1995 Survey of Indiana Evidence Law

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Introduction

On January 1, 1994, the Indiana Supreme Court adopted the Indiana Rules of Evidence (IRE) which are similar to the Federal Rules of Evidence (FRE). The adoption of the IRE occurred following decisions by the Indiana Supreme Court demonstrating a shift towards the Federal Rules.[1]

The adoption of the Indiana Rules has resulted in a change for Indiana practitioners accustomed to following the common law evidentiary rules. The purpose of this Article is to serve as a guide through the IRE for the benefit of Indiana practitioners. As the rules and cases discussed below will show, not all of the rules have resulted in a drastic change in Indiana law.

I. Article I: General Provisions

Article I contains provisions regarding the scope,[2] purpose and construction,[3] evidentiary rulings,[4] determination of preliminary questions,[5] limited admissibility,[6] and the issue of remainder of or related writing or recorded statements.[7] In general, these rules are consistent with prior Indiana law and practice, and are similar to their federal counterparts. However, unlike the Federal Rules, the Indiana Rules are a product of judicial action without legislative involvement.

The rules govern proceedings in the courts of the State of Indiana unless otherwise required by the United States Constitution, Indiana Constitution, or by the provisions of either Indiana Rule of Evidence 101 or other rules promulgated by the Indiana Supreme Court.[8] Only when the rules do not cover a specific evidence issue should common or statutory law apply.[9] The provisions of IRE 101(c) state that other than the rules regarding privileges, the rules of evidence do

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1. *See* Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992) (rejecting common law depraved sexual instinct rule and adopting FRE 404(b)). *See also* Modesitt v. State, 578 N.E.2d 649, 653-54 (Ind. 1991) (rejecting *Patterson* rule in favor of FRE 801(d)).
2. Ind. R. Evid. 101.
3. Ind. R. Evid. 102.
4. Ind. R. Evid. 103.
5. Ind. R. Evid. 104.
6. Ind. R. Evid. 105.
7. Ind. R. Evid. 106.
8. Ind. R. Evid. 101(a).
9. *Id.*

not apply to "the determination of questions of fact preliminary to admissibility" under IRE 104(a), and the rules also do not apply to certain "miscellaneous proceedings."[10]

It is the responsibility of the party opposing the admission of evidence to raise a timely objection stating the specific ground for objection, unless such ground is apparent from the context.[11] Therefore, failure to timely raise the objection, may result in a waiver that does not preserve error for appeal.[12] Absent an appropriate objection, a court will only take notice of fundamental errors affecting the substantial rights of a party.[13] "Fundamental error is a substantial, blatant violation of basic principles of fairness which, if not corrected, would deny the defendant fundamental due process."[14]

If a court excludes the evidence, it is the proponent's duty to make known the substance of the evidence to the court by a proper offer of proof, unless such substance is apparent from the context within which the questions are asked.[15] When an offer of proof is made to the court in a jury trial, it must be done outside of the jury's presence, to the extent practicable, to prevent inadmissible evidence from being "suggested to the jury."[16]

Evidence can be admitted for a limited purpose.[17] It is the duty of the party desiring limited admissibility to request a limiting instruction from the court.

Since the adoption of the Indiana Rules of Evidence, there has been little case law on the rules contained in Article I. However, the Indiana Court of Appeals has confirmed that the rules do not apply to all court proceedings.[18]

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10. IND. R. EVID. 101(c)(2). Miscellaneous Proceedings include those proceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings.

11. IND. R. EVID. 103(a)(1).

12. The admission of testimony regarding a defendant's prior sexual misconduct was a violation of an order in limine. However, defense counsel's failure to lodge a contemporaneous objection to the evidence waived such error. Hackney v. State, 649 N.E.2d 690, 694 (Ind. Ct. App. 1995), *trans. denied*. *See also* Kimble v. State, 659 N.E.2d 182 (Ind. Ct. App. 1995), *trans. denied*.

13. IND. R. EVID. 103(d).

14. *Kimble*, 659 N.E.2d at 184 (citing Townsend v. State, 632 N.E.2d 727, 730 (Ind. 1994)).

15. IND. R. EVID. 103(a)(2).

16. IND. R. EVID. 103(c).

17. IND. R. EVID. 105.

18. A decision of a small claims court may be based solely upon hearsay evidence, including a small claims court's entry of a protective order. Rzeszutek v. Beck, 649 N.E.2d 673, 681 (Ind. Ct. App. 1995), *trans. denied*. The rationale behind this rule is clear: Litigants in small claims courts are often lay people with no legal training.

II. ARTICLE II: JUDICIAL NOTICE

IRE 201 permits a court to take judicial notice of facts[19] and law.[20] The court has the discretion to take judicial notice of a fact or law, whether requested by a party or not.[21] Unlike its federal counterpart,[22] IRE 201 is not limited in scope to adjudicative facts.[23] If a fact is "(1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,"[24] the fact must be judicially noticed.[25] However, as the Indiana Court of Appeals recognized in *Pigman v. Ameritech Publishing, Inc.*, "not every circumstance related to a case presents a fact requiring evidentiary proof or judicial notice."[26]

In *Pigman*, Ameritech challenged the court of appeals' earlier decision,[27] which held that Ameritech's Yellow Pages advertising contract was unconscionable and unenforceable. In reaching its decision, the court took judicial notice that in society the telephone "is ubiquitous and is the primary means of remote interactive communication."[28] Ameritech contended that the court had taken judicial notice of matters that were outside the record and denied it an opportunity to be heard, pursuant to IRE 201(e). The court noted that "[it] should exercise extreme caution in taking judicial notice of facts subject to proof."[29] However, this extreme caution did not preclude it from using its "everyday knowledge of facts in general" to arrive at its decision.[30]

In rejecting Ameritech's argument, the court of appeals noted that awareness of the telephone's place in society came from the court's life experience which "forms the background and frame of reference for every judicial opinion."[31] The frame of reference referred to in *Pigman* was not an adjudicative fact subject to evidentiary proof,[32] nor was it the type of judicial notice governed by IRE 201. Instead, the facts were legislative rather than adjudicative, and in using its

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

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

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

22. FED. R. EVID. 201.

23. This is not to suggest that federal courts are limited to judicial notice of adjudicative facts.

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

25. The present value of $1 per year for a given number of years is a calculation capable of accurate and ready determination by resort to sources, such as the Burns interest tables, whose accuracy cannot reasonably be questioned and, therefore, it is not subject to reasonable dispute. Griffin v. Acker, 659 N.E.2d 659, 663-64 (Ind. Ct. App. 1995) (citing IND. R. EVID 201(d)).

26. Pigman v. Ameritech Publishing, Inc., 650 N.E.2d 67, 69 (Ind. Ct. App. 1995).

27. Pigman v. Ameritech Publishing, Inc., 641 N.E.2d 1029 (Ind. Ct. App. 1994).

28. *Pigman*, 650 N.E.2d at 69.

29. *Id.* (citation omitted).

30. *Id.*

31. *Id.* (citing Belcher v. Buesking, 371 N.E.2d 417, 420 (Ind. App. 1978)).

32. *Id.*

knowledge of those facts, the *Pigman* court was not subject to IRE 201.

Although IRE 201 requires a court to take judicial notice if requested by a party and supplied with the necessary information,[33] generally, a court may not take judicial notice of a different case, even if the case is before the same court and on a related subject between related parties.[34] In probation revocation matters, however, this rule has not been applied strictly.[35]

Although jurors in criminal actions are instructed that they may, but are not required to, accept as conclusive any judicially noticed fact,[36] IRE 201(g) requires that a civil jury be instructed to accept as conclusive any judicially noticed fact. This changes the discretion provided under prior Indiana law.

III. Article III: Presumptions in Civil Actions and Proceedings

According to IRE 301, "[a] presumption shall have continuing effect even though contrary evidence is received."[37] This rule probably changes prior Indiana law. Previously, a presumption disappeared when contrary evidence was received.[38] As it now stands, the rule likely means that the party who receives the benefit of a presumption will not be subject to a directed verdict. The presumption's continuing effect and the contrary evidence received will create an issue for the trier of fact.

