not occurred to anyone before. The goal is a win-win outcome, giving each side as much of their interests as possible, and enough, at a minimum that they see the outcome as a win, rather than a loss.

Using Integrative and Distributive Bargaining Together

Although **distributive bargaining** is frequently seen as the opposite of integrative bargaining, the two are not mutually exclusive. Distributive bargaining plays a role in integrative bargaining, because ultimately "the pie" has to be split up.



Silke Hansen recommends that mediators focus on parties' needs to come up with the widest range of possible solutions.

Integrative bargaining is a good way to make the pie (joint value) as large as it possibly can be, but ultimately the parties must distribute the value that was created through negotiation. They must agree on who gets what. The idea behind integrative bargaining is that this last step will not be difficult once the parties reach that stage. This is because the interest-based approach is supposed to help create a cooperative working relationship. Theoretically, the parties should know who wants what by the time they split the pie.[3]

---

[1] Watkins, Michael and Susan Rosegrant, *Breakthrough International Negotiation: How Great Negotiators Transformed the World's Toughest Post-Cold War Conflicts* (San Francisco: Jossey-Bass, 2001), 31. <**http://www.beyondintractability.org/bksum/watkins-breakthrough (http://www.beyondintractability.org/bksum/watkins-breakthrough)**>.

[2] The principal ideas regarding identifying interests outlined here were drawn from: Roger Fisher and William Ury. *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed. (New York: Penguin Books, 2011). <**http://www.beyondintractability.org/library/external-resource?biblio=23737 (http://www.beyondintractability.org/library/external-resource?biblio=23737)**>.

[3] The idea that integrative or interest-based bargaining will always include distributive bargaining too, was originally put forth by David Lax and James Sebenius in *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, 1986. <**http://books.google.com/books?id=FN_OIG0-alEC (http://books.google.com/books/about/Manager_as_Negotiator.html?id=FN_OIG0-alEC)**>.

Use the following to cite this article:
Spangler, Brad. "Integrative or Interest-Based Bargaining." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: June 2003 <**http://www.beyondintractability.org/essay/interest-based-bargaining**>.

Additional Resources

The Beyond Intractability Knowledge Base Project
Guy Burgess and Heidi Burgess, Co-Directors and Editors
c/o **Conflict Information Consortium**
Mailing Address: Beyond Intractability, #1188, 1601 29th St. Suite 1292, Boulder CO 80301, USA
Contact Form

JACE

The Art of Negotiation, Positional vs Interest-Based Bargaining

by jgrebski | Nov 30, 2019 | Strategy | 0 comments

What is it, this negotiation?

What is at stake, some may ask. Everything, we negotiate every day, knowingly or not. Be it about the added sugar in your coffee, whether you can borrow a buck from your friends, or if someone can lend you a pen. Negotiation encompasses all of that.

Negotiation can also act as a form of conflict resolution; it can involve striking deals, working things out with one or more parties. Negotiation is an integral part of everyday life. Negotiation occurs in business, non-profit organizations, and government branches, legal proceedings, among nations, and in personal situations such as marriage, divorce, and parenting.

In its basic form, negotiation has two distinct strategies, these being the advocate's approach and the win-win negotiator's approach. From these, then we have additional strategies. One strategy is interest-based (or integrative, or cooperative) bargaining. While the other is positional (or distributive or competitive) bargaining.

The advocate's approach, the win — lose.
A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes their party desires, but without driving the other party to permanently break off negotiations.

The win — win approach.
Suggests that agreement often can be reached if parties look not at their stated positions but rather at their underlying interests and requirements.

Part 1: Positional Bargaining

A Deeper Look at the advocate's approach or positional bargaining.

Positional bargaining is a negotiation strategy that involves holding on to a fixed idea, or position, of what you want, and arguing for it and it alone, regardless of any underlying interests. The classic example of positional bargaining is the haggling that takes place between proprietors and customers over the price of an item. The customer has a maximum amount she will pay, and the proprietor will only sell something over a certain minimum amount. Each side starts with an extreme position, which in this case is a monetary value, and proceed from there to negotiate and make concessions. Eventually, a compromise may be reached. For example, a man offers a vendor at the flea market $10 for a rug he has for sale. The vendor asks for $30, so the customer offers $15. The merchant then says he will accept $25, but the customer says the highest he will go is $20. The vendor

agrees that $20 is acceptable, and the sale is made at $20. So the customer pays $10 more than he originally wanted, and the vendor receives $10 less.

Why is Positional Bargaining Important?

Positional bargaining tends to be the first strategy people adopt when entering a negotiation. This is often problematic, because as the negotiation advances, the negotiators become more and more committed to their positions, continually restating and defending them.

A strong commitment to defending a position usually leads to a lack of attention to both parties' underlying interests. Therefore, any agreement that is reached will probably reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties.

Therefore, positional bargaining is often considered a less constructive and less efficient strategy for negotiation than integrative negotiation. Positional bargaining is less likely to result in a win-win outcome and may also result in bad feelings between the parties, possibly arising out of the adversarial, "you vs. me" approach or simply a result of one side not being truly satisfied with their end of the outcome. Positional bargaining is inefficient in terms of the number of decisions that must be made. The example above demonstrates the back-and-forth nature of positional bargaining. The more extreme the opening positions are, the longer it will take to reach a compromise.

Can Positional Bargaining Be Good?

Despite criticism of positional bargaining, supporters of this negotiation strategy do exist.

It has been argued that consideration of all underlying interests in a negotiation process is unnecessary. In fact, it may sometimes be counterproductive. This is because of the distinction and relationship between issues and interests.

Issues are universal; they are shared between each party in a conflict. Interests, on the other hand, are specific to each party: what the buyer of the rug in the market wants is a bargain, what the seller wants is profit. This relationship is quite simple

The problem arises when the issue at hand stirs up dramatically opposing interests between the parties, a situation in which it would be very difficult to bring them into the agreement. If this is the case, it may sometimes be better to negotiate in terms of positions and go for a compromise.

For example, two nations are in dispute over water rights. However, they also differ on many other issues, including trade, immigration, religion, and politics. Broadening the debate to include these underlying interests will only polarize the sides further. In this case, it may be much easier to reach an agreement if the two sides focus on the smaller issue of water, and set aside their other concerns. This involves negotiating in terms of position and may help the sides reach a compromise without creating any larger, interest-based conflicts. So, for issues that involve extremely conflicting underlying interests, it may be best to just focus on positions and aim for a compromise.

Part 2: Interest-based bargaining

The win/win negotiator's approach or Interest-Based Bargaining

Integrative bargaining (also called "interest-based bargaining," "win-win bargaining") is a negotiation strategy in which parties collaborate to find a "win-win" solution to their dispute. This strategy focuses on developing mutually beneficial agreements based on the interests of the disputants. Interests include the needs, desires, concerns, and fears important to each side. They are the underlying reasons why people become involved in a conflict.

Integrative refers to the potential for the parties' interests to be [combined] in ways that create joint value or enlarge the pie. Potential for integration only exists when there are multiple issues involved in the negotiation. This is because the parties

must be able to make trade-offs across issues in order for both sides to be satisfied with the outcome.

Why is Integrative Bargaining Important?

Integrative bargaining is important because it usually produces more satisfactory outcomes for the parties involved than does positional bargaining. Positional bargaining is based on fixed, opposing viewpoints (positions) and tends to result in a compromise or no agreement at all. Often, compromises do not efficiently satisfy the true interests of the disputants. Instead, compromises split the difference between the two positions, giving each side half of what they want. Creative, integrative solutions, on the other hand, can potentially give everyone all of what they want.

There are often many interests behind any one position. If parties focus on identifying those interests, they will increase their ability to develop win-win solutions. The classic example of interest-based bargaining and creating joint value is that of a dispute between two little girls over an orange.

Both girls take the position that they want the whole orange. Their mother serves as the moderator of the dispute and, based on their positions, cuts the orange in half and gives each girl one half. This outcome represents a compromise. However, if the mother had asked each of the girls why she wanted the orange — what her interests were — there could have been a potential for a win-win outcome. This is because one girl wanted to eat the meat of the orange, but the other just wanted the peel to use in baking some cookies. If their mother had known their interests, they could have both gotten all of what they wanted, rather than just half.

Integrative solutions are generally more gratifying for all involved in the negotiation, as the true needs and concerns of both sides will be met to some degree. It is a collaborative process, and therefore, the parties actually end up helping each other. This prevents ongoing ill will after the negotiation concludes. Instead, interest-based bargaining facilitates constructive, positive relationships between previous adversaries.

The first step in integrative bargaining is identifying each side's interests. This will take some work by the negotiating parties, as interests are often less tangible than positions and are often not publicly revealed. A key approach to determining interests is asking, "Why?" Why do you want that? Why do you need that? What are your concerns? Fears? Hopes? If you cannot ask these questions directly, get an intermediary to ask them.

The bottom line is you need to figure out *why* people feel the way they do, *why* they are demanding what they are demanding. Be sure to make it clear that you are asking these questions so you can understand their interests (needs, hopes, fears, or desires) better, not because you are challenging them or trying to figure out how to beat them.

Next, you might ask yourself how the other side perceives your demands. What is standing in the way of them agreeing with you? Do they know your underlying interests? Do you know what your own underlying interests are? If you can figure out their interests as well as your own, you will be much more likely to find a solution that benefits both sides.

You must also analyze the potential consequences of an agreement you are advocating, as the other side would see them. This is essentially the process of weighing pros and cons, but you attempt to do it from the perspective of the other side. Carrying out an empathetic analysis will help you understand your adversary's interests. Then you will be better equipped to negotiate an agreement that will be acceptable to both of you.

There are a few other points to remember about identifying interests. First, you must realize that each side will probably have multiple interests it is trying to satisfy. Not only will a single person have multiple interests, but if you are negotiating with a group, you must remember that each individual in the group may have differing interests. Also important is the fact that the most powerful interests are basic human needs — security, economic well being, a sense of belonging, recognition, and control over one's life. If you can take care of the basic needs of both sides, then an agreement will be easier to establish. You should make a list of each side's

interests as they become apparent. This way you will be able to remember them and also to evaluate their relative importance.

