RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW: OCTOBER 1, 2012 TO SEPTEMBER 30, 2013

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INTRODUCTION

The Indiana Rules of Evidence serve as an important guide for the Indiana legal community. Since Indiana's codification of the Federal Rules of Evidence in 1994, case law and statutory revisions have continued to interpret and apply the Rules. This Article describes the developments in Indiana evidentiary practice during the survey period of October 1, 2012 through September 30, 2013.[1] The purpose of this Article is not to provide an exhaustive list of every case addressing the Indiana Rules of Evidence, but to summarize important developments in this area of practice. Discussion topics are listed below in the same order as the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

Generally, the Rules apply to court proceedings in the State of Indiana, unless otherwise required by the United States Constitution, Indiana Constitution, or rules promulgated by the Indiana Supreme Court.[2] Rule 102 sets forth a very clear purpose for construction: "[T]o administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[3] In the event an evidentiary issue arises that is not covered by the Rules, common or statutory law governs.[4] Judge Robert L. Miller, Jr., of the U.S. District Court, Northern District of Indiana, has explained this as follows:

> [I]n resolving an evidentiary issue, a court must consult the evidence rules first; if they provide an answer, all other sources, whether statutory or case law, are to be disregarded. In deciding whether the evidence rules provide an answer, the rules are to be constructed in accordance with the principles articulated in Rule 102. If the evidence rules provide

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1. On September 13, 2013, the Indiana Supreme Court issued an order amending the Rules; however, these amendments did not take effect until January 1, 2014 and, therefore, are not addressed herein.

2. IND. R. EVID. 101(b).

3. IND. R. EVID. 102.

4. IND. R. EVID. 101(b).

no answer, the court must turn to common law and statutory sources.[5]

Preservation of claims of error, which is addressed in Rule 103, is a very important part of evidentiary practice. In order to claim error, the error must first affect a "substantial right of the party."[6] If a party is claiming error in the admission of evidence, a party must timely object or move to strike, and state the specific basis for the objection.[7] Alternatively, if the ruling erroneously excluded evidence, the party must inform the court of the substance through an offer of proof.[8] Specifically, the Indiana Court of Appeals has noted, "A trial court's ruling excluding evidence may not be challenged on appeal unless a substantial right of the party is affected and the substance of the evidence was made known by an offer of proof or apparent from the context."[9] The Indiana Court of Appeals recently explained this concept in *Allen v. State*, where the defendant proffered an exhibit containing a taxi cab receipt.[10] The trial court ultimately excluded the receipt and the record contained no information regarding the specifics of the receipt.[11] As a result, defendant did not provide a sufficient record for the appellate court and effectively waived the argument.[12]

II. JUDICIAL NOTICE (RULE 201)

Rule 201 sets forth the types of facts and laws of which a court may take judicial notice.[13] Facts that are generally known within the jurisdiction of the trial court and are not subject to "reasonable dispute" may be judicially noticed.[14] Similarly, facts that can be accurately and readily determined from sources whose accuracy cannot be questioned may be judicially noticed.[15] Additionally, a trial court may judicially notice laws that include:

(1) The decisional, constitutional, and public statutory law;
(2) Rules of court;
(3) Published regulations of governmental agencies;
(4) Codified ordinances of municipalities;
(5) Records of a court of this state; and
(6) Laws of other governmental subdivisions of the United States or any

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5. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE § 102 cmt. 1 (2013).

6. IND. R. EVID. 103(a).

7. *Id.*

8. *Id.*

9. Allen v. State, 994 N.E.2d 316, 321 (Ind. Ct. App. 2013).

10. *Id.*

11. *Id.*

12. *Id.*

13. IND. R. EVID. 201.

14. IND. R. EVID. 201(a).

15. *Id.*

state, territory or other jurisdiction of the United States.[16]

A court may take judicial notice at any point in the proceedings, either on its own or upon the request of a party when the court is supplied with necessary information.[17]

In *Banks v. Banks*,[18] the Indiana Court of Appeals analyzed the limits of judicial notice. *Banks* involved a contested post-dissolution of marriage, where an ex-husband sought a reduction in his incapacity spousal maintenance obligation to his ex-wife.[19] The trial court granted the ex-husband's request, reducing the amount of spousal maintenance that he was paying to his ex-wife, and an appeal ensued. Ex-husband included a copy of a Social Security Administration (SSA) decision with his appellee's appendix, requesting that the appellate court take judicial notice of the decision for purposes of his appeal.[20] Ex-wife filed a motion to strike this material from the appellee's appendix. The Indiana Court of Appeals noted the dichotomy between its inability to consider new evidence on appeal, and the provision in Rule 201(d) permitting judicial notice at any point in the proceedings.[21] While the court declined to strike the SSA decision from the appellee's appendix, it importantly noted that "judicial notice may not be used on appeal to fill evidentiary gaps in the trial record."[22] The court further noted, "We need not definitively resolve whether we could or should take judicial notice of the SSA decision. However, because [appellee] presents a colorable basis for taking judicial notice of the SSA decision, we decline to order that the pages of his appendix containing the order be stricken."[23]

III. RELEVANCY AND LIMITATIONS (RULES 401-413)

A. Defining Relevancy

Relevant evidence is defined in Rule 401, while Rule 402 addresses generally the admissibility of relevant evidence. Specifically, Rule 401 deems evidence relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence[, and if] . . . the fact is of consequence in determining the action."[24] While all irrelevant evidence is inadmissible, relevant evidence is not automatically admissible.[25] Relevant evidence can be excluded if prohibited by the state or federal constitution, a statute, other provisions within the Indiana

16. IND. R. EVID. 201(b).

17. IND. R. EVID. 201(c).

18. 980 N.E.2d 423 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 738 (Ind. 2013).

19. *Id.* at 424.

20. *Id.* at 425-26.

21. *Id.* at 426.

22. *Id.* (citing Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998)).

23. *Id.*

24. IND. R. EVID. 401; *see also* Erkins v. State, 988 N.E.2d 299, 311 (Ind. Ct. App.), *trans. granted*, 993 N.E.2d 625 (Ind. 2013).

25. *See* IND. R. EVID. 402.

Rules of Evidence, or other court rules.[26]

In *Chang v. Purdue University*,[27] the Indiana Court of Appeals drew a line with regard to relevancy. Chang was a nursing student in the College of Health and Human Services at Indiana University-Purdue University Fort Wayne who was ultimately dismissed from the program due to various incidents with other students and staff.[28] Chang sued Purdue University, among others. Some counts and defendants were dismissed following summary judgment, and the trial court later conducted a bifurcated jury trial regarding liability and damages on the remaining counts.[29] At the jury trial, the court excluded testimony from two students at IPFW. The first excluded witness was a student who was suspended from class for "unprofessional conduct and violations of the IPFW Disciplinary Code."[30] The second excluded witness observed the incident that led to Chang's dismissal from the Department of Nursing.[31] The jury found against Chang, and she appealed.[32]

The Indiana Court of Appeals concluded that the first witness was properly excluded because his dismissal significantly differed from Chang's dismissal.[33] For example, the dismissal of this witness was premised upon a different IPFW code, which implicated different procedures.[34] As a result, testimony from this witness would have little or no relevance to Chang's claims.[35] The appellate court also affirmed the exclusion of the second witness.[36] The issues before the jury were limited to the nature of the contractual agreement between Chang and the university, and whether the university failed to follow proper procedures such that it breached that contract.[37] Specifically, the jury was limited to determining the disciplinary procedures that IPFW was contractually obligated to follow, and determining whether those procedures were actually followed.[38] Because the second witness would not have aided in determining these questions, her testimony was properly excluded.[39]

In *Wressell v. R.L. Turner Corp.*,[40] the court of appeals further elaborated on definitions of relevancy within the context of the Common Construction Wage Act (CCWA). Wressell sued R.L. Turner, alleging that he was underpaid; R.L.