IV. Article IV: Relevancy

"[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant evidence.[39] Relevant evidence is generally admissible; irrelevant evidence is inadmissible.[40] Trial courts are

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33. Ind. R. Evid. 201(d).

34. Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995).

35. *See* Henderson v. State, 544 N.E.2d 507, 512-13 (Ind. 1989); Szymenski v. State, 500 N.E.2d 213, 215 (Ind. Ct. App. 1986).

36. *See* Sturgis v. State, 654 N.E.2d 1150, 1153 (Ind. Ct. App. 1995) (error for the trial court to not instruct the jury that it may, but was not required to, accept as conclusive those sections of the Administrative Code judicially noticed, however, such error was harmless).

37. Ind. R. Evid. 301:

> In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

38. Gandy v. Orr, 44 N.E.2d 181 (Ind. App. 1942), *trans. denied.*

39. Ind. R. Evid. 401.

40. Ind. R. Evid. 402. *See* Bonner v. State, 650 N.E.2d 1139, 1141 (Ind. 1995) (content of an informant's statements and the propriety of police initiating an investigation were not probative

given wide latitude in ruling on the relevancy of evidence.[41] Relevant evidence, however, can be excluded if its probative value is substantially outweighed by unfair prejudice, issue confusion,[42] misleading the jury, undue delay, or needless presentation of cumulative evidence.[43] Trial courts are also given wide latitude in weighing the probative value of evidence against the possible prejudice of its admission.[44]

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of any contested issue and therefore irrelevant); Swain v. State, 647 N.E.2d 23, 25 (Ind. Ct. App. 1995), *trans. denied* ("why the police acted in a certain manner does not prove in any way that the defendant committed a certain crime"). Judge Chezem registered a strong dissent on the ground that by questioning the police officer's motive for the arrest, the defendant made the arrest an issue. *Id.* at 23 (Chezem, J., dissenting).

41. Bates v. State, 650 N.E.2d 754, 757 (Ind. Ct. App. 1995). Curiously, the court implies that admission of irrelevant evidence is per se an abuse of discretion. "[W]e review to determine whether the admission of certain evidence constituted an abuse of discretion *because the evidence was not relevant* to what the state was required to prove." *Id.* (emphasis added). This statement seems more in line with de novo review. The court did not seem to give any deference to the trial court's determination of relevancy.

Indiana appellate courts might consider rejecting the abuse of discretion standard for overturning a trial court's determination of relevancy. There really should be no discretion to admit irrelevant evidence. (Of course, the counterargument is that the determination of relevancy in close cases lies, to a certain degree, in an individual's everyday experience in how the world works.) Any admission of irrelevant evidence should then be reviewed according to whether any harm resulted from the admission.

42. *See* Griffin v. Acker, 659 N.E.2d 659, 663 (Ind. Ct. App. 1995) (The defendant's use of a 7.5% interest rate for thirty-year Treasury bills as a discount rate for present value purposes was a combination of the inflation rate and real interest rate, but the defendant did not distinguish between the two, and the trial court properly could have concluded that the danger of confusing such a rate on the present value issue substantially outweighed its probative value.).

43. IND. R. EVID. 403. *See Swain*, 647 N.E.2d at 25 (stating in dicta that the prejudice of a police officer testifying about the defendant's prior drug sales substantially outweighed the probative value of the officer explaining the next investigatory step taken by him).

44. Carson v. State, 659 N.E.2d 216, 218 (Ind. Ct. App. 1995). In Indiana, a threshhold question of the admissibility of prior bad acts evidence is whether a reasonable factfinder could find that the act(s) occurred and that the defendant committed the act(s). This is substantially similar to how the admissibility of this evidence would be treated under IRE 104(b). Sloan v. State, 654 N.E.2d 797, 800 (Ind. Ct. App. 1995). Once this question is decided in the affirmative, then the strength of that evidence should not be incorporated into the IRE 403 balancing test. The evidence's probative value is measured by what it can prove under IRE 404(b), not whether the underlying proof of the prior bad act is strong. The *Carson* court incorrectly incorporated the strength of the underlying evidence into the IRE 403 balancing test: "First of all, the evidence linking Carson to the crime [was] very tenuous . . . ." *Carson*, 659 N.E.2d at 219. IRE 104(e) allows parties to attack the strength of the underlying evidence. This should ordinarily provide adequate protection. If Indiana appellate courts are worried about the effect of prior bad acts evidence that just barely passes sufficiency review, then they could raise the threshhold standard of admissibility. A "clear and convincing" standard of admissibility would work. The solution is

A. Photographs and Videotapes

In *Butler v. State*, Butler argued on appeal that the trial court erroneously admitted photographs of two crime victims and a videotape of the crime scene when such evidence was irrelevant. According to Butler, his defense counsel made an offer to stipulate that Butler had killed the two victims with a knife and, further, counsel explained in opening statements that the two women had died as a result of Butler using a knife on them. Butler argued on appeal that because the cause of death of the victims was not at issue, the exhibits were irrelevant or, in the alternative, that any relevance was substantially outweighed by the danger of prejudice.

The Indiana Supreme Court held there was no error in the trial court's admission of photographs of the victims taken at the crime scene and at the morgue before autopsy, and in the admission of a videotape of the crime scene.[45] The court noted that the identity of the alleged victims and assailants, the injuries to the alleged victims and the source of such injuries, the death of the alleged victims and the cause of death, as well as the physical surroundings in which the injuries and deaths occurred, were all facts of consequence in the determination of guilt of an accused in a homicide case.[46] Distinguishing *Butler* from prior cases holding that gruesome photographic evidence was inadmissible,[47] the court found that the photographs in *Butler* correctly showed the victims' wounds, established the *corpus delicti*, and probably aided the jury in determining appellant's state of mind when he killed each of the two victims.[48] Additionally, the photographs did not show the bodies altered in any way by the doctor performing the autopsies.[49] Furthermore, the videotape showed the crime scene shortly after the police found the bodies and there was no claim that the video did not provide the jury with an accurate image of the crime scene at that time.[50] Therefore, the court held that the probative value of the photographs and videotape was not outweighed by their tendency to inflame the jury's emotions.[51]

B. Character Evidence: IRE 404

In general, character evidence is not admissible for the purpose of proving action in conformity therewith on a particular occasion.[52] However, there are two exceptions to this general rule. First, evidence of a pertinent trait of character

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not, however, to obfuscate the IRE 403 balancing test by introducing the strength of the underlying evidence into the inquiry.

45. Butler v. State, 647 N.E.2d 631, 633-34 (Ind. 1995).
46. *Id.* at 634.
47. *E.g.*, Kiefer v. State, 153 N.E.2d 899 (Ind. 1958).
48. *Butler*, 647 N.E.2d at 634.
49. *Id.* at 634-35.
50. *Id.* at 635.
51. *Id.*
52. IND. R. EVID. 404(a).

offered by the accused, or once offered by the accused, offered by the prosecution to rebut the same is permitted under IRE 404(a)(1).[53] Second, IRE 404(a)(2) permits evidence of a pertinent trait of character of the victim of the crime offered by an accused, or, once offered by an accused, by the prosecution to rebut the same, or evidence of a victim's character trait of peacefulness offered by the prosecution in a homicide case to rebut evidence presented by the accused that the victim was the first aggressor.