Positional vs' Interest-Based Negotiation Styles

Let's start up by looking at both types of negotiation techniques and the process that each method passes through.

So what about the psychology of negotiation, where does that come into play. Well, from the above, we can identify that the mentality of a negotiator is based on the style of negotiation he will utilize to attain his goal.

However, to strictly put this as a mentality from the side of the goal, the seeker is wrong. Mentality changes throughout the negotiations process, and is adversely affected by where the individual sees himself at any given moment.

For example, an individual will always be more affected with what he will lose over what he will gain in any situation, people are afraid of losses, and these losses affect their psyche much more adversely than winnings. Therefore, it is necessary when negotiating to convince the opposite party that they are getting a better deal than they really are, a person with low self-esteem will tend to push negotiations too far and to allow his own ego to dictate the course of negotiations. In negotiations with such an individual there are basically two alternatives (other than giving in and getting a raw deal), firstly try and get rid of that individual, and the best method is to stand up to him (and his bullying) in such a way that he (and its not always a he) loses face in front of his colleagues, and the second way is to convince the individual that he has been given a much better deal than may strictly be the case, he can present this as a major victory. The weakness of such a person is that his colleagues probably do not like him and will not always give him the full support in negotiations that he needs.

Anyways, in any complex negotiation, it is a necessity to understand the other party, their personality, their wants, and needs, knowing these attributes one can use psychological knowledge to affect the course of the negotiation. One other thing that can be used in negotiations is neuro-linguistic programming, which allows the person skilled in it, to read the body language of the other and adjust his strategy based on the reactions of the other party.

This also coincides with the politics of negotiation where each party is looking for.

Post Negotiations Strategies

After the negotiation is completed, it is important to sit back and reflect on what occurred during the negotiation phase. Some questions that a negotiator should ask himself are. What did I come into the deal wanting? What did I wind up at? What was my offer and target? How close to the walk away was I? Did I bundle things correctly, use what I had intended to as leverage factors? All these questions are necessary to assess the negotiation between the two parties, and this is one of

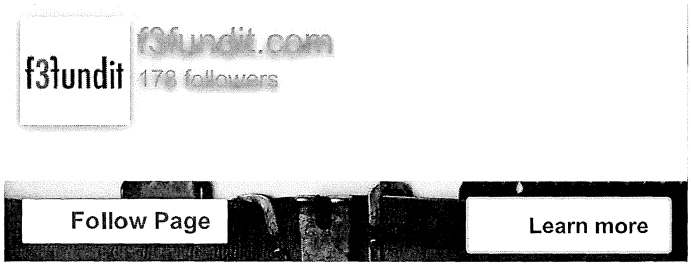
the most important steps in the negotiations process, reflection. It identifies where the negotiation went wrong, or positively, and what was it that made it turn in that direction.

But the above questions only reference the material outcome of the negotiation; it is also important to consider such attributes of the negotiation as psychology. Did I involve my feelings in the process? Is the outcome of the negotiation really what I wanted, or was I simply made to believe so? And, as a disputant were their occurrences where I would have been able to utilize the opposing party's emotions to achieve a more favorable outcome. All these questions are pivotal to understanding the post negations outcome and should be utilized as strategies for learning for future use when negotiating.

Did you find this interesting? Leave a comment or sub to my newsletter or have a look at some other, recent, content:

- Downward Dog. The Call for Capital Efficiency
- Next Stop Ground Floor. Bargain Basement
- Crypto and DeFi are self-fulfilling prophecies
- State of Business in the Post COVID World. Prepare for a wave of Innovation.
- Understanding Machine Learning – 101 Executive MBA

My Startup Blog



My side project

Search

Recent Posts

Downward Dog. The Call for Capital Efficiency

Next Stop Ground Floor. Bargain Basement

Crypto and DeFi are self-fulfilling prophecies

State of Business in the Post COVID World. Prepare for a wave of Innovation.

Understanding Machine Learning – 101 Executive MBA

Categories

Design

Growth

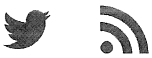
Strategy

Links

Half Basis

f3fundIt | Startup Resources

Seven Tran Ventures Network



INTEREST BASED BARGAINING

This article by Mark Geiger outlines the general principles and advantages that can be derived by use of Interest Based Bargaining. It compares the principles of this approach to the more traditional 'positional' bargaining employed in many organized bargaining settings, especially in unionized collective bargaining. Mark has been involved in a wide variety of bargaining for and with physicians, teachers, the film industry, hospitals, private and public schools, other health care providers, and a wide variety of private employers including in the manufacturing, service, construction and transportation sectors. Although this approach is difficult to implement, especially where traditional positional bargaining has been the norm, he argues the results that are achievable can make the effort well worth it.

INTRODUCTION

People interact everyday in ways which can be seen as bargaining. Where are we going for lunch, what movie are we going to see, what car will we buy? These and many other similar issues are discussed between and among friends and family members, but they would probably not realize that they are in essence 'bargaining'. In coming to a mutual; decision about what actions to take in any given circumstance, the individual interests of each participant plays a part in the discussion, and ideally, the final 'decision' is the one that meets , to the greatest extent possible, the individual interests of each of the participants. Normally in these 'friendly' interchanges, the interests of each of the participants is openly expressed and the final decision hopefully takes those interests into account. Many people would not identify these discussions as 'negotiations', but that is in essence, what they are.

On the other hand, the term 'negotiation' is more commonly associated with the purchase of a major asset such as a house or car. In these circumstances, the seller wants to achieve as much as possible, and the buyer wants to pay as little as possible, and the 'bargaining' is an attempt to see if the seller will accept what the buyer is prepared to pay. The buyer of course will attempt to 'keep secret' from the seller what he is ultimately prepared to buy. But even in these circumstances, sometimes other 'interests' can become involved. For example, the buyer might be prepared to close early to assist the seller, who has already purchased another home, thus eliminating the need for bridge financing, and therefore making a lower selling price acceptable to the seller. So even in a situation where the interests seem to be diametrically opposed, identifying an 'interest' can lead to a better deal for both parties.

The principles of interest based bargaining have been discussed for many years. Several books have been written outlining this approach. Notwithstanding the general availability of these texts and courses, relatively few practitioners involved in traditional 'bargaining', such as human resource professionals, union negotiators, or merger and acquisition professionals are fully aware of or use this approach in bargaining what are seen as traditionally 'adversarial' bargaining. By adversarial bargaining, I mean bargaining where one side sees their interests as fundamentally opposed to the other party(ies) with whom they are bargaining.

There is a great deal of misunderstanding and misinformation concerning interest based bargaining, perhaps in part because it has also been characterized as 'mutual gains bargaining'. In the traditionally adversarial union-management bargaining arena, it is often considered be a "leftist" or union-friendly approach to bargaining, not to be utilized in the tough negotiations that in many ways have characterized the last decade of union/management relations. Terms such as "single team bargaining" have been used to describe the process. Often these terms have given practitioners the impression that adopting this approach to bargaining puts the employer at a disadvantage, especially in tough times. This misconception of the principles underlying interest based bargaining has led many practitioners to avoid learning about it and using it. In my view, this result is unfortunate.

Interest based, or mutual gains bargaining at its foundation is based on the principle that a negotiated settlement of any issue is usually superior to other alternatives available. In fact, in order to determine whether or this approach to 'bargaining' can be of any advantage to you, you first must discover whether or not other alternatives will give you a better solution. If they will, the principles of interest based bargaining are probably inapplicable to your situation.

THE BASIC PREMISE

Mutual gains bargaining is based on the premise that both sides in a negotiation have *something to gain* from the negotiation. A settlement will be better than either party's best alternative. In collective bargaining, it is a very rare case indeed where no agreement is superior to a negotiated settlement. If both sides approach the bargaining table with the understanding that it is in their mutual interest to solve their disputes and to reach a negotiated settlement, the fundamental requirements for mutual gains bargaining to succeed are met. It only remains with the parties to decide whether or not this approach to bargaining will be more effective than the traditional, positional approach.

TYPES OF BARGAINING

Those of us who spend a great deal of our time bargaining collective agreements, or other traditionally adversarial negotiations are familiar with the usual drill. One side prepares a series of demands or 'proposals'. They prepare that series of demands by discussion with their constituents and after a period of internal machination, a "proposal" is prepared. In a unionized context, that proposal usually contains a number of actual contractual language proposals or changes that are put forward by the union, together with changes in wages and benefits. It is most common for unions to hold back on the "monetary" portion of a proposal until all or most of the "non-monetary" demands have been resolved. Often these 'proposals' are the result of sometimes vigorous debate amongst the various constituents of one side - in this case the union and its various members - often containing internal compromises made before the proposals are finalized.

Once the proposals have been formulated, a meeting is set up between the union and management at which time the proposals are formally made. Sometimes counter-proposals by the company are made at the same meeting. More often, the company listens to the proposals from the union, asks some questions and then retires to consider their response. The company then responds to those proposals and perhaps makes several proposals of its own. The practice of companies making proposals for changes in language of the collective agreement has only come to common usage in the last decade or two. Prior to that it was "union asks, company responds".

A good example is the recent lengthy dispute in Sudbury. In that case Vale, the new foreign owners of the old Inco facility, wanted substantial changes to the language of the existing contract. Essentially they wanted to 'change' the culture in the mine. Almost a year later, after the longest strike in Sudbury's history, a compromise was finally reached.

1. POSITIONAL BARGAINING

Positional bargaining is based on the premise that there is a given pie to divide. A win for one side means a loss for the other. Human Resources people often say that the best collective agreement you will ever have is the first collective agreement you have. Changes to that collective agreement usually mean a diminution in the flexibility and/or authority of management. Thus, union demands equal company losses.

A great deal of time in positional bargaining is spent determining what the other side "really wants". In a union situation, management knows that the union does not expect to be successful on all of its demands. The union keeps secret those demands which it *really* wants as opposed to those which it has only put forward as bargaining chips in order to increase the "bargaining power" of any particular

demand which later on in the process they agree to relinquish. By artificially increasing the perceived value of a particular demand, the thinking goes, the union can extract a bigger price when they withdraw that demand. In the new era of 'company demands' - as in the Vale case, there is a tendency on management to adopt exactly the same technique.