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26. *Id.*
27. 985 N.E.2d 35 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d 1187 (Ind. 2014).
28. *Id.* at 40.
29. *Id.* at 45.
30. *Id.* at 54.
31. *Id.*
32. *Id.* at 39.
33. *Id.* at 54.
34. *Id.*
35. *Id.*
36. *Id.* at 55.
37. *Id.*
38. *Id.*
39. *Id.*
40. 988 N.E.2d 289 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 328 (Ind. 2013).

Turner moved for summary judgment; Wressell submitted a response and cross-moved for summary judgment.[41] As part of Wressell's designation of evidence, he included an affidavit from Monte Moorhead, an employee with the Indiana Department of Labor.[42] The trial court struck portions of Moorhead's affidavit on the basis that it contained legal conclusions and was irrelevant.[43] The Indiana Court of Appeals ultimately concluded that the stricken paragraphs of the affidavit were "unquestionably relevant."[44] The excluded portions of the affidavit explained the IDOL's definition of fringe benefits and clarified the application of IDOL policy.[45] Specifically, the appellate court noted, "Whether IDOL considers a certain type of payment to be a fringe benefit strikes us as evidence that would be quite helpful to the factfinder in characterizing that payment, and therefore relevant."[46] As a result, the judgment of the trial court was reversed and remanded.[47]

The Indiana Court of Appeals further elaborated on Rule 401 in *In re TP Orthodontics, Inc*.[48] This case addressed a dispute among siblings regarding the family business. Three sibling shareholders of TP Orthodontics ("TP") sued their brother and president of TP, on behalf of the family business.[49] As a result, TP's board of directors established a special litigation committee to investigate the siblings' derivative claims.[50] In conjunction with this investigation, a written report was prepared, which recommended the claims that should be pursued and those that should be avoided.[51] The plaintiff siblings demanded a copy of this report, and TP refused to produce it in its entirety.[52] Only heavily redacted copies of the report were produced, as attached to their motion to dismiss the rejected claims.[53] The trial court ordered TP to produce the report, and TP filed an interlocutory appeal on the basis of relevancy and privilege. The relevancy arguments are addressed here, but the privilege arguments resurface in Part III of this Article.[54]

Specifically, the plaintiff siblings asserted that the entire report was relevant to determine whether the special litigation committee conducted a good faith investigation of their claims.[55] TP responded by asserting that the unredacted

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41. *Id.* at 292-93.
42. *Id.* at 294.
43. *Id.* at 296.
44. *Id.* at 297.
45. *Id.*
46. *Id.*
47. *Id.* at 299.
48. 995 N.E.2d 1057 (Ind. Ct. App. 2013), *trans. granted*, 9 N.E.3d 170 (Ind. 2014).
49. *Id.* at 1058.
50. *Id.* at 1059.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See infra* Part III.
55. *TP Orthodontics*, 995 N.E.2d at 1064.

portions of the report were the only sections relevant to the issue of good faith.[56] In other words, TP asked the court and the plaintiff siblings to "trust" that they provided all relevant information.[57]

In deciding the relevancy issue, the appellate court noted that the unredacted version of the report presented a "partial picture, at best."[58] While the unredacted version described what actions the special litigation committee took, it failed to give information about what the committee may have neglected to do or may have done improperly.[59] For example, in investigating the sibling's allegations, the committee could have failed to interview an important employee or explore a key issue.[60] The appellate court concluded that the plaintiff siblings would not be able to determine if the committee acted in good faith without seeing the entire report.[61] As a result, a complete version of the unredacted report was relevant to the issue of good faith.[62]

B. The Admission of Relevant Evidence Hangs in the Balance

Rule 403 sets forth a balancing test for the admission of relevant evidence. Under this rule, courts are permitted to exclude relevant evidence its probative value is substantially outweighed by any of the following: potential confusion of issues, unfair prejudice, undue delay, or accumulation of evidence.[63] The Indiana Court of Appeals elaborated on this rule in *Smith v. State*.[64] Here, the defendant was first tried in 2010 and faced a multitude of charges, including: attempted murder, criminal confinement, armed robbery, possession of a firearm by a serious violent felon, auto theft, and resisting law enforcement.[65] Smith was found not guilty of attempted murder and criminal confinement, but the jury was unable to reach a verdict on the remaining counts.[66] A mistrial was declared on the remaining counts, and the state later retried Smith on those counts in 2011.[67]

At the 2011 jury trial, Smith faced felony charges of robbery, possession of a firearm by a serious violent felon, auto theft, and resisting law enforcement.[68] A prosecution witness provided testimony regarding shots that were fired at an officer.[69] Smith objected to this testimony under Rule 401 on the basis that it was

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. IND. R. EVID. 403.
64. 982 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 986 N.E.2d 819 (Ind. 2013).
65. *Id.* at 400.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 402. The basis for Smith's argument was that he was previously acquitted of

not relevant to the charges before the jury.[70] Smith further asserted that even if the evidence was relevant, it was outweighed by the risk of prejudice under Rule 403.[71] The trial court overruled the objection, and the court of appeals affirmed.[72]

The appellate court first addressed Smith's 401 argument, noting the low threshold for relevancy determinations: evidence "need only have some tendency, however slight, to make the existence of a material fact more or less probable, or tend to shed any light upon the guilt or innocence of the accused."[73] Specifically, the court of appeals determined that the evidence was relevant to the charge of resisting law enforcement, as it showed where the defendant went after the shooting and why the officer did not immediate follow in an attempt to apprehend him.[74] With regard to Smith's argument under Rule 403, the court did not find that the probative value of the testimony was outweighed by the likelihood of prejudice.[75] During the trial, the jury heard other evidence making them aware that Smith was armed and had fired at an officer.[76] As a result, the appellate court concluded that the evidence regarding Smith firing his weapon and fleeing from police was relevant to the charge of resisting law enforcement and was not unfairly prejudicial.[77]

C. Evidence of Character, Crimes, and Other Bad Acts

Generally, Rule 404 prohibits the admission of evidence of a person's character or prior bad acts to prove "action in conformity therewith on a particular occasion."[78] Under Rule 404(a), certain exceptions regarding character evidence exist for defendants and victims in criminal cases. For example, a defendant may offer evidence of his or her pertinent traits, and if admitted, it may be rebutted by the prosecution; a defendant may offer evidence as to a pertinent trait of an alleged victim, subject to restrictions in sex-offense cases under Rule 412; and in homicide cases, evidence of a victim's trait of peacefulness may be offered by the prosecution to rebut evidence that the victim was the first aggressor.[79] Finally, character traits of a witness can be admitted for impeachment purposes under Rules 607, 608, and 609.[80] Under Rule 404(b), the admission of evidence regarding prior crimes or other wrongs may not be admitted for purposes of conformity, but may be admitted to prove "motive, opportunity, intent,

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attempted murder at the first trial. *Id.*

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (quoting Simmons v. State, 717 N.E.2d 635, 638 (Ind. Ct. App. 1999)).
74. *Id.*
75. *Id.* at 403.
76. *Id.*
77. *Id.*
78. IND. R. EVID. 404(a)(1); *see also* MILLER, *supra* note 5, § 404.
79. IND. R. EVID. 404(a)(2).
80. IND. R. EVID. 404(a)(3).

preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[81]

In *Wells v. State*,[82] Rule 404(b) was evaluated in conjunction with a motion to sever under Indiana Code section 35-34-1-11. Wells was charged with various offenses arising out of four instances of sexual assault against four separate victims.[83] The Indiana Court of Appeals issued an unpublished memorandum decision, which affirmed the trial court's denial of Wells's motion for severance.[84] The Indiana Supreme Court later granted transfer, vacating the court of appeals' opinion. After granting transfer, considering the arguments presented by counsel in briefs and oral arguments, and further discussion among the justices, the majority of the supreme court determined that transfer was inappropriate.[85] As a result, the Indiana Court of Appeals not-for-publication opinion was reinstated as a memorandum decision.