IRE 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,[54] intent,[55] preparation, plan,[56] knowledge,[57] identity, or absence of

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53. The defendant's prior arrest for disorderly conduct after the defendant wrestled with police, and his prior arrest for resisting law enforcement after he attempted to free his sister from a lawful arrest were relevant to defendant's peaceful nature. Therefore, under IRE 405(a) the State properly cross-examined defendant's character witnesses, who testified that the defendant had a reputation for peacefulness, about the witnesses' awareness of the defendant's prior arrests. The court, however, refused to distinguish between nonviolence and peacefulness in its determination of whether the State's cross-examination was proper. Forrest v. State, 655 N.E.2d 584, 587 n.2 (Ind. Ct. App. 1995), *trans. denied.*

54. *Id.* at 586-87 (evidence on the night of the murder that the defendant (1) smoked cocaine, (2) attempted to borrow money from victim to purchase more cocaine and was turned down, (3) tried to buy cocaine but had no money, and (4) was seen with cocaine after returning to the victim's home, was admissible to show defendant's motive to commit murder). *See also* Kimble v. State, 659 N.E.2d 182, 185 (Ind. 1995) (evidence that the defendant was a member of a racially biased group and testimony that defendant considered himself to be an "official" member of a racially biased group, because he committed a crime against the black race, was probative of the defendant's motive in committing the crime and was thus admissible under IRE 404(b)).

55. *See* Ely v. State, 655 N.E.2d 372, 375-76 (Ind. Ct. App. 1995); Christian-Hornaday v. State, 649 N.E.2d 669, 671 (Ind. Ct. App. 1995).

56. The common scheme or plan exception to the rule of inadmissibility of prior acts permits proof of identity by showing that the accused committed other crimes with identical modus operandi, and permits proof of an uncharged crime as evidence of a preconceived plan that included the charged crime. Sloan v. State, 654 N.E.2d 797, 801 (Ind. Ct. App. 1995), *trans. denied.* In *Sloan*, the court refers to IRE 404(b) exceptions. *Id.* at 800-01. In *Forrest*, the court correctly notes that under IRE 404(b) evidence of prior bad acts is generally admitted unless the evidence is offered solely to prove propensity. As a practical matter, the slight difference in approaches should make little difference, but IRE 404(b) should be viewed as a general rule of admissibility. The exception is when the evidence is offered solely to prove propensity. In that case, IRE 404(b) operates to exclude the evidence.

57. In Whitehair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995), stolen tires were found in the defendant's garage along with a stolen all-terrain vehicle. In the prosecution for receiving the stolen all-terrain vehicle, the defendant put his knowledge of the stolen character of the all-terrain vehicle at issue through his statements to police and defense counsel's opening statement at trial,

> mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.[58]

To be admissible, evidence of an accused's extraneous bad acts must: (1) be directed toward proving a matter in issue other than defendant's propensity to commit a crime; (2) show the prior act as similar enough and close enough in time to be relevant for reasons other than mere propensity;[59] (3) be such that a reasonable jury could find that act occurred and that the defendant committed the act;[60] and (4) be such that the evidence's probative value is not substantially outweighed by danger of unfair prejudice.[61]

Thus, the analysis of admissibility under IRE 404(b) necessarily incorporates the balancing test of IRE 403.[62] This balancing test must be utilized because evidence, although it has probative value, may unfairly affect the outcome of the trial and violate a defendant's constitutional due process right to a fair trial.[63] A threshhold requirement for admissibility of an extrinsic offense under IRE 404(b) requires the State to establish that the defendant committed the offense.[64] In *Carson v. State*, the court also evaluated the strength of the underlying evidence pursuant to the IRE 403 balancing test.[65]

The trial court in *Carson* permitted the State to introduce evidence of a drive-by shooting incident at the victim's mother's house that took place shortly after the shooting of the victim. The drive-by shooting also took place after the victim's mother passed on information to the police that the defendant had murdered her son. The defendant was arrested two days after the drive-by shooting. The defendant was with two other men at the time of his arrest. In the possession of the three men was a nine millimeter handgun and a shotgun. Ballistics tests linked these two guns to the drive-by shooting at the mother's house.

According to the State, the evidence of the drive-by shooting was admissible under the "motive" exception of IRE 404(b). The State justified the admission of this evidence as being probative of the defendant's motive and of consciousness

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therefore evidence of the stolen tires was relevant to the issue of the defendant's knowledge.

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

59. Prior phone calls sufficiently similar to the calls for which the defendant was charged, and that occurred within one month of the charged conduct, were close enough in time to the charged conduct to be genuinely relevant. *Christian-Hornaday*, 649 N.E.2d at 672.

60. This is substantially equivalent to IRE 104(b).

61. Sloan v. State, 654 N.E.2d 797, 800 (Ind. Ct. App. 1995).

62. Carson v. State, 659 N.E.2d 216, 219 (Ind. Ct. App. 1995).

63. *Id.* at 218.

64. *Id.* The reason for this is obvious, if the defendant did not commit the offense, then the offense is irrelevant.

65. *Carson*, 659 N.E.2d at 218. *See supra* note 44 for a discussion of the correctness of this approach.

of guilt. The court of appeals rejected the motive justification, noting that the State is never required to prove motive.[66] Furthermore, the court noted the danger of a broad expansion of the motive exception to IRE 404(b).[67] The court also rejected the consciousness of guilt argument,[68] but did not categorically reject the possibility of its future use in another case.[69]

Even before the Indiana Supreme Court adopted the Indiana Rules of Evidence, Rule 404(b) has governed the admissibility of evidence of other crimes, wrongs, or acts since the 1992 opinion of *Lannan v. State*.[70] The *Lannan* court made it clear that it intended the "common scheme or plan" exception to the general rule to remain in place in addition to the exceptions[71] contained in FRE 404(b). Further, in *Moore v. State*[72] the Indiana Court of Appeals explained:

> Extrinsic evidence may properly be admitted under Evid. Rule 404(b) as per the common scheme or plan exception if it is admitted to either: (1) prove the identity of the perpetrator by showing that the defendant has committed other crimes with an identical *modus operandi*; or (2) as evidence of a preconceived plan which included the charged crime.[73]

Evidence offered to prove motive or purpose may also be probative of a common scheme or plan which ultimately is probative of identity.[74]

In *Moore*, during the trial against the defendant for criminal deviate sexual conduct, the State introduced evidence of an attack upon another woman that occurred eleven months after the attack of the victim for the original offense. Although the evidence was factually similar to the original offense, such evidence should not have been admitted under the "common scheme or plan" exception, or the identity exception to IRE 404(b), and it therefore constituted impermissible character evidence introduced for the purpose of showing the defendant acted in conformity with a particular trait.[75]

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66. *Carson*, 659 N.E.2d at 218.

67. *Id.* at 218-19 (citing Wickizer v. State, 626 N.E.2d 795, 797 (Ind. 1993)). *See also* Moore v. State, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995), *trans. denied* (court dubious of value of proving motive).

68. *Carson*, 659 N.E.2d at 219.

69. Because the court characterized the argument as "lack[ing] coherency," it seems likely that the court probably would not reject a consciousness of guilt argument if there were a better connection, e.g., a drive-by shooting at a complaining witness' house.

70. 600 N.E.2d 1334 (Ind. 1992).

71. The *Lannan* court spoke of FRE 404(b) exceptions. *Id.* at 1339 n.12. This was incorrect. FRE 404(b) is a general rule of admissibility, not a list of exceptions to a general rule of inadmissibility. The only exception in FRE 404(b) is that the evidence must not have the purpose of proving propensity. *See, e.g.*, United States v. Mendez-Ortiz, 810 F.2d 76 (6th Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

72. 653 N.E.2d 1010, 1015 (Ind. Ct. App. 1995).

73. *Id.* at 1016 (quoting Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993)).

74. *Id.*

75. *Id.* at 1018.

Reputation or opinion evidence may be used in all cases in which evidence of character or a trait of character is admissible.[76] When character or a trait of character of a person is an essential element of a charge, claim or defense, evidence of specific instances of the person's conduct can be used.[77] Evidence of a person's habit or of an organization's routine practice is admissible to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.[78]

C. Miscellaneous: Rules 407-412

Pursuant to IRE 407 through 412, certain evidence is not admissible to prove liability. Subsequent remedial measures—measures taken after an event which, if taken previously, would have made the event less likely to occur—are not admissible to prove negligence or culpable conduct in connection with the event.[79] Evidence of furnishing or offering to furnish a compromise, or of accepting or offering to accept valuable consideration in compromise or attempt 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.[80] Evidence of paying or offering to pay medical expenses occasioned by an injury or property damage is not admissible to prove liability for the injury or damages.[81] A withdrawn plea of guilty or admission of a charge, or of an offer so to plead, or of statements made in connection with a withdrawn plea or offer, is not admissible in any civil or criminal action against the person who made the plea or offer.[82] Evidence of

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76. IND. R. EVID. 405(a).