In very large measure, the parties in positional bargaining enact a ritual set piece until they get to the stage where 'real' bargaining occurs. Too often, this happens in extended overnight sessions where the parties get down to "real bargaining". Only at this stage do people start to discuss in any meaningful way their actual interests. Often, at this stage, there are sidebar discussions between one side and the other where there is greater disclosure as to the bottom line and the real interests which need to be accommodated. Too often, too little time is spent by tired individuals whose flexibility has been greatly diminished and who are expected to come to a solution pending some threatened deadline established by one side or the other, or, in the case of labor disputes, by legislation. Not surprisingly, solutions devised in these circumstances are often less than satisfactory to either side. But more importantly, often the very process by which the final result has been achieved has negated any chance of a solution which would have much more effectively satisfied all parties.

2. INTEREST BASED BARGAINING

Interest based bargaining is premised on the understanding that all sides to the bargaining process (there are often more than two sides in multi-party discussions or disputes) have legitimate interests to be protected and advanced. Often the interests are not the same. Sometimes they are directly opposing. But it is usually in the interest of both sides that to the maximum extent possible, the interest of both sides be maximized in the final solution. The more complex the problem, the more parties involved, the more difficult it is to 'solve' with positional bargaining.

In my view, good labour negotiators have always used the principles of mutual gains bargaining, but often they have done so unwittingly. The final negotiations which take place just before the settlement of a new collective agreement strike, or lock-out, almost always involve recognition on both sides that the other side has interests which must be taken into account. Too often this realization is only made when positions have hardened to the point where alternative and perhaps superior solutions are no longer on the table and where the politics simply do not allow for their examination. Traditional, positional bargaining can be inefficient. It produces agreements which are not as good as they could have been had the parties approached the problems in a different way.

THE ROLE OF POWER

In most negotiations, one side or the other has greater negotiating power. In union/management relationships, management is usually perceived as having greater power, but in some cases, this perception is false. The party with the greater negotiating power can change from one set of negotiations to another. Thus, positional bargaining based on bargaining power often results in alternating bargaining situations. In one set, the company has the advantage. In the following set, the union has the advantage. If the goal in bargaining is to always get as much as possible, this shift in power balance can result in extremely adversarial, counter-productive labour relations. But the same problem can arise in other negotiations. Public pressure, legal impediments, logistics or other factors can shift 'power' from one party to another in any negotiation - sometimes in ways that are difficult to predict at the front end. Parties who 'depend' on their superior bargaining power at the front end of a discussion can find the tables turned on them by unforeseen events, and if they have been demonstrably exercising their superior 'bargaining power', can find an 'opponent' intent on exacting revenge. Interest based bargaining, because it starts from a different premise, does not create the adversarial atmosphere so often the main ingredient in positional bargaining.

If the parties approach the issues as problems requiring resolution, and instead of seeking a win on their side, seek the best solution for all parties concerned, this destructive cycle can be avoided.

POSITIONAL BARGAINING: THE USUAL APPROACH

- Each side starts the process by putting forth the "solution".
- Each side is left to guess which problem the solution from the other side is intended to solve.
- Each side becomes wedded to the solution they have suggested before there is any discussion about what, if anything, needs fixing.
- "Positions" are traded and packaged.
- Occasionally, alternative positions are suggested.
- A great deal of time is spent discovering what is really important to the other side.
- Each party plays its cards close to the vest.
- Each party tries to maximize its "bargaining power".

WHEN IS POSITIONAL BARGAINING APPROPRIATE?

One could argue that positional bargaining is *never* appropriate. However, in the real world, positional bargaining will continue to be used.

This positional bargaining is based on certain premises. Some of these are as follows:

- Limited Resources
- Each party strives to maximize its share of a fixed pie.
- The interests of the parties are not interdependent.
- The future relationship between the parties has low priority to them.
- A win for one side equals a loss for the other.
- Each party sees the other side as an opponent.
- The ultimate goal is to win as much as you can, recognizing that your win is the other side's loss.

INTEREST BASED BARGAINING: THE FUNDAMENTAL PRINCIPLE

Mutual gains bargaining in contrast is based on the premise that each side has interests. Each side examines its own interests and also becomes educated as to the legitimate interests of the other parties. Together the issues are addressed, having in mind the interests of all of the parties and how they can be best accommodated.

Interest based bargaining often takes longer. Because it requires open discussion about real issues, more time is needed for each of the bargaining teams to achieve a level of mutual trust - a crucial element to the process. Only in an atmosphere of mutual trust can the parties honestly discuss their own interests. Neither side can view the process as merely a bargaining technique. If either side attempts to do so, the other side will sooner or later recognize that fact and the mutual trust essential for the process will be destroyed. Although the process is in some ways more time consuming, and in many ways more difficult, the results that can be achieved make the effort worth it, especially if the problems are complex.

AN EXAMPLE IN ACTION

I acted for the Ontario Medical Association in its relationships with the Government of Ontario for many years. Anyone who has followed that relationship over the twenty years will recognize that for many of those years it was extremely fractious. The problems which both the Government and the OMA are forced to deal with are complex and involve large sums of money, a large measure of public interest, and a very large number of interested parties.

When the Harris Government was elected, it immediately made significant changes to the relationship between the doctors and the Government. The previous NDP regime had negotiated Framework Agreements with the Ontario Medical Association, governing the 20,000 doctors practicing in the

Province of Ontario. Virtually all of their income is derived from insured medical services, which, because of the ***Canada Health Act***, cannot be provided by doctors to patients except through a provincial medical scheme. For many years, both here and in other jurisdictions, the utilization of medical services by patients had been increasing at double digit rates. The then new Harris Government was convinced that this increased utilization was at significantly driven by the doctor's themselves. Accordingly, early in their mandate the Government passed Bill 26, an omnibus piece of legislation which, among other things, nullified the agreements which had been reached with the OMA and the Government of Ontario. In addition, several arbitration decisions which had been rendered under that agreement, that had been 'won' by the OMA were also nullified.

The Government indicated to the OMA that it no longer wished to discuss these matters with them, but would be content to deal directly with various interested groups. The effect of this decision, perhaps surprisingly for the Government, was to intensify the animosity between doctors and the Government. The OMA had represented all of the doctors in Ontario. Now groups of doctors either on a specialty specific basis, or on an interest basis sought the right to negotiate directly with the Ministry. When the Ministry did not respond effectively or quickly enough, various of the newly established groups threatened to withdraw or reduce services being provided in order to force the Government to negotiate with them.

It was against this back-drop of suspicion, distrust, ripped up agreements and claw backs that the OMA and the Government sat down to attempt to negotiate a new agreement. Both sides recognized that it was in their individual interest to come to a mutually negotiated settlement. The situation was chaotic and rapidly deteriorating. The public was concerned about lack of medical services. The doctors were concerned that the Government had nullified previous obligations to them and was refusing to negotiate in any meaningful way with them. Doctors both individually and collectively were angry and distrustful. The Ministry officials had come to accept that physicians were driving utilization by a serious of what later proved to be erroneous and inadequate statistical analysis. What followed was a lengthy negotiation which lasted more than eight months. During that negotiation, the Government and the OMA consciously chose representatives who would be prepared to discuss issues on a rationale basis. After a series of meetings where positional bargaining took place, the parties quickly realized that the issues involved were far too complex to be amenable to positional approaches. Over a period of months of extensive discussions, the parties started to discuss the underlying issues which each of them had on a myriad of fronts.

Out of this discussion grew an Agreement which was far more about process than about specific contractual obligations. The parties set in place a committee, known as the Physician Services Committee. That committee had, and still has equal representation from both the Government on the one hand and from the OMA on the other. The committee was originally chaired by the Honourable George Adams who acted as the initial neutral facilitator. Those of you who know something about alternative dispute resolution will recognize this name. This approach prevents either side from high-jacking the agenda of the meeting.

The Physicians Services Committee has a number of sub-committees that report to it. These sub-committees are divided on particular issues which are complex or which require significant technical knowledge.

The agreement which established the PSC and its sub-committees also created an obligation for all of the members from both the Government and the OMA to be given a course on conflict resolution. That course was given with all members from both sides attending together. The intention was to attempt to establish a format and atmosphere in which issues could be discussed openly and honestly and where alternative solutions could be proposed by anyone without attribution. Further it was understood that agreement on everything would be unlikely. That doesn't mean that the relationship necessarily needs to end or that there necessarily needed to be sanctions of any sort.

This Committee has now been meeting for almost fourteen years. A number of very creative and unique approaches to the problems of our health care system have been developed by the PSC or its sub-committees and recommended to both the OMA and the Government of Ontario. The situation is far from perfect, and there have been some remarkable successes - and some failures, but I maintain this approach has produced agreements and solutions to problems which would have been impossible using traditional positional bargaining.

INTEREST BASED BARGAINING: THE PROCESS

THE BATNA CONCEPT

In order to properly commence a process of interest bargaining, it is necessary for both sides to carefully examine the interests they need to protect. They also have to speculate about the interest which the other side needs to protect.

Each side then needs to inquire as to whether negotiations are necessary at all. This requires an examination of what is commonly referred to as the Best Alternative to a Negotiated Agreement (or BATNA). The BATNA is a solution to the issues which confront your side which can be solved without agreement of the other side or sides. If your BATNA is better than a negotiated settlement, you have no need to negotiate at all. On the other hand, if your BATNA is not as good as a possible solution achieved through negotiation, then there is a reason for you to negotiate.

The other sides go through essentially the same exercise. If both or all sides come to the conclusion that their BATNA is not as good as a possible negotiated solution, then the fundamentals exist for interest based or mutual gains bargaining.

Sometimes it will not be clear at the onset whether or not the BATNA is inferior to a negotiated solution. In such case, either side can enter discussions, always keeping in mind its BATNA. When it becomes clear that the BATNA is superior to any negotiated solution, that side has the option to implement their BATNA. Identifying your BATNA not only provides you with an alternative to negotiation, it also provides you with a touch stone to which you can refer during the negotiating process.