Justice Rucker dissented, issuing a separate opinion with which Chief Justice Dickson concurred. In this opinion, Justice Rucker noted that he would consider Rule 404(b) when determining the appropriateness of joinder when two or more offenses are of the same or similar character.[86] Justice Rucker thoroughly examined a variety of cases from other states in his analysis. He further explained his position as follows: "I would hold that if under Rule 404(b) relating to other crimes, the evidence of the crimes on trial would be inadmissible in a separate trial for the other, then the defendant is entitled to severance as of right under Indiana Code section 35-34-1-11(a)."[87] Justice Rucker concluded by acknowledging that Indiana's "traditional approach is in need of reconsideration."[88] While Justice Rucker's dissent is not controlling on this issue, it will be interesting to see this area of the law develop in the future.

The Indiana Court of Appeals further elaborated on the "prior bad acts" rule of 404(b) in *Bryant v. State*.[89] Bryant appealed his conviction for aggravated battery as a Class B felony, and his classification as a habitual offender. Bryant argued that the trial court improperly admitted a recording of a telephone conversation that he made from the jail telephone to a friend, which "painted him as a racist with a criminal history, violent propensity, and penchant for fighting

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81. IND. R. EVID. 404(b).

82. 983 N.E.2d 132 (Ind. 2013).

83. *Id.* at 132 (Rucker, J., dissenting).

84. *See generally* Wells v. State, 953 N.E.2d 1281 (Ind. Ct. App. 2011).

85. *Wells*, 983 N.E.2d at 132 ("By order dated February 2, 2012, the [c]ourt granted a petition seeking transfer of jurisdiction from the [c]ourt of [a]ppeals. After further review, including consideration of the points presented by counsel in supplemental briefs and at oral argument, and discussion among the [j]ustices in conference after the oral argument, the [c]ourt has determined that it should not assume jurisdiction over this appeal and that the [c]ourt of [a]ppeals not-for-publication memorandum decision . . . should be reinstated as a memorandum decision.").

86. *Id.* at 139 (Rucker, J., dissenting).

87. *Id.*

88. *Id.*

89. 984 N.E.2d 240 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 796 (Ind. 2013).

in jail."[90] Specifically, he asserted that this conversation was inadmissible hearsay,[91] was unfairly prejudicial, and informed the jury of prior bad acts as prohibited under Rule 404(b).[92]

With regard to Bryant's 403 arguments, the court of appeals determined that the recording was offered to prove intent and, as a result, the probative value of the recording exceeded any unfair prejudice that may result.[93] With regard to Bryant's 404(b) arguments, the court noted that the recording evidenced his intent—an issue that Bryant raised by making claims of self-defense.[94] Intent is one exception to inadmissible character evidence under Rule 404(b). This exception has been explained as follows:

> The intent exception in . . . [Indiana Evidence Rule] 404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense. The trial court must then determine whether to admit or exclude such evidence depending upon whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.[95]

Bryant's allegations that he acted in self-defense served as evidence of contrary intent sufficient to invoke the exception to Rule 404(b).[96] As a result, the recording was admissible.[97]

A very similar issue was addressed by the court of appeals in another case—*Sudberry v. State*.[98] The State charged Sudberry with four counts of battery, resulting from an altercation between Sudberry and his brother.[99] At trial, the prosecution sought to introduce evidence of a prior threat made one year before by Sudberry to his brother—"[I]f you push[] me again, I will kill you."[100]

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90. *Id.* at 249 (internal quotations omitted).

91. Bryant's hearsay arguments are addressed in greater detail in Part VII of this Article. *See infra* Part VII.B.

92. *Bryant*, 984 N.E.2d at 249.

93. *Id.*

94. *Id.* at 250.

95. *Id.* at 249-50 (quoting Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993) (internal quotations omitted)).

96. *Id.* at 250.

97. *Id.*

98. 982 N.E.2d 475 (Ind. Ct. App. 2013).

99. *Id.* at 479.

100. *Id.* (alterations in original).

Sudberry objected on the basis of Rule 404(b).[101] Similar to *Bryant*, at trial Sudberry raised the issue of intent by asserting self-defense. Sudberry acknowledged his self-defense argument, but responded that "the threat was too remote in time to be relevant and probative of his intent at the time of the battery."[102] Evidence suggested that there were no altercations between Sudberry and his brother between the date the threat was made and the date of the incident at issue.[103] As a result, the Indiana Court of Appeals concluded that "a reasonable jury could conclude that Sudberry did not have a reason to act on his threat until the date of the battery."[104] Therefore, the appellate court concluded that the trial court did not abuse its discretion by admitting the evidence of the prior threat.[105]

D. Compromise Offers and Settlement Negotiations

Rule 408 prohibits the use of settlement negotiations to prove or disprove the validity of a claim or for impeachment by a prior inconsistent statement or contradiction.[106] However, evidence of settlement negotiations may be used for another purpose such as proving witness bias or prejudice, negating contention of undue delay, or proving efforts to obstruct a criminal investigation or prosecution.[107]

Rule 408 applies to both informal negotiation and alternative dispute resolution. The Indiana Supreme Court addressed the impact of Rule 408 on statements made during mediation in *Horner v. Carter*.[108] In this case, the parties were divorced pursuant to the trial court's decree of dissolution, which incorporated their mediated settlement agreement.[109] Six years later, husband sought to modify a maintenance provision contained in the agreement.[110] Husband sought to admit evidence of statements that he made to the mediator during negotiations leading to the agreement at issue, which the trial court excluded.[111] Husband's purpose in seeking to admit this evidence was to circumvent liability under the agreement "on grounds that it reflected neither his intent, nor his oral agreement during the mediation."[112]

On appeal to the Indiana Court of Appeals, the court concluded that the agreement was ambiguous and, therefore, husband's statements were admissible

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101. *Id.* at 480.
102. *Id.*
103. *Id.* at 481.
104. *Id.*
105. *Id.*
106. IND. R. EVID. 408(a).
107. IND. R. EVID. 408(b).
108. 981 N.E.2d 1210 (Ind. 2013).
109. *Id.* at 1211.
110. *Id.*
111. *Id.*
112. *Id.* at 1212.

as extrinsic evidence to aid in construction of the agreement.[113] Upon transfer to the Indiana Supreme Court, the court disagreed, finding:

> Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue.[114]

As a result, the trial court's exclusion of husband's statements was affirmed.[115]

IV. PRIVILEGE (RULES 501-502)

Rules 501 and 502 address privilege and waiver. Generally, unless provided by constitution, statutory law, Indiana Supreme Court rules, or common law, there is no privilege to refuse to serve as a witness, refuse to disclose, refuse to produce documents or objects, or prevent another person from disclosure or from serving as a witness.[116] Privilege can be waived if a person, or a person's predecessor in privilege, voluntarily and intentionally disclosed or consented to disclosure of any significant portion of the privileged matter.[117] Importantly, an erroneous compulsion of privileged information does not defeat privilege.[118]