77. IND. R. EVID. 405(b).

78. IND. R. EVID. 406.

79. IND. R. EVID. 407. Such evidence is admissible, however, when offered for other purposes such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

80. IND. R. EVID. 408. Such evidence can be used to prove bias or prejudice of a witness, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution.

81. IND. R. EVID. 409.

82. IND. R. EVID. 410. Such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Although the language of IRE 410 does not contain the limiting language of FRE 410, which limits protection to statements made "in the course of plea discussions with an attorney for the prosecuting authority," IRE 410 retains the Indiana common law evidence rule providing that a defendant's statements made to a police officer who had no authority to enter into a binding plea agreement were not privileged plea negotiations and were, therefore, admissible. Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995), *trans. denied*. For a statement to qualify as a privileged communication, two requirements must be satisfied: (1) the defendant must have been charged with

insurance against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully.[83]

Finally, in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except for evidence of the victim's or witness' past sexual conduct with the defendant, evidence showing that some person other than the defendant committed the act upon which the prosecution is founded, evidence that the victim's pregnancy at the time of trial was not caused by the defendant, or evidence of conviction for a crime to impeach a witness under IRE 609.[84] There is no exception to the rape shield statute to allow for the admission of the victim's past sexual conduct for the independent purpose of showing the defendant's belief as to the victim's age.[85]

V. PRIVILEGES

The general rule regarding privileges is that no person has the privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness, disclosing any matter, or producing any object or writing.[86] This general rule is, however, subject to exceptions found in the Constitution, statutes, other rules promulgated by the Indiana Supreme Court, or principles of common law.[87] Some of these privileges include the attorney-client privilege, which applies to all communications between the client and attorney for purposes of obtaining professional legal advice regarding the client's rights and liabilities,[88] the physician-patient privilege, which protects communications that are "necessary to treatment or diagnosis looking toward treatment,"[89] the social worker-patient privilege,[90] and the privilege against

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a crime at the time of the statement; and (2) the statement must have been made to someone with authority to enter into a binding plea agreement. *Id.* Although IRE 410 "provides no test for determining whether a statement was made 'in connection with' a plea offer, [pursuant to the common law of Indiana, to qualify as a privileged communication], the communication must have as its ultimate purpose the reduction of punishment or other favorable treatment from the state to the defendant." *Id.* (quoting Crandell v. State, 490 N.E.2d 377, 380 (Ind. Ct. App. 1986), *trans. denied*).

83. IND. R. EVID. 411. Such evidence can be used to prove agency, ownership or control, or bias or prejudice of a witness.

84. IND. R. EVID. 412(a).

85. Little v. State, 650 N.E.2d 343, 344-45 (Ind. Ct. App. 1995).

86. IND. R. EVID. 501(a).

87. *Id.*

88. IND. CODE § 34-1-14-5(2) (Supp. 1995); Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 725-26 (Ind. Ct. App. 1995).

89. IND. CODE § 34-1-14-5(3) (Supp. 1995); Thomas v. State, 656 N.E.2d 819, 822 (Ind. Ct. App. 1995).

90. Stone v. Daviess County Div. of Children & Family Servs., 656 N.E.2d 824, 831 (Ind. Ct. App. 1995), *trans. denied.*

self-incrimination.[91]

Even though a privilege may exist to protect a witness from testifying, the privileges can be waived if the privileged communication is revealed to a third person,[92] or if the privilege is not asserted by objection. Furthermore, limits and exceptions can be placed on privileges. For example, the privilege against self-incrimination is not absolute, but is to be balanced with the government's legitimate demands to compel citizens to testify in order to ascertain the truth surrounding a criminal incident.[93] Also, the social worker-patient privilege, like the physician-patient privilege, is abrogated in proceedings for involuntary termination of the parent-child relationship.[94]

VI. ARTICLE VI—WITNESSES

Article VI concerns the testimony of a lay witness. Under IRE 601, every person is presumed competent except as provided in the IRE[95] or as provided by any legislative act.[96] The question of witness competency is determined by the trial court and reviewed on an abuse of discretion standard.[97] A competent witness cannot be excluded from testifying,[98] although the witness' testimony can be excluded if it violates another rule of admissibility.[99]

In addition, a competent witness' credibility may be attacked by any party to

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91. *In re* Steelman, 648 N.E.2d 366, 369 (Ind. Ct. App. 1995) (citing U.S. CONST. amend. V; IND. CODE § 35-37-3-3(a) (1993)).

92. *Thomas*, 656 N.E.2d at 823.

93. *In re Steelman*, 648 N.E.2d at 369 (citing *In re* Caito, 459 N.E.2d 1179 (Ind. 1984)). However, if the state forces a person to testify about a crime, it must provide a "grant of immunity [that will] leave the witness in substantially the same position as if the privilege to remain silent had been properly exercised." *Id.*

94. *Stone*, 656 N.E.2d at 831; *see also* IND. CODE §§ 25-23.6-6-1, 31-6-5-1, 31-6-5-13(d) (1993).

95. *See* IND. R. EVID. 602 (witness without personal knowledge of a matter is incompetent to testify; no personal knowledge if the matter occurs only during or after hypnosis); IND. R. EVID. 605 (presiding judge incompetent to testify); IND. R. EVID. 606 (juror may not testify before jury in which she is sitting).

96. *See also* IND. CODE § 34-1-14-4 (1993) (providing that all persons are competent witnesses in a civil action or proceeding, whether parties to, or interested in, the suit, except as provided by statute); Thornton v. State, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995) (witnesses presumed competent).

97. *Thornton*, 653 N.E.2d at 497 (citing Hughes v. State, 546 N.E.2d 1203, 1204 (Ind. 1989)).

98. The trial court lacks discretion in this area. White v. White, 655 N.E.2d 523, 524 (Ind. Ct. App. 1995).

99. *Id.* at 529 n.11 (exclusion of a witness and exclusion of certain evidence from a witness are two different things, but competent witness' testimony may be excluded under IRE 403 if the probative value of the evidence is outweighed by the testimony's prejudicial impact).

the proceeding.[100] IRE 608, 609, 613 and 616 provide specific modes of attacking a witness' credibility. IRE 608 allows a party to attack a witness' credibility by evidence either in the form of opinion or reputation[101] or specific instances of conduct.[102] Furthermore, IRE 609 permits a party to attack a witness' credibility by the introduction of evidence concerning the witness' conviction of certain crimes.[103] Finally, IRE 613 permits a witness' credibility to be attacked through the use of a witness' prior inconsistent statements,[104] and IRE 616 permits a party to attack a witness' credibility by introducing evidence of bias, prejudice, or interest of the witness.[105]

Article VI also addresses the general treatment of witnesses. IRE 611 and 614 address the interrogation of witnesses both on direct and cross-examination and the interrogation of witnesses by the court and jury. IRE 612 allows a party to refresh a witness' recollection by examining a writing or object either before or during testifying.[106] Finally, IRE 615 mandates the separation of witnesses at the request of any party to the litigation.[107]

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100. IND. R. EVID. 607.

101. IND. R. EVID. 608(b). The credibility of a witness may be attacked or supported subject to two limitations: (1) the evidence may only refer to character for truthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

102. *Id.* A witness' credibility may be attacked or supported on cross-examination by an inquiry into specific instances of conduct, other than a conviction of a crime as provided by IRE 609, subject to the court's discretion.

103. IRE 609 permits a party to attack a witness' credibility with the witness' prior convictions. In Davis v. State, 654 N.E.2d 859 (Ind. Ct. App. 1995), the court held it was not error to allow the introduction of evidence of the defendant's prior burglary conviction under IRE 609 even though defendant was on trial for burglary. The defendant wanted to only allow the jury to hear that he had been convicted of an unnamed felony. This would allow the jury to speculate and call into question the witness' veracity based on any criminal conviction. This type of inference is prohibited by IRE 609. *Id.* at 860. The court did not note that the plain language of the rule suggests that the trial court *must* admit evidence of a prior conviction for one of the enumerated crimes when it is proffered.