It is important that you not only identify your own BATNA, but that you also learn as much as you can about the other sides' BATNA.

When both sides recognize that their BATNA , as well as the BATNA of the opposite number is not as good as a negotiated settlement, the opportunity exists for both sides to build on this recognition.

HOW TO BUILD THE PROCESS

In positional bargaining, each side attacks the other's proposal and attempts to convince them that their proposal is the right one. In interest based bargaining, both (or all) sides attack the problem and attempt to discover the solution which best deals with the interests of both (or all) sides. The challenge for bargainers is to assist not only your own side but also the other side to approach the problem in this manner.

In this paper, I have broken down the process into a number of stages.

STEP ONE: IDENTIFYING THE INTERESTS

The first thing you need to do before getting started with negotiations is to identify those interests which both you and the other side have in the process. This is true whatever approach to bargaining you intend to take.

There are three types of interests that both sides need to consider:

1. **Substantive Issues**

Substantive issues are those issues which are usually put on the table in positional bargaining as "positions". They deal with money, resources, benefits, or other actual issues that need to be solved during the negotiating process. Often some of these issues will involve fixed resources. Fixed resources issues can easily degenerate into win/lose situations and that realization needs to be foremost in the minds of the negotiators on both sides if the process is to be successful.

2. **Procedural Interests**

These are interests with respect to how the process is to be carried out and how disputes will be resolved. In addition, parties need to deal with how the process of negotiations will be communicated to the principals and how the settlement will be implemented. Very often, procedural interests are not properly considered and as a result, the process breaks down. It is usually appropriate for these issues to be discussed at the front end of the negotiating process. Issues such as communication with principals, communications with the press, and statements as to the issues being dealt with are important because miscommunication on these issues can destroy trust and break down the bargaining. In complex negotiations, a negotiation protocol is often the first thing discussed. It certainly needs to be raised early in the process, especially if the issues are of interest to the press or the public.

3. **Psychological Interests**

Negotiations are conducted by individuals, often with their own peculiarities, strengths and weaknesses. In the negotiating process, 'psychological' interests can often be the most important. They involve how the opposite side is treated, the respect that is given to their positions and the way in which you respond to the proposals put forward by them. It is crucial to the process that you attack the problem, not the people. Negotiators often confuse positions with the people advocating them. This is true both for the advocator and for the person to whom they are advocating. Although people are not always constructive in their approach to a problem, they almost always expect the response to be. Throughout the process work hard to treat the individuals on all sides with respect.

CHOOSING THE TEAM

It is important that you chose people on the team who actually have the ability to make decisions, or to make effective recommendations. It is also important that you choose individuals who have credibility with people on the other side. They need to have the right mental approach to the problem. They need to realize that the endeavour in which we are engaged is not a power struggle, but is instead an attempt to reach mutually acceptable solutions, keeping in mind the interests of both sides to the bargaining table.

The Use of Third Parties and Objective Criteria

Much of the literature discussing mutual gains bargaining describes the importance of using third parties or objective criteria as a methodology to evaluate options that are created during the negotiating process. Although it is sometimes very difficult to do so, parties should agree upon objective principles with which they will evaluate the proposed solutions to any problem put forward by either side. The concept that both sides need to adopt at some stage in the negotiating process is that they are jointly seeking the right solution as opposed to the solution proposed by either side. The use of third party criteria, ie. standards elsewhere in the community, public opinion, the advise of third party mediators, or other similar inputs can be extremely useful in assisting the parties to view problems in this light. Mediators can be expensive. Therefore in many cases agreed upon 'goals' that would be necessary for a 'good settlement' - such as mutual acceptability, and perhaps, in appropriate cases, acceptability of third party participants or users may be a useful place to start. In the OMA - MOHLTC case for example, part of the reduction in utilization was achieved by delisting certain procedures seen as medically unnecessary. A panel of experts was created to review the mutual recommendations and only after they agreed that the procedures were medically unnecessary, were recommendations forwarded to the Government and the OMA.

Step 1A: Changing The Game

It may be that one side of the bargaining table has decided to attempt to use a interest based bargaining approach to the set of bargaining in which they are about to become engaged. What steps can this side of the bargaining table take to move the bargaining in that direction, when the other side of the table has no experience with mutual gains bargaining and is using positional tactics? This is a difficult problem and one that requires patience and a real understanding of where you and your team want to go.

Firstly, it is crucial to defuse the initial antagonism and anger which often accompany positional bargaining, especially in tough times. The key to defusing this anger is listening.

1. **The Art of Active Listening**

(i) "Active Listening" is one of the most important arrows in any negotiator's quiver. Contrary to popular opinion, an negotiator who can listen well is more important than one who can speak well. By listening to the other side, and by actually hearing what they say, it is possible to gain credibility. You need to demonstrate, not only that they have been given an opportunity to express their position, but that you have actually heard what they said.

One of the most important skills that you can learn in this regard, is to "replay the tape". Having given them an opportunity to give their position, you then in your own words, and without the hyperbole, tell them what you have just heard. It is not necessary for you to agree with what they have said, it is only necessary that you establish that you have heard what they said.

(ii) When they put forward a position, it is important that you do not respond with a counter position. Instead, attempt to understand what the position is and more importantly the interests behind the position. Ask questions to elucidate information about their position and more particularly, the reasons for that position. Where it is possible for you to agree with any of the statements they have made, you should agree. In some cases, it may be advisable for you to say something like this.

> "I understand that you feel the following . . .If I was in your position, I would probably feel the same way."

You will note from the above statement that you have not said you agree with them, but you have said that their position has some validity. By saying to them that "If I were in your position" you are making it clear that you are <u>not</u> in their position. This opens the door for them to ask you further information concerning your position. This ability to open the door to rational discussion is a crucial skill for any negotiator, especially one who is interested in using the interest based bargaining approach.

(iii) When responding to statements from the other side, it is more useful for you to comment with "I statements" as opposed to "you statements".

For example, it is far more effective for you to say,

"The effect of that on our side would be as follows.."

as opposed to saying

"Your position is ridiculous"

By posing your responses in your own interest terms, it is possible to greatly defuse anger and resentment and at the same time open the door to rational discussion.

(iv) Many negotiators use threats as part of their arsenal. The problem with threats is they normally invite counter threats. Instead of using threats, it is a more effective tactic to warn the other side as to what the consequences of any particular action could be.

Don't say,

"If you do this....we will do that".

Instead say,

"If you do this...we will have to examine our options. Some of those options could be etc.".

The difference in those two remarks is subtle, but by no means unimportant.

(v) Sometimes the other side will attempt to influence your actions by using a power tactic or sanction. The way in which you respond to this use of "power" will be very important to the success of the negotiations. Experience of many negotiators and supported by theoretical research done using the prisoner's dilemma and other similar game theory approaches, would suggest that a 'tit-for-tat' response is most likely to assist the parties to eventually reach agreement.

By this, I mean the following: If the opposite side uses a power tactic or strategy or sanction in an attempt to influence your actions, you should respond with a similar level sanction, but being careful that you do not escalate or use more power in response to their sanction than is absolutely necessary. At the same time as you use that "tit-for-tat" strategy, you should signal that you are prepared to continue to negotiate and that the use of further "power" on your part will only occur in response to a further use of "power" on theirs.

To respond by doing nothing, simply demonstrates weakness. To respond by using greater sanctions than absolutely necessary creates anger, resentment and escalation

of the dispute. A measured "tit-for-tat" response coupled with a clear indication that you are prepared to continue to discuss the issues in dispute has been demonstrated to be the best way to respond in the long run.

2. Controlling Your Reactions

Negotiations is, by its very nature, an emotionally charged process. Usually one or more of the spokespersons for either side will have strongly held positions, to which these individuals will be committed. People often find it difficult to separate their own identity from the positions they are taking. It is absolutely essential for a negotiator who wishes to move the other side from a positional bargaining approach to one based on mutual gains, that they control their own reactions. By controlling your own reactions, you will eventually help them to control their reactions.

Steps that are useful in controlling your reactions are as follows:

(1) **Listen Carefully**

Listen carefully and attempt to pick out from the hostility and anger, the underlying message and interests that are being conveyed.

(2) **Personal Attacks**

If they attack you personally, do not respond in kind. It is appropriate to indicate that personal attacks are not approaches that you intend to use and that you would appreciate it if they would separate personal attacks against you from the issues they wish to raise. If they are unable to do that, it is appropriate for you to call for a time out. A time out will allow them to get themselves under control and allow you to do the same thing.

(3) **Don't Respond Too Quickly**

Don't force yourself into a position where you are responding before being given an opportunity to carefully consider what you are going to say. If they attack with anger and hostility and personal attacks, indicate that you may need a little time to properly respond.

(4) **Become a Spectator**

When you are attacked personally, it is almost impossible to avoid the natural human responses of this attack. Learn to recognize the signs of emotional distress in yourself. Learn

to recognize the physical signs associated with anger. Your pulse increases, you feel a knot in your stomach, you feel tense, your senses become more alert. These are characteristics of physiologists describe as the flight or fight response which prepare an individual to protect themselves or flee from a dangerous situation. While they prepare your body for sudden and immediate action, they do not prepare your mind for careful considered responses.

It is almost always inappropriate to respond to a position taken by the other side, while you are understandably reacting to this anger at a physiological level. In these circumstances, it is appropriate to ask for a time out and during that time out attempt to put yourself completely above the fray. Pretend you are a spectator at the Rogers Centre watching a game from the top level. Look down on what has just occurred and attempt to fashion your response only after you have calmed yourself down and looked at the problem from afar. By not reacting in kind, you actually will defuse their anger and allow for the possibility of rational discourse.