Rule 502 specifically addresses the attorney-client privilege. This rule was elaborated upon in *In re T.P. Orthodontics, Inc.*[119] The factual background for this case was previously addressed in this Article and, therefore, is not restated in this section.[120] In addition to the relevancy arguments explained in the previous section, TP also refused to provide the redacted material on the basis of privilege.[121] Prior to this case, Indiana courts had not yet considered privilege in the context of special litigation committee reports.[122] In this case, the Indiana Court of Appeals noted that other courts throughout the United States have held that special litigation committee reports may contain privileged material.[123] Because it is common for special litigation committees to seek legal advice in determining how to proceed on particular claims, it is not unusual for some attorney-client communications to be included in these reports.[124]

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113. *Id.*
114. *Id.*
115. *Id.* at 1213.
116. IND. R. EVID. 501(a).
117. IND. R. EVID. 501(b).
118. IND. R. EVID. 501(c).
119. 995 N.E.2d 1057 (Ind. Ct. App. 2013), *trans. granted*, 9 N.E.3d 170 (Ind. 2014).
120. *See supra* Part III.A.
121. *TP Orthodontics*, 995 N.E.2d at 1064.
122. *Id.* at 1065.
123. *Id.*
124. *Id.*

The court of appeals noted the instances in which privilege can be waived and held, "this is another instance where privilege is waived because the report is necessary to the litigation and requiring its production comports with fairness."[125] The court further explained its holding by stating:

> We allow access to the committee report because Indiana law permits the siblings to make two challenges to the committee's determination—they can argue that the committee was not disinterested or that their investigation was not made in good faith. The most relevant source of that information is undoubtedly the committee's report. The siblings cannot make their statutorily allowed challenges, particularly their good-faith challenge, without access to the entire report.[126]

Only two Indiana cases mention special litigation committee reports, and plaintiffs were provided with access to the reports in both cases.[127] Aside from the value of the report to the derivative plaintiffs, the appellate noted the considerable value to the trial court.[128] Limiting trial court access to these types of reports would hinder the proper evaluation and adjudication of derivative plaintiff claims.[129]

V. WITNESS TESTIMONY (RULES 601-617)

A large portion of the Rules specifically detail witness competency, character, and impeachment.

A. Evaluating Witness Competency

The Rules provide generally for competency, such that every person is competent to be a witness unless otherwise provided in the Rules or by statute.[130] In *Archer v. State*,[131] the Indiana Court Appeals applied and interpreted Rule 601 in the context of testimony from a child at the defendant's trial for felony child molesting. The court noted that determinations as to witness competency are subject to the discretion of the trial court.[132] When children are called to testify, it is appropriate for trial courts to consider the following in evaluating competency: (1) whether the child understands the difference between telling the truth and a lie; (2) whether the child knows she is compelled to the tell the truth; and (3) whether the child knows what a true statement is.[133] Here, the trial court asked the child witness the following questions to determine if she was competent

125. *Id.*
126. *Id.*
127. *Id.* at 1065-66 (citing Cutshall v. Barker, 733 N.E.2d 973 (Ind. Ct. App. 2000)).
128. *Id.* at 1066.
129. *Id.*
130. IND. R. EVID. 601.
131. 996 N.E.2d 341 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).
132. *Id.* at 346.
133. *Id.*

to testify:

- "Do you understand the difference between telling the truth and telling a lie?"[134]
- "If I told you that I was sitting up here and this robe in [sic] color, would that be the truth or would it be a lie?"[135]
- "And sometimes if you get caught telling a lie, what happens to you?"[136]

After asking these questions and hearing the corresponding answers from the witness, the trial judge stated in the presence of the jury, "Okay. Very good. I'm very satisfied that this witness understands the oath and that she is competent, understands the difference between the truth and a lie and understands the consequences of telling a lie."[137] Archer alleged on appeal that the trial judge's comments effectively vouched for the child's testimony in the presence of the jury.[138]

The appellate court disagreed, finding that the trial judge's comments did not amount to vouching for the child's testimony.[139] The court further explained its position as follows: "Whether a witness is competent and whether a witness is credible are different questions, the former for the trial court and the latter for the jury."[140] The trial court's statement addressed the child's competency, not credibility, and therefore was not erroneous.[141]

B. Impeachment

Any party may attack a witness's credibility, including the party who called the witness.[142] A witness's character for truthfulness or untruthfulness may be attacked or supported based on reputation or opinion testimony; however, evidence of "truthful character" is only admissible after the witness's character for truthfulness has been attacked.[143] Specific conduct is largely inadmissible for impeachment purposes, unless "the door has been opened by other evidence."[144] Additionally, past convictions may also be used for impeachment purposes, subject to certain limitations.[145] Importantly, past convictions may not be used to demonstrate bad character and propensity to act in accordance with past behavior.

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 347.
139. *Id.*
140. *Id.*
141. *Id.*
142. IND. R. EVID. 607.
143. IND. R. EVID. 608(a).
144. MILLER, *supra* note 5, § 608 cmt. 5; *see also* IND. R. EVID. 608(b).
145. IND. R. EVID. 609(a).

For example, in *Brown v. Brown*,[146] Tammy sued her ex-husband, Terry, for fraud, forgery, and battery. Tammy sought to introduce evidence of Terry's past convictions of rape and check deception.[147] Prior to the trial, Terry filed a motion in limine to exclude his convictions from the evidence.[148] At the hearing on the motion in limine, Tammy argued:

> [W]e believe that these two [convictions of rape and check deception] are quite relevant in that this; [sic] number one: we are arguing that there is a forge [sic] and fraudery (sic) of a document. He has a history right here of a check deception. Both—what we're alleging and what he was convicted of involved deception. Number two; [sic] we're arguing that during a sexual act he battered her causing injury. He's been convicted of rape, which involves a sexual act and of course, battery. So the two convictions that he has are quite relevant to this issues being brought forth in this matter.[149]

The trial judge denied the motion in limine and admitted the evidence, noting: "I believe [the admissibility of Terry's convictions] goes to the weight rather than the admissibility."[150] At trial, Tammy used Terry's past convictions to demonstrate Terry's bad character and his propensity for behavior similar to the conduct alleged in the instant case.[151]

The court of appeals noted that Rule 609(a) places very specific restrictions on the use of evidence relating to past convictions.[152] Evidence of past convictions may only be used for attacking the credibility of a witness.[153] The appellate court concluded that the evidence of Terry's past convictions was not used to attack Terry's credibility within the confines of Rule 609(a).[154] The court further expressed concern that Terry's convictions (which were over twenty years old) could have reasonably led the jury to make the forbidden inference that based on the convictions Terry had the propensity to commit the acts that Tammy alleged.[155] Ultimately, the admission of this evidence was more prejudicial than probative, which violated the exception set forth in Rule 609(b).[156] As a result, the trial court was reversed and the case was remanded for additional

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146. 979 N.E.2d 684 (Ind. Ct. App. 2012).

147. *Id.* at 685.

148. *Id.*

149. *Id.* at 686 (alterations in original).

150. *Id.* (alterations in original).