104. IND. R. EVID. 613. The witness need not be shown the statement before being examined, although the statement shall be disclosed to opposing counsel. IND. R. EVID. 613(a). In addition, extrinsic evidence of a prior inconsistent statement of a non-party witness is not generally admissible to impeach a witness unless the witness has the opportunity to explain or deny the statement and the opposing party has an opportunity to interrogate the witness regarding the same. IND. R. EVID. 613(b).

105. The Federal Rules have no counterpart to IRE 616.

106. If a witness' memory is refreshed while the witness is testifying, the opposing party is entitled to have the writing or object produced at trial or other processing. IND. R. EVID. 612(a). If the witness' memory is refreshed prior to testifying, the court may allow the opposing party to obtain the writing or object if the court determines that the interests of justice so require. IND. R. EVID. 612(b).

107. The rule does not require the exclusion of a party, a party's representative or a party

A. IRE 601—General Rule of Competency

White v. White[108] is an important case for the domestic law practitioner. In this case, the court of appeals confronted the issue of whether the exclusion of the testimony of a ten year-old child in a dissolution hearing was proper. In *White*, the wife attempted to call her ten year-old son to rebut previous testimony presented by her husband. Her husband's witnesses previously testified that they had seen the wife display hostility towards the son and that the wife had actually kicked him on occasion. The son's counsel objected to allowing the son to testify, and the court sustained the objection stating, in part:

> It is the position of this Court and has been the position of this Court . . . that children of the parties are not to be called as witnesses. I will allow children of the parties to be called as witnesses if the issue is emancipation for the limited purpose of them testifying as to whether they meet the qualifications of the statute. I will allow children of the parties to be called as witnesses for the limited purpose of them testifying as to advanced educational expenses. . . . I think that it is abundantly clear, based on [Indiana Code section 31-1-11.5-21(d)] and based on case law, that it is within this Court's discretion to exclude children as witnesses.[109]

The court of appeals held that the exclusion of the rebuttal testimony was error.[110]

The court reasoned that section 31-1-11.5-21(d) of the Indiana Code did not permit a judge to exclude a minor child from testifying at trial.[111] The Court further reasoned that the IRE permit a party to call and obtain relevant testimony from any competent witness and that the trial court lacks discretion to accept or reject those witnesses.[112] However, the acceptance of a competent witness does not necessarily require the court to accept all of the witness' testimony. The trial court may still preclude testimony if it determines that the testimony violates another evidentiary or procedural rule.[113]

B. IRE 608—Evidence of Character and Conduct of a Witness and IRE 609—Impeachment by Evidence of a Conviction of a Crime

As discussed above, a witness' credibility may be attacked under certain

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essential to the presentation of the party's cause. IND. R. EVID. 615.

108. 655 N.E.2d 523 (Ind. Ct. App. 1995).

109. *Id.* at 526.

110. The court noted that two pieces of evidence were offered with the son's testimony: (1) the proper rebuttal testimony regarding whether the wife had kicked the son; and (2) the improper rebuttal evidence regarding the son's custody desires, the latter of which should have been offered in the wife's case in chief. *Id.* at 527.

111. *Id.* at 528.

112. *Id.* at 529.

113. *Id.* at 531. The trial court was within its discretion to preclude testimony of the minor child that should have been properly offered during the wife's case-in-chief.

circumstances by opinion, reputation or specific instances of conduct,[114] or by evidence of a conviction of a crime.[115] In *Palmer v. State*,[116] the court addressed both types of credibility attacks under IRE 608 and 609. In *Palmer*, the defendant attempted to admit evidence of one of the undercover police officer's drug use and related suspension. The State filed a motion in limine to exclude this evidence which the trial court granted. On appeal, the court upheld the exclusion of the evidence because the proffered evidence did not fit under either IRE 608 or 609.[117] The court reasoned that the drug use evidence did not constitute an opinion of the officer's reputation under IRE 608(a) and that the drug related suspension did not constitute a crime under IRE 609.[118] Finally, the court noted that a witness could not be impeached by specific acts of misconduct that had not resulted in criminal convictions.[119]

C. IRE 611—Mode and Order of Interrogations and Presentations

Generally, under IRE 611(b), the scope of cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." However, a party's direct examination of a witness may open the door to additional cross-examination that otherwise may not have been permissible. For example, in *Reeves v. Boyd & Sons, Inc.*,[120] the court upheld the trial court's allowance of a party to question the defendant over the defendant's objection under IRE 404(b) about a prior conviction for driving under the influence of alcohol. The trial court allowed the examination because the defendant's witnesses had opened the door by giving rise to an inference that the defendant did not partake of alcoholic beverages and thus would not have been intoxicated at the time of the collision. Therefore, the court held that even though the plaintiff could not have otherwise questioned the defendant regarding the prior conviction, the defendant's witnesses had opened the door to such questions through their testimony, and such questioning was proper.[121]

D. IRE 615—Separation of Witnesses

This rule has not altered prior case law holding that a court may disqualify a witness for violating a separation of witnesses order if the violation was caused by the connivance or fault of the party calling the witness.[122] However, IRE 615 has

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114. IND. R. EVID. 608.

115. IND. R. EVID. 609.

116. 654 N.E.2d 844 (Ind. Ct. App. 1995).

117. *Id.* at 848.

118. *Id.* However, the court did note that evidence of drug use could be offered if the witness was under the influence of drugs either at the time of trial or at the time of the occurrence or that the officer's ability to perceive, remember or testify was substantially affected by the drug use. *Id.*

119. *Id.* (citing Hicks v. State, 544 N.E.2d 500 (Ind. 1989)).

120. 654 N.E.2d 864 (Ind. Ct. App. 1995), *trans. denied.*

121. *Id.* at 872.

122. Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995), *trans. denied.*

changed prior case law in that a motion to separate is no longer subject to the discretion of the court, but mandatory upon any party's request.[123]

VII. ARTICLE VII—OPINION TESTIMONY AND THE USE OF EXPERTS

Under Article VII, witnesses may testify as to their opinions concerning any issue in question. IRE 701 allows lay witnesses to testify as to their opinions if those opinions are "rationally based on the perception of the witness" or "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." More broadly, IRE 702 provides that expert witnesses [124] may testify in the form of opinion or otherwise where their testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.[125] This expert opinion may be based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field,[126] and may embrace an ultimate issue to be decided by the trier of fact.[127] However, the expert witness' scientific testimony "is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests is reliable."[128]

A. Rule 702—Testimony by Experts

Steward v. State[129] addressed the additional requirements of IRE 702(b). In *Steward*, the defendant was convicted of two counts child molesting. At trial, the State presented evidence that one of the victim's behavior was consistent with that of other victims of child sexual abuse. The State presented such evidence

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123. IND. R. EVID. 615. *But see* Miller v. State, 648 N.E.2d 1208, 1211 (Ind. Ct. App. 1995), *trans. denied* (discussing discretion of trial court in granting motion to separate witnesses). *See also* Fourthman v. State, 658 N.E.2d 88, 90 (Ind. Ct. App. 1995), *trans. denied* (trial court is required by rule to grant a party's motion to separate with the exception of certain witnesses identified by the rule). *Fourthman* is the correct view.

124. An expert is defined as one qualified "by knowledge, skill, experience, training or education." IND. R. EVID. 702.

125. Whether expert witnesses are required first to disclose the underlying facts or data giving rise to their opinions prior to testifying is in the discretion of the court. However, expert witnesses are required to disclose such information on cross-examination. IND. R. EVID. 705.

126. IND. R. EVID. 703. *See also* Fleener v. State, 648 N.E.2d 652, 659 (Ind. Ct. App. 1995), *aff'd*, 656 N.E.2d 1140 (Ind. 1995) (testimony from practicing psychologist that exhibit was a reprint from the *Diagnostic and Statistic Manual* and that manual was used by both her and by others in her field satisfied the evidentiary foundational requirement of IND. R. EVID. 703).