(5) **Practice the Art of Listening**

When people are angry, they need time to blow off steam. Until they have been allowed to do so, they will be in no mood to listen to anything you have to say. Thus it's crucial that you give them the opportunity to be heard and then demonstrate to them, that you have heard what they have said. As indicated previously, it is always possible to agree to something that they have said or at least to indicate to them, that you understand their position. Saul Alinsky in his famous book, Rules for Radicals, advised people to use tactics that the other side doesn't expect. In negotiating, the other side doesn't expect you to agree with their position or to sympathize.

Anyone who has been exposed to training in the martial arts will realize that it is far more difficult to attack a person who is standing right beside them, then someone who is at a distance. Thus, showing understanding for the position and the reasons for the position, disarms the other side and puts them in a position where they become more amenable to rational discussion. That is the purpose of the exercise. Remember, they won't be prepared to listen to you until they believe they have been heard.

3. **Establishing Trust**

Anyone who negotiates for a living will tell you that trust between the spokespersons is almost always required before there can be any settlement. I believe this to be true in positional bargaining or in any other kind of bargaining, but it is especially true in interest based bargaining.

There are many levels of trust. Most people operate according to the other's expectation and not according to their own potential. It is important in fact in order to establish trust, that you behave according to the *other party's* expectation. It is not absolutely crucial that they like what you do. It is important that they can rely on you to do what you say you will do. Trust takes a great deal of time to establish and can be destroyed instantly. If you actively mislead the other side at any time in the process, the chances of them ever trusting you again are virtually nil. On the other hand, if you come into a situation in which there is a high degree of mistrust, it takes a long time for you to establish a level of trust with the other side. It is therefore very important that you say what you mean and mean what you say. It is further very important that you deal with any misunderstandings in a forthright manner as soon as you learn that they have occurred. Negotiators that are the most respected are almost always the ones who have a reputation for personal integrity.

WHAT DO I LOOK FOR

If you have decided to attempt to change the bargaining from a positional approach to a mutual gains approach, there are several signs that you can look for which will tell you whether or not you are succeeding.

(1) Positional bargaining is characterized by anger, hostility, high levels of emotion and tense atmosphere. If you have experienced that reaction at the beginning of the process and now the process is becoming more relaxed, there is actual discussion taking place and people are exchanging incidents with humour, you know you are on the right track.

(2) Positional bargaining often focuses on personalities at the onset. Approaches are often characterized by attacks, often attacks on individuals. If the focus has moved from personalities to issues, you know you are on the right track.

(3) Positional bargaining is often characterized by repetition of the same points over and over again. Each side gets the impression that the other side is not listening. If you have moved to an actual discussion of issues as opposed to positions and if it is clear that each side is listening to what the other side is saying, you are moving in the right direction.

(4) Positional bargaining often results in individual positions hardening. One side merely indicates to the other that their position is the right position. If the discussion has moved from discussion of the position of each of the parties to the possible solutions to the problem, you are moving in the right direction.

(5) Positional bargaining is often accompanied by high levels of mistrust. If individuals on both sides of the table are beginning to show signs that they trust what the other side is saying, whether or not they agree with it, you know you are moving in the right direction.

(6) Finally, positional bargaining is almost always characterized by a discussion of who is right. "I say my solution is the right solution--you say your solution is the right solution". If this discussion has changed so that now both sides are talking about **what** is right, as opposed **who** is right, you have a clear indication that the parties have moved in the direction of mutual gains bargaining.

WHERE DO WE GO FROM HERE

Assuming that you have made the decision to engage mutual gains bargaining as opposed to positional bargaining and that you have achieved some or all of the signs indicated above, you are now ready to begin the real bargaining.

STEP TWO: FRAMING THE ISSUES

In framing the issues, both sides attempt to indicate in a non-threatening and value neutral fashion, the issues and interests that are of concern to them. If the mutual trust has been established, then both sides can lower their guard and tell the other side what is truly important to them. It may be that on your side of the table, it is your position to listen to angry, often hostile, threatening positional statements and translate them into interests, problems or concerns that can be responded to productively. It is important however not to try to do this too early in the process.

You should be observing some or all of the signs referred to earlier before you attempt to outline to the other side, what you think their interests are. However, once you have managed to develop the trust required for this open discussion, you need to ensure that you really do understand all of the interests they need to address. Often parties will be very reluctant to be that forthright. It is therefore crucial that you ask questions and ensure that you understand all of the interests they have. It is also important for you to articulate to them the interests that you need to protect. This open discussion of interests that need to be taken into account on both sides is crucial to the process. The problems then need to be framed in terms of the various interests to be taken into account.

This process is often referred to as reframing. Once we have framed and reframed the problems, in terms that are value neutral, we next move the step three.

STEP THREE: IDENTIFYING THE PROBLEMS

Both sides agree on the problems that both sides need to address. Both sides identify the interests which both sides need to protect. Both sides test their own interests and the interests of the other side to ensure that everybody understands the issues, the problems and the interests. This testing is done by both sides asking each other to explain why interests are important to them.

STEP FOUR: GENERATING OPTIONS

There are a number of methods that can be used to generate options for solutions. The key to this process is that nobody owns any particular option. What we are attempting to do in this phase is to get as many possible solutions as there can be without evaluating any of them.

Brainstorming with everyone present can work very well. It is crucial for this process to be successful that no one immediately evaluates the solutions proposed by anyone else. The various solutions are merely listed on flip charts or a blackboard. This process continues until no one comes forward with any further possible solutions. Other approaches involve individuals, on their own, listing the possible solutions that they conceive of and then the group looking at all of the lists and from that list identifying all of the options which have been proposed.

Whatever procedure is used, the purpose of this exercise is to be as creative as possible without the risk of immediate rejection or ridicule. Negotiators who practice this approach to bargaining will tell you that often the most creative solutions arise in just such a brainstorming session. They will also tell you that these solutions are often ones that would never have been achieved using traditional positional approaches. Often brainstorming sessions create a synergistic energy and an option will be generated as a variation on an option generated by somebody else, that on their own they would never have thought of. Brainstorming encourages people to think out of the proverbial box. For this process to work properly, whether or not brainstorming is used as the generator or not, it is crucial that generation and evaluation be separated.

STEP FIVE: EVALUATING OPTIONS

Once all of the possible options have been generated, we then move to the evaluation procedure. As much as possible, this analysis should be done jointly. If the process has worked up until this point, you will now be at the stage where individuals will indicate why a particular solution is not only

acceptable to their own side, but also why it is not acceptable to the other side. This process is important to the final result because both sides need to understand why any particular option will create difficulties for the other side. Often this evaluative process will lead to a combination of options. Sometimes combinations will be such that they solve one set of interests for one side combined with another option which solves a different set of problems for the other side. Often options which have low costs for one side can have high satisfaction for the other. Pairing low costs/high satisfaction options for each side can often allow the parties to reach solutions on a number of different problems simultaneously.

As in any bargaining, it is far better to deal with the easier problems first. By finding appropriate solutions to easier problems, we build confidence and momentum to deal with the tougher problems.

Sometimes solutions are hard to find. In these cases, it is useful to develop principles which need to be satisfied in order for a solution to be found. If both sides can agree on the principles, they are well on the way to finding an appropriate solution.

STEP SIX: FINALIZING THE SETTLEMENT

Although it is often tempting to do so, in my view it is almost always a mistake to walk away from the table without formal documentation. Often the trust and good feelings which allow parties to solve difficult problems will leave them with the impression that it is not necessary to codify the solutions in writing. The failure to memorialize a solution in writing can lead to disaster. Often, it means, the parties have not in fact actually reached a solution. If you can't write down the agreement you have made, you don't have an agreement.

In the expression of the agreement in writing, it is important to establish monitoring mechanisms. The relationship that you have established across the table can be carried forward into the general relationship between the parties. If you build in check points at regular intervals, you have an excellent chance of avoiding future problems that can blow up in any future discussions.

It is also crucially important to agree on dispute resolution methodologies. Sometimes these are mandated by legislation - such as under the *Labour Relations Act*. But whether or not mandated, you need to consider how a dispute about whether or not one party is living up to commitments made by it will be resolved. There are many approaches short or arbitration or court action to solve these disputes. Certainly reconvening the 'team' that came to the agreement in the first place, or the

leaders of the parties to the team, may be a good place to start. In general, parties who are able to solve their contractual disputes using mutual gains bargaining will find the number of disputes that cannot be solved between the parties significantly reduced in number. Parties who agree to continue the dialogue are far more likely to maintain the mutual trust they have developed during the negotiating process.

FINAL COMMENTS

Interest based bargaining is not a panacea. It does not mean that all solutions can be solved without the confrontations that often characterize disputes, including the traditional sanctions used in industrial relations. What it does give to the parties is a better opportunity to solve complicated problems and to build a relationship that allows both sides to maximize their interests.

Any experienced negotiator will tell you that it is a mistake to win too big. A win which humiliates or denigrates the other side is almost bound to lead to future problems. Bargaining is a human process. Interest based bargaining works because it takes cognizance of the way in which human beings work best together.

This paper, is by its very nature, only a very brief discussion of the issues. There is a growing body of literature dealing with interest based and mutual gains bargaining. Over the last several years, a growing number of professionals have come to realize the importance and validity of the techniques briefly described in this paper. Even if you don't use the particular methodology set out in this paper, and in other materials, exposure to the approach will, in my view, improve both your performance as a negotiator, and more importantly, the results you achieve.

Deborah Graham

11/19/2016 3 COMMENTS

What is interest-based negotiation?

Collaborative Practice and Mediation are interest based processes. Interest based negotiation is a problem solving approach to conflict that focuses on needs, desires, concerns and fears rather than positions.

A position is what we want (or think we want). An interest is the why beneath the position. For example, a position might be 'I want a tuna sandwich.' The why beneath that is that 'I am hungry and want a healthy food choice.'

Positional bargaining or negotiating tends to lead to win-lose or zero-sum outcomes, where one person wins and gets what they want and the other person loses and doesn't get what they want. Positional bargaining can also lead to compromises where one person gets half of what he wants and the other person gets half of what she wants.