151. *Id.*

152. *Id.* at 687.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* Rule 609(b) places a limit on the use of convictions that are more than ten years old. If ten years have passed, evidence of the conviction is only admissible if the probative value of the evidence outweighs its prejudicial effect; and notice of the intent to use the conviction is provided and the opposing party is given the opportunity to contest its use. IND. R. EVID. 609(b).

proceedings.[157]

The Indiana Court of Appeals elaborated on the confines of Rule 609(b) in *Sisson v. State*.[158] In this case, the defendant was convicted of burglary, receiving stolen property, and unlawful possession of a firearm by a serious violent felon.[159] Sisson argued on appeal that the trial court erred in excluding evidence of the criminal history of a witness who testified at his trial.[160] Specifically, Sisson asserted that evidence of the witness's criminal history was admissible for impeachment purposes and to prove that the witness had committed the burglary of which Sisson was accused.[161] With regard to Sisson's argument that the criminal history was admissible to prove that the witness committed the burglary at issue, Sisson never argued this at trial; therefore, this argument was waived on appeal.[162] The court of appeals noted that whether the witness had committed burglary in the past had no bearing on whether he committed the burglary in the instant case.[163]

While the witness's past convictions may have been substantively inadmissible, evidence of the criminal history is not precluded for purposes of impeachment under Rule 609.[164] However, Rule 609 imposes timeframe requirements such evidence. Here, all of the witness's convictions, except for one mail fraud conviction, fell outside the ten (10) year timeframe included in Rule 609(b).[165] As a result, Sisson was required to prove that the probative value of the convictions substantially outweighed any resulting prejudice.[166] Some of the witness's convictions were more than twenty-five years old; as a result, the court of appeals found that the probative value of this evidence was substantially outweighed by the prejudicial effect.[167]

With regard to the mail fraud conviction that fell within Rule 609(b)'s timeframe requirements, the court of appeals determined the exclusion amounted to harmless error.[168] In explaining this position, the appellate court noted that based on the testimony of other witnesses, the credibility of this particular witness was already in question, and the exclusion of evidence regarding one mail fraud conviction would not have changed the jury's determination.[169]

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157. *Brown*, 986 N.E.2d at 687.
158. 985 N.E.2d 1 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).
159. *Id.* at 6.
160. *Id.* at 16.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 17.
166. *Id.*
167. *Id.*
168. *Id.* at 18.
169. *Id.* at 17.

VI. EXPERT WITNESSES (RULES 701-705)

The Rules limit when witnesses can testify about their personal opinion on a matter. Concerning lay witnesses, Rule 701 states that lay witnesses may testify as to their opinion only if it is "rationally based on the witness's perception; and . . . helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue."[170] For both lay and expert witnesses, they are not permitted to testify as to their opinions about a defendant's guilt or innocence in a criminal matter, the veracity of a witness's testimony, legal conclusions, or the truthfulness of allegations at issue.[171]

Additional requirements are imposed on expert witnesses. Expert witnesses, in order to testify, need to be qualified either through knowledge, skill, experience, training or education.[172] Their testimony needs to "help the trier of fact to understand the evidence or to determine a fact in issue."[173] Expert *scientific* testimony will only be allowed if the court first finds that testimony to be grounded in "reliable scientific principles."[174] Notably, Rule 703 allows experts to base their testimony upon inadmissible evidence so long as other experts in their same field rely on such evidence.[175]

The admissibility of expert scientific testimony was considered in the context of the termination of a parent/child relationship in *T.H. v. Indiana Department of Child Services*.[176] In this case, a mother was appealing the state's decision to remove her two sons and permanently terminate her parental rights. The trial court conducted an evidentiary hearing in August 2012 seeking termination of the mother's parental rights.[177] During this hearing, the Miami County Office of the Indiana Department of Child Services sought to establish through its evidence that the mother could not give her two children stability and safety at her home. Additionally, they called an expert witness, a social worker, to testify as to her recommendation that the mother's rights be terminated. The expert examined this matter through individual tests of the parenting techniques of the mother, an observation of the mother spending time with the children and an interview with the mother.[178] The trial court allowed the social worker to testify as an expert. Part of the social worker's testimony was her findings after administering the Child Abuse Potential Inventory ("CAPI").[179]

In addition to appealing the trial court's decision to qualify the social worker

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170. IND. R. EVID. 701.

171. IND. R. EVID. 704(b).

172. IND. R. EVID. 702(a).

173. *Id.*

174. IND. R. EVID. 702(b).

175. IND. R. EVID. 703.

176. 989 N.E.2d 355 (Ind. Ct. App. 2013).

177. *Id.* at 357.

178. *Id.* at 358.

179. *Id.* at 358-59. The CAPI is a test that assesses a person's propensity to physically abuse children. *See id.* at 358.

as an expert, the mother appealed the trial court's decision to allow testimony on the CAPI test, arguing this assessment is not based on reliable scientific principles. Looking to Rule 702(b), the trial court stated that "no specific test is required to establish a scientific process's reliability."[180] The court in *T.H.* noted that despite no specific test being required, trial courts generally may consider

> (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error, as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community.[181]

In finding that the testimony regarding CAPI was based on reliable scientific methodology, the court of appeals discussed how the social worker described the history of this test and its widely-accepted use in the psychiatric community.[182] The mother put great emphasis in her appeal on the fact that the social worker was unable to cite specific studies and journal articles on the CAPI.[183] The court of appeals agreed with the trial court that this inability to cite specific statistics did not make her testimony about CAPI unreliable.[184]

To comply with Rule 702(b), the party seeking to use that testimony does have the burden of proof to establish the scientific principles serving as the basis for that expert's testimony, but does not have to conclusively establish the reliability of those principles.[185] At issue in *State Automobile Insurance Co. v. DMY Realty Co.*, was the admissibility of an expert report used by an insured in a declaratory judgment action. The expert report, drafted by a professional engineer and geologist, opined that the contamination at the relevant site began or persisted during the period the insurance policies at issue were held. [186] The expert report was cited by the insured in its cross-motion for summary judgment. The insurers filed a motion to strike this report as being based on unreliable scientific principles.[187]

The trial court admitted this expert report and granted the insured's cross-motion for summary judgment.[188] The insurers argued that the expert report should have been excluded as it was based on guesswork and speculation.[189] The Indiana Court of Appeals stated that "[s]cientific knowledge admitted by a trial court under Indiana Evidence Rule 702 must be 'more than a subjective belief or

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180. *Id.* at 362 (citing Troxell v. State, 778 N.E.2d 811, 815 (Ind. 2002)).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. State Auto. Ins. Co. v. DMY Realty Co., 977 N.E.2d 411, 429 (Ind. Ct. App. 2012).
186. *Id.* at 416.
187. *Id.* at 417.
188. *Id.*
189. *Id.* at 422.

unsupported speculation.'"[190] Specifically, the insurers argued that certain values used to calculate the estimated contamination period were estimated rather than tested, and the expert's use of a certain modeling software should not have been applied to this type of contamination and did not account for certain unique variables at that site.[191] The insured responded by noting that the modeling software was designed by the United States EPA, and was "perfectly appropriate" for use by the expert.[192]

The Indiana Court of Appeals conducted an extensive examination of the expert's qualifications and methods in finding that the trial court did not abuse its discretion in admitting this report.[193] The court decided the report did contain a detailed explanation of the processes used to reach his opinion.[194] To the extent the modeling software was inappropriately used, the court concluded that the insured did not need to have "conclusively established the reliability of [the expert's] scientific principles in order to prove admissibility."[195]

The Indiana Court of Appeals expounded on the admissibility of expert scientific testimony in the context of conducting an autopsy. In *Carter v. Robinson*,[196] a medical negligence and wrongful death action was filed after a patient in his sixties passed away the same afternoon after visiting with Dr. John Carter complaining of stress. The patient was diagnosed with stress and insomnia, but nothing was noted about any possible heart problems. The autopsy technician concluded that the patient died from acute and chronic congestive heart failure.[197] The plaintiff hired the autopsy technician as an expert in this action. Dr. Carter filed a motion to strike the testimony of the autopsy technician and submitted his own expert's affidavit concluding that the technician's conclusion about the patient's death was unsound and based on unreliable scientific principles. At trial, the trial court permitted the testimony of the autopsy technician, but did not permit Dr. Carter's expert physician to testify as an expert witness.[198]

The court elaborated on Rule 702 by stating that its purpose was to expand the admission of reliable scientific testimony rather than to narrow it.[199] Dr. Carter alleged that the testimony of the autopsy technician failed to follow the differential etiology methodology, a procedure where other causes of death are considered and excluded.[200] Dr. Carter also claimed that certain scientific facts

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190. *Id.* at 423 (quoting Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 366 (Ind. Ct. App. 2002)).