127. IND. R. EVID. 704. However, IRE 704(b) precludes witnesses from testifying as to their opinions regarding "intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

128. IND. R. EVID. 702(b). FRE 702 does not have the explicit requirement, but as the Supreme Court noted in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), FRE 104(a) requires that in order for a court to admit scientific evidence under FRE 702, it must be satisfied of the reliability of such evidence. *Id.* at 592 n.10.

129. 652 N.E.2d 490 (Ind. 1995).

expressly for the purpose of proving that the alleged sexual contact occurred. Over the defendant's objection, the State's expert witnesses testified generally about child sexual abuse accommodation syndrome (CSAAS) and that the victim's behavior was consistent with the syndrome. The defendant objected to the CSAAS testimony on the ground that the testimony was not based on reliable scientific principles and therefore was not admissible under IRE 702(b).

At the outset, the court noted that "[t]he admissibility of expert testimony regarding [CSAAS] evidence is controversial and has received substantial criticism."[130] The court then examined an extensive amount of studies and recognized that "[b]ecause children's responses to sexual abuse vary widely, and because many of the characteristics identified by [CSAAS], or by similar victim behavior groupings, may result from causes unrelated to abuse, diagnostic use of syndrome evidence in courtrooms poses serious accuracy problems."[131] Thus, the court held that CSAAS testimony was not scientifically reliable to satisfy IRE 702(b),[132] and therefore, was not admissible.[133]

The importance of *Steward* lies predominantly in the court's discussion of the trial court's function in determining the reliability of proffered expert testimony. As in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[134] the *Steward* court recognized the trial court's role as the gatekeeper of the admission of expert testimony. The court stated that the trial court's determination of "reliability may be established either by judicial notice or, in its absence, by the proponent of the scientific testimony providing sufficient foundation to convince the trial court that the relevant scientific principles are reliable."[135] Thus, upon a finding by the trial court that the expert testimony will assist the trier of fact[136] and is sufficiently reliable, the expert testimony may be admitted.[137]

Another important point made by the *Steward* court relates, as the *Daubert* Court noted, to the expert testimony's "fit." As noted by the Court, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated

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130. *Id.* at 492.

131. *Id.* at 493.

132. The court reaffirmed this holding in Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995).

133. *Steward*, 652 N.E.2d at 499. The court did note, however, that "[i]t is possible that foundational support may be discovered in the future which will expand the purposes for which such expert testimony may be deemed reliable." *Id.*

134. 509 U.S. 579 (1993).

135. *Steward*, 652 N.E.2d at 499.

136. IND. R. EVID. 702(a). *See also* Vega v. State, 656 N.E.2d 497, 503 (Ind. Ct. App. 1995), *trans. denied* (court upheld a trial court's exclusion of expert testimony concerning memory on the ground that it would not assist the trier of fact).

137. *Steward*, 652 N.E.2d at 499. In addition, however, the trial court must also be mindful of IRE 403's balancing test, which precludes admission of evidence where its probative value is substantially outweighed by the danger of unfair prejudice. Justice Sullivan noted in his dissent in *Steward* that it is under IRE 403 that "the real battle over the admissibility of [CSAAS] should be fought in most cases." *Id.* at 501 (Sullivan, J., dissenting).

purposes."[138] Rather, the rule "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[139] In *Steward*, the valid connection might occur where the victim's credibility was attacked. Under such a circumstance, expert testimony might be appropriate where CSAAS testimony could be offered to explain the victim's behavior patterns, even though it was not admissible to prove that the sexual contact occurred.[140]

B. Rule 704(b)—Legal Conclusions

As noted above, IRE 704(b) prevents any witness, lay or expert, from testifying as to legal conclusions. The court of appeals addressed this rule in *In re Annexation Proposed by Ordinance No. X-01-93*.[141] In this case, a witness was offered to testify about a chain of title for a particular piece of property. The court noted that the results of a chain of title search are not legal conclusions, but rather the results of the search. If the title search reveals a specific encumbrance, the encumbrance is in the chain of title and the witness can testify as to the encumbrance. Thus, the court held that the results of a chain of title search are not legal conclusions necessitating a court's determination and are not precluded by IRE 704(b).[142]

VIII. ARTICLE VIII—HEARSAY AND THE EXCEPTIONS

Article VIII of the IRE discusses hearsay and the myriad exceptions to the general rule of non-admissibility.[143] IRE 801 defines hearsay as "a statement,[144] other than one made by the declarant[145] while testifying at the trial or hearing, offered to prove the truth of the matter asserted." However, two categories of statements are defined as nonhearsay under the rules—certain types of prior statements by a witness[146] and statements by a party-opponent.[147] They may be

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138. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993).

139. *Steward*, 652 N.E.2d at 498 (citation omitted). The *Daubert* Court used the following example of the study of the moon to illustrate "fit." The Court noted that the study of the phases of the moon may provide valid scientific knowledge about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact and will "fit." However, the testimony will not "fit" if evidence that the moon was full on a certain night is offered to show that an individual was unusually likely to have behaved irrationally on that night. *Daubert*, 509 U.S. at 591.

140. *Steward*, 652 N.E.2d at 499. Although not discussing the use of the testimony in terms of "fit," the use of the CSAAS testimony would "fit" where the victim's credibility was attacked.

141. 654 N.E.2d 284 (Ind. Ct. App. 1995), *trans. denied.*

142. *Id.* at 288.

143. IRE 802 provides that "[h]earsay is not admissible except as provided by law or by these rules."

144. A "statement" is an oral or written assertion or nonverbal conduct of a person intended by the person as an assertion. IND. R. EVID. 801(a).

145. The declarant is the person who makes the statement. IND. R. EVID. 801(b).

146. IND. R. EVID. 801(d)(1). The statement is not hearsay if the declarant testifies at a

offered for any purpose.

Two categories of hearsay exceptions are provided in Article VIII. IRE 803 provides twenty-three exceptions to the hearsay rule where the availability of the declarant is immaterial.[148] IRE 804 provides four (4) exceptions to the hearsay rule where the declarant is unavailable.[149] Finally, where hearsay is included within hearsay, the hearsay statement is admissible if each part of the combined statement is admissible under an exception as provided in IRE 803 and 804.[150]

A. Rule 801—Definitions

Several recent Indiana cases have addressed the definitional aspects of hearsay. As discussed above, hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement.[151] Conversely, where the statement is not offered for the truth of the matter asserted, it is not hearsay and is admissible for other purposes.

Whited v. State contains a good example of a statement, where, if offered for the truth of the matter asserted, it would be inadmissible hearsay, but where

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hearing or a trial, is subject to cross examination concerning the statement, and the statement is either (1) inconsistent with the declarant's testimony at trial and was given under oath, or (2) consistent with the declarant's statement and used to rebut a charge against the declarant of recent fabrication, improper influence, or motive, so long as the prior statement was made before the motive to fabricate arose, or (3) is one of identification of a person made shortly after perceiving the person.

147. IND. R. EVID. 801(d)(2). A party-opponent's statement is not hearsay if it is offered against that party and is either: (1) the party's own statement; (2) a statement adopted by a party; (3) a statement by a person authorized by the party to make such a statement; (4) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment and made during the relationship; or (5) a statement of a co-conspirator made during the course and in furtherance of the conspiracy. *See, e.g.*, Carmichael v. Kroger Co., 654 N.E.2d 1188, 1189-90 (Ind. Ct. App. 1995), *trans. denied* (claim form signed by plaintiff held not hearsay, but a statement of a party opponent and thus admissible under IRE 801(d)(2)(A) or (C)).

148. See IND. R. EVID. 803(1)-(23) for a complete listing of the exceptions.

149. A declarant is generally unavailable if she cannot testify or refuses to testify for any reason. However, a declarant is not unavailable as a witness if the declarant's refusal to testify is due to the wrongdoing of the proponent of the statement for the purpose of preventing the witness from testifying. IND. R. EVID. 801(a). *See also* Kellems v. State, 651 N.E.2d 326, 329 (Ind. Ct. App. 1995) (declarant is unavailable for purposes of this rule if he invokes the protections of the Fifth Amendment).