Interest based negotiating often leads to win-win outcomes where each person gets their needs and desires met or their concerns and fears addressed. For example, if one person wants the window open and the other person doesn't, a positional negotiation might lead to the window being open or closed or perhaps open halfway. An interest based negotiation might go as follows:
Why do you want the window open? Because it is stuffy in here and I want some fresh air.
Why do you want the window closed? Because I am fighting a cold and don't want the draft.
A win-win solution might be to open a window in an adjacent room to allow some fresh air without creating a draft.

Another example is if two people both want an orange. A positional negotiation might lead to one getting the orange and the other not getting it or it might lead to the orange being cut in half. An interest based negotiation might look as follows:
Why do you want the orange? I am hungry and thirsty and the orange will satisfy both.
Why do you want the orange? I am baking muffins and I need the orange rind.
A win-win solution would be that one person gets the orange rind and the other person gets to eat the orange.

If we don't spend the timing asking for the 'why's' beneath the positions, we miss opportunities to create win-win outcomes.

Deborah Graham

Wife: "Because it is near to the kids' school."
So it is important to you that the children are able to continue to go to the same school?
Wife: "Yes."
So the interest is that the children go to the same school and one possible solution or outcome is that she keeps the house. There are other possible options that would allow the children to go to the school and depending on some of the husband's interests, these options would also be explored in a collaborative negotiation or mediation.

3 COMMENTS SHARE

Amir Khan 2/11/2021 03:07:14 pm

Lon appaly

REPLY

sports track 12/20/2021 12:13:04 am

Good article, a great job! Thanks so much for providing and sharing such information. Thanks!

REPLY

Peter Manyoni...very clear 8/6/2022 06:30:23 am

Very clear

REPLY

LEAVE A REPLY.

Deborah Graham

Website

Comments (required)

☐ Notify me of new comments to this post by email

RSS Feed

FMCS | FEDERAL MEDIATION & CONCILIATION SERVICE

Interest-Based Bargaining

Joint Problem-Solving for Mutual Gain

Does your organization seek to bargain in a highly collaborative, transparent, and problem-solving way?

The mission of the Federal Mediation and Conciliation Service (FMCS) is to assist and train labor and management partners in building stronger working relationships. Put our more than 70 years of experience to work for you, with the implementation of FMCS relationship development training programs focused on achieving results in today's workplaces with new approaches to cooperatively addressing mutual problems.

What Is Interest-Based Bargaining (IBB)?

IBB is a collaborative approach to resolving labor and management disputes. Through the process, parties proactively identify durable solutions to outcomes at the bargaining table. Agreements are based on mutual and individual interests rather than positions. This approach emphasizes problem solving and enables mutual gain outcomes.

The Federal Mediation IBB Program Has Four Stages:

1. Orientation to IBB
2. Training in IBB Principles and Techniques
3. Bargaining Preparation
4. Bargaining

During the Orientation Session, parties receive an overview of the process and use that information to decide whether to participate in training. At the training session, participants learn about the principles, beliefs, steps and techniques of IBB. Following the training program, the participants make a decision about using the IBB process during the next contract negotiation. If the decision is made to use the process, the parties enter the preparation phase and then begin the bargaining process.

How Does It Work?

The Interest-Based process includes the following steps in a joint problem-solving process:

1. Identifying the **Issue** – What is the problem? What has been occurring? Why is it a problem?
2. Identifying Individual and Mutual **Interests** – Why do you want to resolve the problem? What do the parties care about? What concerns them? What is at the heart of the matter? Why do they believe a change or contract provision is needed?
3. Generating **Options** – The parties identify all possible solutions to the issue.
4. Developing **Standards** for Selecting the Solution(s) – instead of using adversarial, power-based methods for arriving at a solution, the parties develop objective criteria to judge the options.
5. Selection of the **Solution** from those options that meet the criteria.

What Are Interests?

Interests are the underlying reasons, concerns, needs, and basis for seeking resolution of a problem. The traditional approach is to determine a solution unilaterally, based on our own information and interests, and then attempting to persuade others to accept our solution. This often results in conflict when the offered solution has the potential to harm the interests of the other party.

How Does IBB Differ from Traditional Bargaining?

One of the major differences between traditional problem-solving approaches and interest-based approach includes an increased dialogue which promotes a better understanding of the issues being discussed. From this, the group can engage in a meaningful discussion about which solution will best meet, and not harm, the interests of both parties. Therefore, strong communication and active-listening skills are essential for ensuring that everyone's interests are expressed, heard, and understood.

Also in this process, it is critical to explore a broad array of possible solutions so that the best solution, addressing the most interests, is achieved. This is done by using brainstorming, a method of idea generation that encourages quantity and discourages evaluation. Because brainstorming/brainwriting does not involve the evaluation of options, the method for identifying the options which can be further considered is by use of jointly developed and objective criteria. Criteria that focuses on feasibility, relation to the interests of the parties, and acceptability, reduces the list down to those ideas which will provide the greatest mutual benefit.

Another difference is that decisions made by consensus rather than power. In the traditional labor-management arrangement, the parties use power-based methods to force a resolution acceptable to them. Consensus decision-making requires that the solution be **supported** by all group members, not just a majority. Full and open dialogue, incorporating the input of all participants and stakeholders, and a willingness to be open to the ideas of others, are important components of this process.

For More Information

For more information about FMCS and its programs, please contact FMCS Headquarters or visit our website at www.fmcs.gov.

interest based negotiation

What is Interest-Based Negotiation?

An interest-based negotiation is one in which parties share the interests that underlie their grievances and try to jointly negotiate a solution that satisfies all parties.

Interest-based negotiation, or integrative negotiation, involves exploring the deeper interests underlying parties' stated positions to identify potential tradeoffs and win-win opportunities across issues and interests.

Negotiation ultimately involves a choice between the deal you've been offered and what you would get by walking away from the table. Thus, the negotiation process should involve a search for solutions that leave both parties better off than they would be if they reached an impasse and turned to their outside options.

It turns out that interest-based negotiation has proven to be the most reliable way to create value and resolve conflicts.

When you know the areas of agreement where you and your counterpart are in alignment (and those areas on which you diverge), a skilled negotiator can craft an agreement that most closely approximates her own and her counterpart's needs while building a bargaining relationship with her counterpart. Rather than antagonistic, the negotiation process becomes a value-creating, integrative situation in which each side gets a "fair share" of the pool of resources.

By listening closely to each other, treating each other fairly, and jointly exploring options to increase value, negotiators can find ways of working together that reduce the need to rely on hard-bargaining tactics and unnecessary concessions.

Learn how to negotiate like a diplomat, think on your feet like an improv performer, and master job offer negotiation like a professional athlete when you download a copy of our FREE special report, ***Negotiation Skills: Negotiation Strategies and Negotiation***

Techniques to Help You Become a Better Negotiator, from the Program on Negotiation at Harvard Law School.

We will send you a download link to your copy of the report and notify you by email when we post new business negotiation advice and information on how to improve your dealmaking skills to our website.

The following items are tagged interest based negotiation:

Teaching the Fundamentals: The Best Introductory Negotiation Role Play Simulations

POSTED JULY 13TH, 2023 BY LARA SANPIETRO & FILED UNDER TEACHING NEGOTIATION.

Introductory negotiation courses are taught in law and business schools around the world, but are also increasingly taught to undergraduates and in all types of corporate settings. No matter the context, though, the basic elements of negotiation are roughly similar. Teaching interest-based negotiation, the Zone of Possible Agreement (ZOPA), the Best Alternative to a Negotiated ... **READ MORE**

High Stakes Negotiations in the Healthcare Industry

POSTED JULY 12TH, 2023 BY LARA SANPIETRO & FILED UNDER TEACHING NEGOTIATION.

Teach Your Students to Negotiate One of the Most Critical Global Industries With the COVID-19 pandemic devastating communities around the world, the acute importance of the healthcare industry to community welfare has become even more apparent. Healthcare is one of the biggest economies in the world, with billions of dollars spent on treatments and associated research. ... **READ MORE**

Business Conflict Management

POSTED MAY 1ST, 2023 BY KATIE SHONK & FILED UNDER CONFLICT RESOLUTION.

In the business world, workplace disputes are all too common. Consider these real-life conflict scenarios: a group of employees who, working overtime to make up for staff shortages, complain to their manager that they aren't getting paid enough for the extra time. A colleague confides about his boss's verbal abuse. Two employees argue openly about ... **READ BUSINESS CONFLICT MANAGEMENT**

For Better Communication, Try Appreciation

POSTED NOVEMBER 16TH, 2020 BY KATIE SHONK & FILED UNDER NEGOTIATION SKILLS.

Many professional negotiators have come away from talks wondering, How did that pleasant discussion turn sour? Why did the deal unravel at the last minute? ...
READ FOR BETTER COMMUNICATION, TRY APPRECIATION

Negotiation Skills: What's the Best Process?

POSTED OCTOBER 19TH, 2020 BY PON STAFF & FILED UNDER NEGOTIATION SKILLS.

This three-step approach to managing process issues in negotiations will reap significant rewards at the bargaining table. ...
READ NEGOTIATION SKILLS: WHAT'S THE BEST PROCESS?

What an Operatic Role-Play Simulation Can Teach You About Negotiation

POSTED MAY 23RD, 2019 BY LARA SANPIETRO & FILED UNDER TEACHING NEGOTIATION.

A distinguished older soprano, Sally has not had a lead role in two years. However, when another soprano falls ill, the Lyric Opera is eager to hire Sally…but at what price? Sally Soprano is one of the best-known role-play simulations from the Program on Negotiation's Teaching Negotiation Resource Center (TNRC). And it's a classic for good …
READ MORE

Thoughts from Dan Shapiro, Director of the Harvard International Negotiation Program, on the Government Shutdown

POSTED JANUARY 23RD, 2019 BY PON STAFF & FILED UNDER NEGOTIATION SKILLS.

This week, Dan Shapiro, Director of the Harvard International Negotiation Program, was quoted in The Christian Science Monitor speaking President Trump's negotiation style, and how he may get better results through interest-based negotiation. "The basic idea here is, let's not focus on positions, or what each side says they want: 'I want a wall;' 'Well, we're … **READ MORE**

Teach Your Students Dispute Resolution for Their Everyday Lives

POSTED SEPTEMBER 6TH, 2018 BY LARA SANPIETRO & FILED UNDER TEACHING NEGOTIATION.