191. *Id.* at 423-24.

192. *Id.* at 425.

193. *Id.* at 429.

194. *Id.*

195. *Id.* at 428.

196. 977 N.E.2d 448 (Ind. Ct. App. 2012), *trans. denied*, 989 N.E.2d 338 (Ind. 2013).

197. *Id.* at 451.

198. *Id.*

199. *Id.* at 452.

200. *Id.*

on which the technician based his opinion were not reliable, such as the technician's lack of knowledge about the patient's medical history and his reliance on observations from the patient's estranged wife who had not seen the patient in a year.[201]

The Indiana Court of Appeals evaluated the differential etiology methodology, explaining that the reliability of this methodology should be judged independently in each case.[202] For this specific methodology, the court of appeals explained that "admissible expert testimony need not rule out all alternative causes, but where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that it was not the sole cause, that doctor's methodology is unreliable."[203] The court found that had the autopsy technician appropriately used the differential etiology model as evidenced by his testimony at trial looking at other potential causes of the patient's death and excluding those.[204] With regard to Dr. Carter's contention that the autopsy technician wrongly relied on the testimony of the patient's estranged wife, the technician testified that the cause of death was determined independently from his conversation with the estranged wife.[205] Concerning Dr. Carter's other factual disputes in the testimony of the autopsy technician, the court determined these disputes went to the credibility and weight of the testimony rather than the admissibility of that testimony.[206]

> Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.[207]

In *Shelby v. State*,[208] the court of appeals considered whether the trial court erred in restricting the testimony of a defense expert on false or coerced confessions, specifically the expert's opinion whether the actions of the police in questioning Shelby were coercive. During Shelby's trial for murder of his stepdaughter, he put on Dr. Richard Leo to support the defense's argument that Shelby's confession to killing his stepdaughter was false and coerced.[209] While the trial court permitted Dr. Leo to testify generally about police interrogation tactics, the trial court did not allow Dr. Leo to give his impression on whether the

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201. *Id.* at 452-53.

202. *Id.* at 453.

203. *Id.* (citing Henricksen v. ConocoPhillips Co., 605 F. Supp. 2d 1142, 1162 (E.D. Wash. 2009)).

204. *Id.* at 454.

205. *Id.*

206. *Id.* at 455.

207. *Id.* (citing Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001)).

208. 986 N.E.2d 345 (Ind. Ct. App.), *trans. denied*, 989 N.E.2d 782 (Ind. 2013).

209. *See id.* at 367-68.

questioning tactics by the police in this case were coercive.[210]

In reviewing this decision, the court of appeals examined *Miller v. State*,[211] and *Callis v. State*.[212] The Indiana Court of Appeals interpreted *Miller* to find that

> experts may testify on the general subjects of coercive police interrogation and false or coerced confessions. Experts may not, however, comment about the specific interrogation and controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false, as this would invade the province of the jury and violate Evidence Rule 704(b).[213]

Looking to *Miller* and *Callis*, the court of appeals found it was not reversible error for the trial court to restrict Dr. Leo's testimony since the jury received ample evidence of the details surrounding Shelby's interrogation and evidence about the interrogation tactics used on Shelby.[214] Dr. Leo was permitted to testify generally about police interrogation tactics and how those tactics can lead to false or coerced confessions.[215]

VII. HEARSAY (RULES 801-806)

Hearsay is defined as a statement "not made by the declarant while testifying at the trial or hearing" and "offered in evidence to prove the truth of the matter asserted."[216] Hearsay evidence is generally not admissible unless the rules of evidence provide for an exception or other law provides differently.[217] "[T]he exceptions to the [hearsay] rule have been generally based upon some combination of the unavailability of the declarant, the reliability of the declaration, or the presumed inefficiency of any possible cross-examination."[218]

A. Statement of an Opposing Party—Rule 801(d)(2)

Rule 801(d)(2) states that admissions or other statements by a party opponent in a case can be used against that person and are not hearsay. In *Turner v. State*,[219] Marion Turner appealed his conviction for dealing cocaine, partly on the basis that during trial, the trial court denied Turner the permission to repeat statements of a confidential informant whom he believed acted as an agent of the

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210. *Id.* at 368.

211. 770 N.E.2d 763 (Ind. 2002).

212. 684 N.E.2d 33 (Ind. Ct. App. 1997).

213. *Shelby*, 986 N.E.2d at 369.

214. *Id.* at 369-70.

215. *Id.* at 370.

216. IND. R. EVID. 801.

217. IND. R. EVID. 802.

218. Embrey v. State, 989 N.E.2d 1260, 1264 (Ind. Ct. App. 2013) (quoting In re Termination of Parent-Child Relationship of E.T., 808 N.E.2d 639, 641-42 (Ind. 2004)).

219. 993 N.E.2d 640 (Ind. Ct. App.), *trans. denied*, 997 N.E.2d 357 (Ind. 2013).

State.[220] The court of appeals concluded the statements of the confidential informant should have been considered non-hearsay under Rule 801(d)(2), citing the testimony of a police sergeant who described how informants act as agents for the police.[221] The court then analyzed this error under the harmless error analysis.[222] An error is harmless in this context if "in light of the totality of the evidence in the case, its probable impact on a jury is sufficiently minor so as not to affect the substantial rights of the parties."[223] Although the jury was not explicitly made aware that the informant offered Turner additional money for the cocaine, the court determined this was harmless error.[224]

B. Excited Utterance—Rule 803(2)

In *Young v. State*,[225] Young appealed his conviction of felony domestic battery and strangulation, in part, contending that the testimony of two firefighters and a police officer at his trial were inadmissible hearsay which violated the Confrontation Clause.[226] Shortly after the alleged incident of domestic violence, firefighters at a fire station near Young's home observed Young's wife, the victim, approach the fire station crying.[227] In speaking with her as she continued to cry, the firefighters learned the incident occurred less than twenty minutes prior to her arrival at the fire station.[228] They also observed bruises and abrasions on her arm, hand, and neck to which they tended.[229] Approximately forty-five minutes after she approached the fire station, at which time the wife had previously stopped crying and was "antsy to leave," Officer Stuff arrived.[230] Officer Stuff observed her crying again and appearing scared.[231]

The court of appeals partially agreed with the trial court, finding that the firefighters' testimony was properly admitted.[232] The appellate court disagreed with the trial court's admission of Officer Stuff's testimony and with the State's justification for this testimony as an excited utterance under Rule 803. Rule 803(2) states that a statement is admissible as an exception to the hearsay rule when it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[233]

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220. *Id.* at 642.
221. *Id.* at 643.
222. *Id.*
223. *Id.* (citing Miller v. State, 720 N.E.2d 696, 704 (Ind. 1999)).
224. *Id.*
225. 980 N.E.2d 412 (Ind. Ct. App. 2012).
226. *See* U.S. CONST. amend. VI.
227. *Young*, 980 N.E.2d at 416.
228. *Id.*
229. *Id.*
230. *Id.* at 417.
231. *Id.*
232. *Id.* at 423.
233. IND. R. EVID. 803(2).