150. IND. R. EVID. 805.

151. *See* Matusky v. Sheffield Square Apartments, 654 N.E.2d 740, 741-42 (Ind. 1995) (affidavit of landlord's employee attesting that the notice that was sent to the tenant's within statutory period was hearsay, but admissible in a small claims proceeding); Whited v. State, 645 N.E.2d 1138, 1140 (Ind. Ct. App. 1995); *see also* Rzeszutek v. Beck, 649 N.E.2d 673 (Ind. Ct. App. 1995).

offered to show the effect the statement had on the hearer, it is not hearsay.[152] In *Whited*, the defendant attempted to offer out of court statements made by the victim. The victim allegedly told the defendant soon after they first met that she did not have a boyfriend. The defendant argued that these statements caused him to believe she had consented to sex. The trial court excluded the statements on the grounds they were hearsay.

The court of appeals held that the trial court erred in excluding the statements.[153] The court reasoned that the statements were being used to attempt to prove the effect they had on the defendant. The statements were not being offered to prove the truth of the statements, i.e., whether the victim actually had a boyfriend. Because they were not offered to prove the truth of the matter asserted, the court correctly found that the statements were not hearsay, and that the trial court erred in excluding the testimony.[154]

Hilton v. State[155] discusses: (1) the requirements to preserve alleged error where the trial court excludes evidence of a prior inconsistent statement; and (2) the foundational requirements to admit a prior inconsistent statement.[156] In *Hilton*, the defendant attempted to call a witness to testify about another witness' prior inconsistent statement.[157] The trial court excluded the testimony on the grounds that the defendant failed to establish a proper foundation for the testimony and that the statements were hearsay. The trial court reasoned that the foundation for the testimony was lacking because the defendant had failed to cross-examine the available declarant concerning the statement as required by IRE 801(d)(1)(A).

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152. *See also* Fleener v. State, 648 N.E.2d 652, 656 (Ind. Ct. App. 1995), *aff'd*, 656 N.E.2d 1140 (Ind. 1995) (child molestation victim's mother's testimony that abuse precipitated divorce from defendant was not hearsay because it was not offered to prove the truth of the matter asserted, but rather to explain why the marriage to the defendant had ended).

153. *Whited*, 645 N.E.2d at 1140.

154. *Id.* However, the court held the exclusion of the testimony was harmless error and upheld the defendant's conviction for rape and criminal confinement. *Id.*

155. 648 N.E.2d 361 (Ind. 1995).

156. Some prior inconsistent statements are defined as nonhearsay under IRE 801(d)(1)(A).

157. The court confuses the different requirements of and effects of nonhearsay evidence admitted under IRE 613(b) as opposed to IRE 801(d). "Statements admitted for this purpose are not hearsay. *Evid. R. 801(d).*" *Hilton*, 648 N.E.2d at 362 (emphasis added). IRE 801(d) has absolutely nothing to do with whether prior inconsistent statements are admissible under IRE 613(b). Prior inconsistent statements offered to impeach a witness' credibility are not hearsay because they are not offered to prove the truth of the matter asserted; they are offered to impeach. Therefore, they do not need to be defined as nonhearsay by IRE 801(d) to be admissible. Statements admitted under IRE 613(b) cannot be used to prove the truth of the matter asserted. Prior inconsistent statements admitted under IRE 801(d) of course may be used for impeachment, but they may also be used to prove the truth of the matter asserted. Prior inconsistent statements admitted under IRE 613(b) do not have to meet the predicate requirements of IRE 801(d), i.e., "given under oath subject to the penalty of perjury, hearing or other proceeding, or in a deposition . . . ." Introducing IRE 801(d) into the inquiry of whether the evidence of the prior inconsistent statements was admissible under IRE 613(b) was incorrect.

The supreme court agreed that the defendant failed to establish the proper foundation for the testimony.[158]

In addition to discussing the foundational requirements, the court also noted that the defendant had failed to make an adequate offer of proof concerning the proffered testimony, and thus, the defendant had waived the issue. The court stated: "An offer of proof must be certain and must definitely state the facts sought to be proved, and must show the materiality, competency, and relevancy of the evidence offered."[159] The court found the defendant's offer of proof defective in that it lacked specificity and failed to establish such material facts as when the conversation took place, and who was present at the time.[160] Additionally, the court reasoned that a phrase such as "I believe" did not adequately assure the court that the offer represented the substance of the declarant's testimony.[161] Thus, the court held that the defendant waived the issue by failing to make an adequate offer of proof.

B. Rule 803—Hearsay Exceptions—Availability of Declarant Immaterial

IRE 803 provides twenty-three exceptions to the hearsay rule. Under IRE 803, the availability of the declarant is immaterial. Numerous cases have addressed many of the exceptions under IRE 803. This subpart will provide a brief overview of many of these cases.

1. Rule 803(4)—Statements for Purposes of Medical Diagnoses or Treatment.—Under IRE 803(4), statements which are made for the purposes of, and reasonably pertinent to, medical diagnoses or treatment[162] are admissible even though they are hearsay statements. It is important to remember that the statements need not be solely related to how the individual feels, but can also be related to the cause of the injury. A good example of such statements can be found in *Thomas v. State*.[163]

In *Thomas*, the defendant was convicted of aggravated battery against his wife. Apparently after becoming embroiled in an argument in their car while at a gas station, the defendant struck his wife in the face and bit her on the face, eyes and arms. As a result of the bites to the eye, the wife's eye was surgically removed. At trial, the State offered the wife's doctor's testimony concerning the injured eye. The doctor testified that the wife told him during his initial evaluation that she had been in a fight with a "significant other" and the fight included biting. The doctor also testified that ascertaining the cause of the injury was important in treating the patient. The defendant objected to this testimony on the grounds of

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158. *Hilton*, 648 N.E.2d at 362.

159. *Id.* (citing Tope v. State, 362 N.E.2d 137 (Ind. 1960)).

160. *Id.*

161. *Id.*

162. The statements need not be made to a physician to be admissible where the declarant subjectively believes the statement is being made in contemplation of receiving medical diagnosis or treatment. Fleener v. State, 648 N.E.2d 652, 658 (Ind. Ct. App. 1995).

163. 656 N.E.2d 819 (Ind. Ct. App. 1995).

hearsay. The trial court overruled the objection and the appellate court upheld the trial court's ruling. The court held that the statements made to the doctor were made for the purpose of diagnosing and treating her injured eye and were therefore admissible under IRE 803(4).[164]

2. Rule 803(6)—Business Records Exception.—Under the business records exception, a document made at or near the time, by a person with knowledge,[165] regularly kept in the course of the conducted business activity is admissible. The foundation for the admission of a business record need not be made by the person who created the business record, but need only be made by testimony of any person who possesses a functional understanding of the record-keeping process.[166] Once the foundation has been established, the business record may be admitted for any permissible purpose.

One interesting case discussing the business record exception is *Humbert v. Smith*.[167] In *Humbert*, Smith gave birth to a child and filed a paternity action against Humbert, alleging that Humbert was the child's natural father. During the possible period of conception, however, Smith had sexual relations with three different men, including Humbert. Blood tests were administered to all three men. The blood test showed a 99.97% probability that Humbert was the child's father and excluded the other two men. The test results were admitted under section 31-6-6.1-8(b) of the Indiana Code over the defendant's objection that Smith did not establish a proper foundation as required by IRE 803(6). Section 31-6-6.1-8(b) provides that blood or genetic test results are admissible without establishing a foundation regarding the accuracy of the results, unless the objecting party files a written objection thirty days before the hearing.