Negotiation refers to the process of working out agreements that meet each party's needs and address their interests. People negotiate all the time in their everyday lives: in the workplace, within families, and when buying goods and services. Knowing which negotiation strategies to use in different circumstances can make a significant difference. The Teaching Negotiation … **READ MORE**

Negotiating the Fiscal Crisis

POSTED DECEMBER 12TH, 2012 BY PON STAFF & FILED UNDER NEGOTIATION SKILLS.

How can we avert a full-throttle drive over the fiscal cliff? Despite some promising signs of movement on both sides of the aisle, the current negotiation approach – positional bargaining – is bound to bring us dangerously close to the edge. …
READ NEGOTIATING THE FISCAL CRISIS

Why Classic Cases?

POSTED MAY 11TH, 2011 BY PON STAFF & FILED UNDER DAILY, NEGOTIATION SKILLS, PEDAGOGY AT PON.

Why are some negotiation exercises still used in a great many university classes even twenty years after they were written? In an effort to understand more about the enduring quality of some classic teaching materials, we asked faculty affiliated with PON to explain why they think some role play simulations remain bestsellers in the Clearinghouse …
READ WHY CLASSIC CASES?

Former Clearinghouse Customers Speak!

POSTED MAY 11TH, 2011 BY PON STAFF & FILED UNDER DAILY, NEGOTIATION SKILLS, PEDAGOGY AT PON.

In an effort to understand more about how the former PON Clearinghouse does and doesn't meet its customers' needs, we interviewed a number of long-time Clearinghouse clients. We asked what teaching materials they found most valuable and for what reasons. We also asked how they found out about the former Clearinghouse and what additional teaching and ... **READ FORMER CLEARINGHOUSE CUSTOMERS SPEAK!**

A Closer Look at Collective Bargaining

POSTED APRIL 18TH, 2011 BY PON STAFF & FILED UNDER BUSINESS NEGOTIATIONS, DAILY.

Adapted from "Innovation in Labor Relations," first published in the Negotiation newsletter. In 2004, a team of MIT and Harvard researchers published a study of a bold initiative by health-care giant Kaiser Permanente and its many unions to restructure their relationship. Given the recent spotlight focused on collective bargaining, beginning with a very public battle in ... **READ A CLOSER LOOK AT COLLECTIVE BARGAINING**

Opening students up to negotiation

POSTED JUNE 15TH, 2010 BY PON STAFF & FILED UNDER NEGOTIATION SKILLS.

Working It Out is a 27-page handbook designed to introduce high school students to problem-solving, interest-based negotiation. Written by Getting to YES co-author Roger Fisher and Difficult Conversations co-author Douglas Stone, Working It Out presents core concepts from both books in a clear, simple format with plenty of age-appropriate examples from family, school, workplace and ...

READ OPENING STUDENTS UP TO NEGOTIATION

Gravel quarry or hiking grounds?

POSTED JUNE 14TH, 2010 BY PON STAFF & FILED UNDER BUSINESS NEGOTIATIONS, DAILY.

The PON Clearinghouse offers hundreds of role simulations, from two-party, single-issue negotiations to complex multi-party exercises. Rockwell Quarry is a five-party, multi-issue negotiation among elected officials, property owners, and a gravel company over a permit for a gravel quarry in a recreationally valuable canyon. The Rockwell Quarry Complex Environmental Negotiation is a five-party, multi-issue simulation that ...

READ GRAVEL QUARRY OR HIKING GROUNDS?

Salvaging the deal

POSTED JUNE 9TH, 2010 BY PON STAFF & FILED UNDER DAILY, NEGOTIATION SKILLS.

The Clearinghouse at PON offers hundreds of role simulations, from two-party, single-issue negotiations to complex multi-party exercises. Tendley Contract is a two-party integrative contract negotiation between a computer consultant and a school district representative at an apparent impasse over different expectations over cost of services. SCENARIO: A school district and a computer consultant are negotiating a ...

READ SALVAGING THE DEAL

Negotiate how you'll negotiate

POSTED NOVEMBER 3RD, 2009 BY PON STAFF & FILED UNDER DAILY, NEGOTIATION SKILLS.

Adapted from "Have You Negotiated How You'll Negotiate?" by Robert C. Bordone, Professor, and Gillien S. Todd, Lecturer, Harvard Law School. Breakdowns in negotiation are common. In the face of impasse at the bargaining table, managers are quick to blame either the challenges of the issues being negotiated or the hard-line tactics of the opposing parties. ... **READ NEGOTIATE HOW YOU'LL NEGOTIATE**

Steps in Interest-Based Negotiation
Federal Mediation and Conciliation Service
Human Resources Development Canada

Step 1 - Formulation of Joint Opening Statement

Once the decision has been made to use the interest-based process and joint training has been completed, preparation for negotiations begins with the parties developing a joint opening statement of objectives for the negotiation process.

Purpose:

- Sets positive tone for negotiations
- Ensures common understanding of process
- Can be provided to constituents

All of these may be useful since interest-based bargaining constitutes a departure from the parties' usual way of conducting negotiations.

This and all steps of the interest-based approach are based on the assumption that time spent in early, open, and explicit discussion of both process and content issues will pay dividends in fewer misunderstandings and less rigidity and entrenchment later in the process.

Joint statements of objectives usually contain:

- a good faith commitment by all parties to make a serious effort to use the interest-based process and to refrain from attempting to apply power to the resolution of issues
- a description of their understanding of interest-based negotiation
- a statement of why they decided to use the process, including any shared, superordinate goals (e.g. the long-term viability of the employer)

Sample Joint Opening Statement:

The Union and the Company plan to make every effort to negotiate the collective agreement using the interest-based process. They will endeavour to share

information openly and participate in discussions of a range options with the understanding that no final commitments will be made until the end of the process.

As the parties jointly face the challenge of the future, they share the following values:

- client focus
- the overriding value of people as a resource
- union-management partnership
- quality and continuous improvement

Alternatives:

- Each party prepares and provides to the other a separate opening statement setting out the what, how and why of their decision to use the process. This has the advantage of requiring less time and effort, but the process lacks the synergistic benefits of working through a joint statement.
- A joint subcommittee prepares a joint statement of objectives prior to negotiations. This maintains the jointness of the process without requiring the time and effort of the full negotiating team.

The joint or separate opening statements should be copied onto flip chart paper and posted in view of the group.

Step 2 - Establishing Ground Rules

In traditional negotiations, parties do not usually engage in much discussion about the negotiating **process**. Ground rules are typically used simply to establish agreement as to where, when and how frequently the parties will meet. In addition to these housekeeping matters, ground rules are used in interest-based bargaining to establish the process, including the new negotiating norms and the expected behaviours of individuals. The joint development of these ground rules helps ensure:

- Ownership of the process
- Commitment to the ground rules

Ground rules typically cover:

- Physical arrangements
- Use of flip charts, facilitation
- Start and stop times, breaks
- Use of caucuses
- Record of proceedings, if any
- Table behaviour, such as:
  - Focus on issues, not personalities
  - One person speaking at a time
  - No cell phones on in meetings
  - Treat the input of others with respect
- Use of subcommittees
- Communications
- Confidentiality of information shared
- Right to withdraw from process or revisit the ground rules

The agreed to ground rules should be written on flip chart paper and posted in view of the group. All negotiators should take personal responsibility for ensuring that the ground rules are respected.

Sample Ground Rules:

The following ground rules were used by one Canadian union and company in their interest-based bargaining process.

- Separate, independent communication channels
- Advise each other of communication plans and the issues/interests to be covered
- No official detailed record/minutes of proceeding
- Periodic jointly prepared summaries based on charts and reviewed by full group
- Don't over-advertise (hype) the interest-based bargaining process

- Options not to go beyond table
- Tentative agreement on issues which may be revisited if needed
- In special cases new issues may be brought up later
- Co-chairs needed for coordination/communication, with understanding of full participation of all
- Experts/resources to attend with advance notice if possible
- Review the process at intervals
- No smoking in meeting room
- Voice issues openly to full group
- Respectful of each other's ideas/suggestions
- Written handouts to be coordinated through co-chairs
- When sensitive, confidential information is to be shared, the following procedure will be used:
    - the provider will state the nature of the sensitivity
    - the parties will discuss the information and decide by consensus how it is to be handled
- Everyone is personally pledged to support the agreement reached

Step 3 - Developing the List of Issues

In preparation for traditional collective bargaining, parties normally develop lists of demands or positions, which they exchange early in the negotiation process, thereby determining the **issues** or topics to be discussed. In interest-based negotiation, separate lists of demands are not prepared, and it is fundamental to the process that parties make a concerted effort to avoid taking a firm position on any issue in advance of bargaining.

Instead, each party considers the hopes, fears, needs and concerns of its constituents and then prepares a list of issues it wants discussed in the negotiations. Once these lists of issues have been exchanged, the parties typically meet to agree on a common list for the negotiations.

Lists of issue should be:

- **Realistic** - Unlike traditional negotiations, this list should not contain "throw-away" issues which are included simply to be dropped when a concession is required. The list should be an honest statement of those issues which a party believes must be addressed.
- **Open-ended** - the statement should not include any positions or preferred solutions, but simply a description of the problem. It may be helpful to reframe the issue as a question to remove positions, interests, options, solutions and judgements from the statement of the issue. The question should start with an open-ended phrase such as: "How can we..." or "What is the best way to ensure...".

  Example:

  Employer Issue: We need to reduce abuse of sick leave.

  Union Issue: We need to reward employees for good attendance.

  Reframed Joint Issue: What can we do to promote an improvement in attendance?