Admissibility under this exception depends "on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications."[234]

In finding that Officer Stuff's testimony on the wife's statements was not an excited utterance and should not have been admitted, the court cited *Boatner v. State*,[235] a case explaining that "[w]hile lapse of time is not dispositive, if a statement is made long after a startling event, it is usually 'less likely to be an excited utterance.'"[236] As the officer first spoke to the wife an hour after the incident and the wife had stopped crying for some time during that hour, the officer's testimony of the wife's statements was inadmissible hearsay.[237] This error was not harmless because it was the only evidence used for the strangulation charge, so the court of appeals reversed the conviction of felony strangulation.[238]

In *Bryant v. State*,[239] a case discussed earlier in this Article,[240] this hearsay exception was similarly addressed in the context of a detective's testimony after speaking with a stabbing victim. Crowdus was stabbed in the ear with a pencil and taken to the hospital for treatment after fighting with Bryant in jail. At Bryant's trial for this incident, the trial court admitted the detective's testimony about his conversation with Crowdus prior to his receiving medical treatment. The Indiana Court of Appeals disagreed, concluding this testimony was admitted in error.[241] In this instance, Crowdus had returned to his cell after the fight and the State did not establish how much time elapsed between the fight and Crowdus's conversation with the detective, a key consideration for this hearsay exception.[242] This error was harmless as it was mostly cumulative of Crowdus's own testimony at trial.[243]

The excited utterance exception was again considered in *Teague v. State*.[244] The evidence at issue was a 911 call from a neighbor relaying statements from Saylor that her ex-boyfriend Teague had just beat Saylor's mother and robbed them.[245] The trial court admitted this evidence at Teague's trial for multiple charges of burglary, robbery, and battery. To complicate matters, the 911 call contained hearsay included within hearsay, Saylor's statements to the neighbor and the neighbor's statements to the 911 operator.[246] Teague agreed that Saylor's

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234. *Young*, 980 N.E.2d at 421 (quoting Sandefur v. State, 945 N.E.2d 785, 788 (Ind. Ct. App. 2011)).

235. 934 N.E.2d 184, 185 (Ind. Ct. App. 2010).

236. *Young*, 980 N.E.2d at 421 (quoting *Boatner*, 934 N.E.2d at 186)).

237. *Id.* at 422.

238. *Id.*

239. 984 N.E.2d 240 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 796 (Ind. 2013).

240. *See supra* Part II.C.

241. *Bryant*, 984 N.E.2d at 247.

242. *Id.*

243. *Id.*

244. 978 N.E.2d 1183 (Ind. Ct. App. 2012).

245. *Id.* at 1186.

246. *Id.* at 1187.

statements to the neighbor were excited utterances, but argued that the neighbor's statements to the 911 operator were not excited utterances and thus, should not have been admitted at trial.[247]

Whether a 911 call could be admitted where the caller, with no personal knowledge of the event, was relaying statements from the victim, with personal knowledge of the event, was a matter of first impression for the court of appeals.[248] In considering the neighbor's statements, the court observed that a statement can still fall under this exception if it is in response to a question "so long as the statement is unrehearsed and is made under the stress of excitement from the event."[249]

The court found the neighbor was under the stress of the event when she made the 911 call as a distraught and bloodied Saylor had moments before arrived at the neighbor's house in hysterics claiming her mother was beaten.[250] At the same time, the neighbor could hear the mother screaming next door and was unsure if Teague remained at Saylor's house.[251] Although the neighbor did not have personal knowledge of the original beating of Saylor's mother, she did have personal knowledge of the frightening event that she observed.[252] The court found her statements bore "sufficient indicia of reliability, the hallmark of all hearsay exceptions," and were excited utterances under Rule 803(2).[253]

C. Statement Made for Medical Diagnosis or Treatment—Rule 803(4)

In *Clark v. State*,[254] the court addressed the medical diagnosis and treatment hearsay exception to determine whether reports prepared by a social worker could be used against Clark as evidence of his age at the time of the offense. Clark was convicted at trial of felony battery under Indiana Code section 35-42-2-1(a)(2)(b), which requires proof that the battery injured a person less than fourteen years old and was committed by a person eighteen years old or older.[255] The only evidence used by the State to prove Clark's age at the time of the offense were two reports on the abuse allegations prepared by a social worker.[256] The State argued on appeal that these reports, although hearsay, were properly admitted by Rule 803(4).[257] This Rule allows hearsay statements "made by persons who are seeking medical diagnosis or treatment and describing medical history, or past or

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247. *Id.*

248. *Id.* at 1188.

249. *Id.* (citing Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996)).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. 978 N.E.2d 1191 (Ind. Ct. App. 2012), *aff'd on reh'g*, 985 N.E.2d 1095 (Ind. Ct. App. 2013).

255. *Id.* at 1193.

256. *Id.*

257. *Id.* at 1195.

present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[258]

The trial court analyzed the reports under a two-step analysis used in *McClain v. State*,[259] "1) is the declarant motivated to provide truthful information in order to promote treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[260] The court of appeals noted that although Rule 803(4) can include statements made to clinical social workers, the statements about Clark's age had "no apparent relevance to a diagnosis of the child's injuries."[261] As such, Clark's conviction was reversed.[262]

D. Records of Regularly Conducted Business Activity—Rule 803(6)

Rule 803(6) states that certain types of business records are exceptions to the hearsay rule. The documents subject to this exception are as follows:
A memorandum, report, record, or data compilation, in any form, of facts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate a lack of trustworthiness.[263]

This rule was at issue in *Embrey v. State*,[264] where Embrey argued that a statutorily-required report documenting ephedrine and pseudoephedrine purchases by Embrey from Indiana retailers was inadmissible hearsay used to convict him at trial for felony dealing in methamphetamine. Specifically Embrey argued that because the custodian of the records did not have personal knowledge of the purchases, the report should not have been admitted.[265]

The court of appeals disagreed with Embrey, preliminarily observing that the custodians who record facts need not have personal knowledge of the facts contained within it.[266] From a review of the report and the affidavit of the custodian of that report, the court decided that the submissions of Embrey's

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258. IND. R. EVID. 803(4).

259. 675 N.E.2d 329 (Ind. 1996).

260. *Clark*, 978 N.E.2d at 1196 (quoting *McClain*, 675 N.E.2d at 331 (adding further that "to satisfy the requirement of the declarant's motivation, the declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment")).

261. *Id.* at 1197.

262. *Id.* at 1198.

263. IND. R. EVID. 803(6).

264. 989 N.E.2d 1260 (Ind. Ct. App. 2013).

265. *Id.* at 1266.