The court of appeals recognized that a conflict existed between the statute and IRE 803(6). The court noted that "in the event of a conflict between a procedural statute and a procedural rule adopted by the supreme court, the latter shall take precedence."[168] Furthermore, the court reasoned, where a conflict exists, the rules of procedure govern and the phrases that are contrary to the rules of procedure are considered a nullity.[169] Thus, the court held that the statute was void to the extent it conflicted with IRE 803(6), and IRE 803 controlled the report's admission.[170]

3. Rule 803(8)—Public Records and Reports.—Under IRE 803(8), records or reports of a public office or agency made or kept pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law are admissible unless

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164. *Id.* at 823.

165. *See, e.g.*, D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995) (parts of reports were not admissible under hearsay exception because evidence did not establish that the preparers had first-hand knowledge of the incidents reported).

166. Payne v. State, 658 N.E.2d 635, 645 (Ind. Ct. App. 1995), *trans. denied.*

167. 655 N.E.2d 602 (Ind. Ct. App. 1995), *aff'd*, 664 N.E.2d 356 (Ind. 1996).

168. *Id.* at 604 (citations omitted).

169. *Id.* at 605 (citations omitted).

170. *Id.* However, the court found the admission of the report to be harmless error and affirmed the trial court's finding of paternity.

the sources of information indicate a lack of trustworthiness. Like IRE 803(6), the reports must be made by a person with first-hand knowledge.[171] These admissible records, however, do not include: (1) police or law enforcement investigative reports; (2) investigative reports prepared by or for a government or agency when offered by a government or agency; (3) factual findings offered by the government in criminal cases; and (4) factual findings resulting from special investigation of a particular complaint, except when offered by the accused in a criminal case.[172] One example of these admissible public records is a Bureau of Motor Vehicles report.[173]

A case that discussed the applicability of IRE 803(8), and the distinction between an "observation" and a "factual finding" is *Kindel v. State*.[174] In *Kindel*, the defendant was arrested as an habitual traffic offender. After a bench trial, the defendant was convicted of operating a motor vehicle while his driving privileges were suspended. Kindel appealed the conviction and argued that the Bureau of Motor Vehicles (BMV) report used by the State to prove he was a habitual traffic offender was inadmissible hearsay. Kindel argued that the report was inadmissible hearsay under IRE 803(8)(c) because "the fact that an individual is an habitual traffic offender is an 'administrative factual finding made by an individual employed by the BMV.'"

The court of appeals held that the report from the BMV was admissible under IRE 803(8) and did not constitute a "factual finding" under IRE 803(8)(c).[175] The court reasoned that the finding of a habitual violator "is not the product of an investigation that requires the BMV to make inferential selections between possible truths."[176] The court further reasoned that such a finding does not require the BMV to make subjective interpretations that could taint its trustworthiness and thus should be treated as an "observation" to which the exclusions of IRE 803(8) do not apply.[177] Thus, under IRE 803(8) a report satisfying the foundational criteria would generally be found admissible, unless the report preparer is required to make a subjective interpretation or select inferentially from possible truths.

C. Rule 804—Hearsay Exceptions—Declarant Unavailable

Under IRE 804, hearsay is admissible if the declarant is unavailable and the testimony falls into one of four exceptions. These four exceptions are: (1) former testimony in a proceeding if the predecessor in interest had an opportunity and similar motive to develop the declarant's testimony; (2) a statement made by the declarant under the belief of impending death; (3) a statement against interest

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171. *See* D.W.S v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995).

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

173. Coates v. State, 650 N.E.2d 58, 63 (Ind. Ct. App. 1995), *trans. denied*; Kindel v. State, 649 N.E.2d 117 (Ind. Ct. App. 1995).

174. 649 N.E.2d 117 (Ind. Ct. App. 1995).

175. *Id.* at 119.

176. *Id.*

177. *Id.*

made where no reasonable person would have made the statement unless believing it to be true; and (4) a statement of personal or family history.[178]

The court discussed the use of former testimony under IRE 804(b)(1) in *Kellems v. State*.[179] In *Kellems*, the defendant was convicted of dealing in cocaine. At trial, the defendant attempted to introduce into evidence the depositions of two alibi witnesses after the witnesses invoked their fifth amendment privilege and refused to testify. The prosecutor had previously deposed both alibi witnesses and charged both with perjury in relation to the statements made in their depositions. The court of appeals held that the trial court's exclusion of the depositions was an abuse of discretion.[180]

In holding that the trial court abused its discretion, the court found that the depositions were admissible under IRE 804(b)(1). The court reasoned that despite the evidence being in the form of depositions rather than live testimony, its admissibility was not allowed.[181] Furthermore, the court noted that the prosecutor, in initiating and taking the depositions, had the same opportunity and similar motive to develop the testimony of the alibi witnesses as required by the rule. Thus, because the witnesses were unavailable and because the prosecutor had sufficient previous opportunity to examine them, the court held that the depositions were admissible under IRE 804(b)(1).[182]

IX. ARTICLE IX—AUTHENTICATION OF EVIDENCE

Certain evidence must be authenticated prior to its admission before the trier of fact. As provided in IRE 901(a) the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims it to be.[183] IRE 901(b) discusses nine examples of authentication sufficient to comply with IRE 901(a), however, the list is not meant to be exhaustive.[184] Some evidence is self-authenticating and does not require extrinsic evidence to properly authenticate it.[185] However, it is important to note that "[w]hile self-authentication of a document under IRE 902(1) relieves the proponent from submitting foundational testimony as to authenticity, it does not,

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178. IND. R. EVID. 801(b)(1)-(4).

179. 651 N.E.2d 326 (Ind. Ct. App. 1995).

180. *Id.* at 329-30.

181. *Id.* at 328.

182. *Id.* Because of the improper exclusion of the evidence coupled with the defendant's right to present witnesses, the court held that the trial court abused its discretion and granted the defendant a new trial. *Id.* at 329-30.

183. The testimony of a subscribing witness is not, however, necessary to authenticate a writing unless required by the jurisdiction whose laws govern the validity of the writing. IND. R. EVID. 903.

184. IND. R. EVID. 901(b)(1)-(9). IRE 901(b)(10) notes that further authentication methods may be provided by the Indiana Supreme Court, by statute or by the Indiana Constitution.

185. IND. R. EVID. 902. Such things include, for example, domestic public documents, newspapers and periodicals or certified records. IND. R. EVID. 902(1)-(10).

unlike Indiana law before adoption of the Rules of Evidence, guarantee admissibility."[186] Rather, the proponent must offer an independent basis for admissibility under the IRE for the evidence to be admitted.

X. ARTICLE X—BEST EVIDENCE RULE

Article X addresses the admissibility of writings, recordings and photographs.[187] In addition, IRE 1001 addresses the use of originals or duplicates of the media being offered. Under IRE 1002, the original media is required to prove the content of the offered media, except as provided by the IRE or statute. However, a duplicate of the media may be used unless a genuine question is raised as to the authenticity of the original, or under the circumstances it would be unfair to admit the duplicate.[188] Finally, in the instance where the originals are unavailable,[189] other evidence of the contents of the media is admissible.[190]

The contents of an official record may be proved by copy, certified as correct in accordance with IRE 902 or testified to be correct by a witness who has compared it with the original.[191] However, if a copy of the official record is not available or cannot be obtained with reasonable diligence, other evidence of the contents of the public record may be admitted.[192] In addition, where the media is voluminous, the contents of the media may be presented in the form of a chart, summary or calculation.[193]

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186. Coates v. State, 650 N.E.2d 58, 62 (Ind. Ct. App. 1995).

187. IRE 1001 defines writings, recordings and photographs in broad terms and the rule should be consulted to determine if the offered evidence falls into one of the categories.

188. IND. R. EVID. 1003.

189. The original is not required if the original is: lost or destroyed; not obtainable by any judicial process or procedure; in the possession of an opponent; or is not closely related to a controlling issue. IND. R. EVID. 1004(1)-(4).

190. Other evidence includes the testimony or the deposition of the party against whom offered or by a written admission. In this instance, the party need not account for the original of the media. IND. R. EVID. 1007.

191. IND. R. EVID. 1005.

192. *Id.*

193. IND. R. EVID. 1006. However, the original, or duplicates, from which the summary was produced shall be made available for examination by the other party.