Suggestions for negotiating common list of issues:

1. Issues can be stated very broadly in a word or short phrase: e.g. family leave, or more specifically in a complete sentence: e.g. The challenges faced by employees attempting to balance work and family responsibilities.
2. It may be helpful to **cluster** issues under broader headings, with each subissue identified.
3. All issues should be **clarified** at this stage so that all parties have a common understanding of the problem or topic to be addressed. The party proposing the issue for inclusion should provide examples and clarify the examples. It is very important that everyone has the same definition of the issue before proceeding to the next step.
4. If the issue is still not clear, a joint sub-committee could be assigned the task of **investigating the matter** and developing background information for the plenary group.
5. The agreed to definition of each issue should be **copied onto a separate sheet of flip chart paper**. This will be the starting point for the discussion of each issue.

Step 4 - Identification of Interests

Issue: Topic or subject under discussion

Position: One party's solution to an issue

Interest: One party's concern, fear, need or worry about an issue

Positional Bargaining

In traditional negotiations, positions are the primary vehicle of communication between the negotiators. Typically, opening positions are exaggerated and negotiators then use a ritual of posturing and bluffing to retreat from their positions to reach an agreement. Using positions and traditional negotiating behaviour can create the following problems:

- Negotiators become locked into positions
- Positions become entangled with egos
- Creativity is discouraged
- Time and effort are wasted
- May damage the relationship

Interest-Based Bargaining

In interest-based bargaining, parties avoid taking positions and try to focus on underlying interests on each issue. In fact, the success of the process depends upon the ability of the negotiators to suppress the urge to take firm positions.

Focusing on interests and avoiding positions has the following advantages:

- Interest statements, unlike positional arguments, are not tied to a particular outcome - therefore, the other side can acknowledge their legitimacy without committing to any particular course of action
- Interests are easier to reconcile than positions
- Sharing information about interests builds trust, enhances relationships and leads to further information-sharing
- A fuller understanding of the interests of all parties provides a basis for developing options

Types of Interests

- **Mutual interests** - the richest source of information for options
- **Separate non-conflicting interests** - different interests which are not mutually exclusive
- **Separate, conflicting interests** - different interests which are mutually exclusive

Positions tend to be mutually exclusive by definition. In interest-based bargaining it is recognized that the parties will have interests which conflict, but there will also be much more common ground when the parties explore interests than when they dig themselves into positions.

Guidelines on how to explore interests:

- Start with a belief that you do not already know the solution to the issue
- Share information openly
- Take turns sharing interests on an issue and write them on flip charts, posting completed sheets
- Constantly ask yourself and others: "Why?" "What is the background to that?" "Can you elaborate on that?" "What is driving that?" "Can you give me an example?"
- Use questioning as a genuine tool for learning more, not in a confrontational, challenging manner which demonstrates that you disagree with another's view
- Practice effective listening - when others are describing their interests, concentrate on listening to achieve a full understanding
- Do not move on to the next task until everyone understands the interests that have been shared
- Keep an open mind and make an effort to avoid confrontational behaviour

It will take practice and effort to become comfortable with the process of exploring and sharing interests. Negotiators will naturally gravitate toward positions and all members of the group should be aware of this tendency and give others a gentle reminder when they become positional.

Step 5 - Generation of Options

Issue:	Topic or subject under discussion
Interest:	One party's concern, fear, need or worry about an issue
Option:	One of a number of possible solutions to resolve an issue

In traditional negotiations, we often settle on the first solution which is minimally acceptable to both, often a compromise between our positions. In so doing, we sometimes leave something on the table, that is, neither party does as well as was possible in the circumstances.

In interest-based bargaining no decisions are made until a full range of options have been explored, on the assumption that the sharing of interests and the joint exploration of options will ensure that opportunities for mutual gain are not missed.

Once the issue has been defined and interests have been shared, the parties jointly generate options using the brainstorming technique and writing the options on flip charts.

Brainstorming is a creative process, the objective of which is to generate as many options as possible - the goal is **quantity not quality**. In order for brainstorming to work, the **rules must be clearly understood and enforced**. In particular, the process of inventing options must be separate from the process of evaluating the options and making decisions.

During brainstorming, the facilitator should write each idea on the flip chart exactly as presented, summarizing and abbreviating, but taking care not to change the basic idea. Put everything on the board, including repetitions of ideas already presented and ideas which are clearly absurd. There will be an opportunity later to edit the options and discard the absurdities.

We find creative processes like brainstorming difficult for the following reasons:

- Fear of looking foolish
- Premature judgement
- Assumption that we already know the single, correct answer to the problem
- Belief that we should look after ourselves and let the other side look after themselves

- Difficulty of seeing things in new ways

Suggestions for encouraging creativity:

- Conduct the meeting in as informal a setting as possible - try standing or walking around during brainstorming
- Challenge assumptions - the ones you hold as well as those of others
- Question perceptions and traditions
- Suspend judgement
- Analyse the problem in parts or in ways it has never been examined before
- Try to examine the issue from the point of view of others - put yourself in their shoes

Step 6 - Development of Standards

Issue: Topic or subject under discussion

Interest: One party's concern, fear, need or worry about an issue

Option: One of a number of possible solutions to resolve an issue

Standards: Criteria used to compare, evaluate or judge a number of options

In traditional negotiations, outcomes are often determined by the relative power of the parties. In the long run this may not be a satisfactory method because it can leave one or both parties feeling alienated and mistreated. In interest-based negotiations, parties may attempt to resolve issues using fair and mutually agreed to criteria or standards rather than power. Once interests have been explored and options generated for a given issue, the parties may jointly create standards for judging the options.

Examples of Standards:

- Feasibility or practicality
- Mutual gain
- Satisfaction of mutual interests
- Acceptability to constituents
- Area or industry practice

- Fairness
- Equal treatment
- Productivity
- Cost effectiveness
- Impact on clients
- Impact on quality

Parties will need to experiment with the process to determine how many standards they wish to use for each issue and how general or specific the standards should be. Standards may not be scientific or precise. They function primarily as a guide or structure for the discussion of the relative merits of the various options.

The most important thing about standards is that they be developed jointly by the parties and not introduced unilaterally. Therefore, if you know in advance of the negotiations that external information will be useful to the negotiators, assign a small, joint subcommittee to investigate the issue and gather the relevant information.

As with all steps of the interest-based process, the group's agreed to criteria should be documented on flip chart paper and posted in full view of all participants.

Step 7 - Evaluation of Options

Once parties have generated a number of possible options for an issue and jointly developed standards for judging the options, the next step in the process is to jointly evaluate the options against the standards. The group may find the consensus decision-making technique useful at this stage.

The first task is to edit the list of options by combining any redundant options and eliminating those that clearly do not meet any standard or are otherwise absurd. Remaining options are clarified and explained. The group must be careful at this point not to assign ownership of an option to the person who provides the explanation or clarification of it.

Parties will need to experiment to develop a process for evaluating options which fits their way of working together. Some parties find it useful to categorize the

options at an early stage without engaging in a full discussion. One process for eliminating unworkable options is the **three-cut method**. The group reviews the options three times and, each time, eliminates those options which do not satisfy the following criteria:

- **1st Cut: Interests**

The group reviews the list of options against the union and management interests identified earlier. An option is still viable if it has the potential of meeting the interests of both parties.

- **2nd Cut: Resources**

The group reviews the list of options still viable after the first cut based on resources. The options for which resources could potentially be made available remain on the list following this cut.

- **3rd Cut: Saleability**

  The group reviews the remaining options to determine which ones would be acceptable to the constituents of both parties.

Once the three cuts have been completed, the remaining options are discussed fully and compared against the agreed standards. This step of the process can becomes quite creative once the group has fashioned a process which suits them and becomes comfortable working with it. At this stage, with all the interests, options and standards related to the issue posted on the wall before them, group members are often able to see possible combinations of options which represent a solution that had not previously been considered.

In most cases, a final decision on the issue will be postponed until group members have had an opportunity to gather further information on some of the options and/or discuss them with their principals.

When the group reaches consensus on the issue, they may wish to assign it to a joint sub-committee to develop contract language around the selected option or options. It is understood that, although consensus has been achieved, the issue can be raised again in the negotiation and the tentative agreement may be revisited if a subsequent discussion affects that issue in an unforeseen manner.

If the group is unable to reach consensus on the issue, the appropriate action will depend on the reason for the impasse:

- **Information deficiency or disagreement over facts** - one group member or a

joint sub-committee could be assigned to gather additional information and report back to the group

- **Discussions with key stakeholders are necessary** to determine possible impacts of various options before group members can make a final decision - the item can be placed in the "parking lot" until such discussions have taken place
- **Resolution of the issue is dependent upon the outcome of other issues** - item can be parked to be revisited when the related issue or issues are being discussed
- **Strong emotions or conflicts have arisen over the issue** - it may be appropriate to park the issue, allow a cooling off period and revisit the issue at a later point
- **The parties cannot agree on the outcome of the issue** - the parties, having fully explored all interests and options, have reached an impasse and, as further discussion is fruitless, the issue should be parked and revisited later in the negotiations

Step 8 - Closure

After completing the above steps on all issues, the negotiation moves toward closure. It is likely that, at this point, some issues will have been resolved and some will remain unresolved.

It may be useful to group the unresolved issues based on similarity of issue or common interests. Each group of issues can then be addressed and the group attempts to fashion a package of options which addresses all the issues in a category.

The consensus decision-making technique is useful at this point of the process. In order to reach agreement, parties will have to remember that the definition of a consensus is that all members of the group **support** the decision, although they may not **prefer** it, because they each feel that they had an opportunity to be heard and the group's decision is the best course of action in the circumstances.

It is important to remember that it is still collective bargaining and “No” is part of the process. There are some things you cannot get at the bargaining table regardless of how you conduct the negotiations, and the interest-based approach does not provide the magic bullet.

All negotiations consist of a combination of integrative and distributive bargaining. In interest-based negotiation, as with any other negotiation, some packaging of issues will occur at the end of the process and some trades or compromises will inevitably be necessary. The advantage of interest-based negotiation is that more opportunities may be available for expanding the pie before it is cut, but sooner or later the pie will have to be cut.

When the group reaches the point where final decisions must be made, the process often resembles traditional negotiations in that the parties may spend more time in caucus preparing comprehensive responses. Typically, however, there is generally much less tension, adversarialism and competitive behaviour at the end of the interest-based process.