266. *Id.* at 1264.

purchases listed in the report were made by others with a duty to report accurately and were made in the ordinary course of their employment.[267] Because the report was considered a business record and the custodian of the report did not need to have firsthand knowledge of Embrey's purchases, the court ruled that this evidence was properly admitted within the discretion of the trial court.[268]

E. Public Records and Reports—Rule 803(8)

Comparable to business records, public records and reports are also exceptions to the hearsay rule if created as part of their regularly conducted activity or investigation.[269] Among a limited set of specific restrictions on this exception, Rule 803(8) does not provide a hearsay exception for "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case."[270]

In *Smith v. Delta Tau Delta*,[271] the Smiths' son died from alcohol poisoning at his fraternity house at Wabash College after consuming large amounts of alcohol. The Smiths appealed the grant of summary judgment in favor of the national fraternity Delta Tau Delta by the trial court, finding that Delta Tau Delta assumed no duty to protect Smiths' son or other fraternity members.[272] They argued that, among other improper evidence, two unsworn and uncertified statements supposedly made to police offers about this incident, and used as part of Delta Tau Delta's motion for summary judgment, should have been stricken.[273]

Delta Tau Delta tried to get around the requirements of Indiana Trial Rule 56(E)[274] that an unsworn statement cannot qualify as proper evidence by contending the two statements at issue were admissible under the public records exception.[275] The court of appeals found that "the statements purport to be an interview by a police officer of two witnesses pertaining to the events surrounding [the son's] death. As such, both documents fall within the provision of investigative police reports and are inadmissible as hearsay statements . . . ."[276] The court held that the trial court abused its discretion in admitting those

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267. *Id.* at 1267.

268. *Id.*

269. IND. R. EVID. 803(8).

270. *Id.*

271. 988 N.E.2d 325 (Ind. Ct. App. 2013).

272. *Id.* at 331-32.

273. *Id.* at 328.

274. Indiana Trial Rule 56(E) states:

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self authenticated of all pages or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

275. *Smith*, 988 N.E.2d at 334.

276. *Id.* at 335.

statements and partly for this reason, the court of appeals reversed Delta Tau Delta's grant of summary judgment.[277]

Evidence in *Allen v. State*,[278] Allen's arrest report, was similarly examined against Rule 803(8). Allen was tried and convicted for attempted robbery, robbery, and being a habitual offender. Allen appealed his conviction, arguing his arrest report was improperly admitted because it was an "investigative report[] by police and other law enforcement personnel."[279] The Indiana Court of Appeals did not agree with Allen, but rather considered the arrest report closer to a booking report.[280] The court determined the report was properly admitted, explaining that "[w]hile this booking report was created by law enforcement, the biographical information on the printout was obtained and recorded in the course of a ministerial nonevaluative booking process."[281]

F. Forfeiture by Wrongdoing—Rule 804(b)(5)

The Rules of Evidence provide for additional hearsay exceptions in certain circumstances where the declarant is unavailable for cross-examination at trial. One of those exceptions is Rule 804(b)(5): "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying."[282]

In *White v. State*,[283] White appealed his murder conviction partly on the admission of testimony under Rule 804(b)(5). White was convicted of murdering his ex-girlfriend Amy Meyer.[284] Testimony was admitted at trial after the trial court determined by a preponderance of the evidence that White killed Meyer to prevent her from testifying against him at a provisional custody hearing concerning their son scheduled the day after the murder.[285]

White argued on appeal that the trial court misapplied Rule 804(b)(5) when the "State did not prove by a preponderance of the evidence that his purpose in shooting [Meyer] was to prevent her from testifying."[286] Prior to 2009, when Rule 804(b)(5) was adopted, case law held that "a party, who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness as being inadmissible under the Indiana Rules of Evidence."[287] Rule 804(b)(5)

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277. *Id.* at 340.
278. 994 N.E.2d 316 (Ind. Ct. App. 2013).
279. *Id.* at 320 (quoting IND. R. EVID. 803(8)).
280. *Id.* at 321.
281. *Id.*
282. IND. R. EVID. 804(b)(5).
283. 978 N.E.2d 475 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1016 (Ind. 2013).
284. *Id.* at 479.
285. *Id.* at 476-79.
286. *Id.* at 479.
287. *Id.* (quoting Roberts v. State, 894 N.E.2d 1018 (Ind. Ct. App. 2008)).

requires more than the case law did, demanding that "the party procured the unavailability of the declarant for the purpose of preventing the declarant from attending or testifying."[288] Evaluating this additional requirement under the Indiana Rules of Evidence was a matter of first impression for the Indiana Court of Appeals.[289]

In analyzing this Rule, the court looked to Federal Evidence Rule 804(b)(6) and case law interpreting that Rule.[290] The court also examined *United States v. Dhinsa*,[291] which understood the federal rule to mean the government "need not . . . show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant 'was motivated in part by a desire to silence the witness.'"[292] The court of appeals agreed with the trial court that by a preponderance of the evidence,[293] the hearsay evidence was not admitted in error because "White *was at least partially* motivated to kill Amy to prevent her from testifying at the provisional custody hearing."[294] Through its finding, the court appeared to implicitly adopt the interpretation of Rule 804(b)(5) from Weissenberger's Indiana Evidence Court Room Manual, that this "hearsay exception applies where offering party shows party engaged in wrongdoing that resulted in witness's unavailability and that one purpose was to cause the witness to be unavailable at trial."[295]

VIII. AUTHENTICATION OF EVIDENCE (RULES 901-902)

In *B.J.R. v. C.J.R.*,[296] a mother appealed a court order modifying child support to be paid by the father for their son. An initial child support order (hereinafter "Pennsylvania Order") was entered in Pennsylvania in 2000.[297] In 2010, the father filed a petition in Marion County, Indiana to modify the child support.[298] In 2012, the trial court granted the father's petition to decrease child support.[299] On appeal, the mother claimed the Pennsylvania Order was not properly authenticated before the trial court in Marion County, Indiana.[300]

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288. *Id.*

289. *Id.*

290. *See id.* at 479-80.

291. 243 F.3d 635 (2d Cir. 2001).

292. *White*, 978 N.E.2d at 480 (quoting *Dhinsa*, 243 F.2d at 1279).

293. *See id.* at 481. The court of appeals added that if the evidence at issue were live testimony rather than a paper record, a clearly erroneous standard of review would apply. *Id.*

294. *Id.* at 482 (emphasis added).

295. *Id.* (citing A.J. STEPHANI & GLEN WEISSENBERGER, WEISSENBERGER'S INDIANA EVIDENCE COURTROOM MANUAL 320 (2012-13 ed.)).

296. 984 N.E.2d 687 (Ind. Ct. App. 2013).

297. *Id.* at 690.

298. *Id.*

299. *Id.* at 691.

300. *Id.* at 694. She specifically alleged that the Pennsylvania Order "consist[ed] of two documents, the order and the stipulation, and that these two documents bore different case numbers,

The Indiana Court of Appeals in *B.J.R.* first explained Indiana's rule on authentication found in Rule 901(a), that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[301] Looking next to domestic official records, such a record is self-authenticated "provided that it is 'attested by the officer having the legal custody of the record, or by his deputy.'"[302] In this case, the trial court decided that the Pennsylvania Order was authentic and the handwritten changes did not impact that authenticity.[303] The court of appeals found the trial court did not abuse its discretion in authenticating this record as the Pennsylvania Order was certified by a stamp, handwritten notation, and a deputy's signature.[304]

CONCLUSION

This survey of Indiana appellate case law reveals how the Indiana Rules of Evidence, and their interpretation, create an ever-changing legal landscape. Knowledge of decisions that evolve these Rules is invaluable to any attorney's practice in law.

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the stipulation was not certified, and the two documents had been altered by an unknown person without authentication of the hand-written changes made." *Id.*

301. IND. R. EVID. 901(a); *B.J.R.*, 984 N.E.2d at 695.

302. *B.J.R.*, 984 N.E.2d at 695 (quoting IND. R. EVID. 902(1)).

303. *Id.*

304. *Id.*