

appeals, thus, in effect, rejected the highly questionable practice described in *Barkey*.

The paternity statutes²²⁵ have been repealed and re-enacted as part of the new juvenile code.²²⁶ A number of changes have been made in the statutes, most of them simply involving the rewording and reorganization of its provisions. Several provisions dealing with the quasi-criminal aspects of paternity actions, such as arrest of the defendant in lieu of summons,²²⁷ and the provision that the alleged father "shall not be compelled to give evidence,"²²⁸ have been deleted. Also omitted are all references to imprisonment for contempt,²²⁹ and the provision for modification of support orders.²³⁰ Provisions relating to the putative father's right to remain silent and enforcement of support orders by contempt are included in other chapters of the code.²³¹ Since the statute continues to impose on parents of children born out of wedlock the same obligations as are imposed on parents of legitimate children,²³² presumably the modification provisions of the Dissolution of Marriage Act will be applicable to orders for support of illegitimate children.²³³

X. Evidence

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A. Hearsay; *Patterson Reconsidered*

The departure from the traditional hearsay rule, announced by the Indiana Supreme Court in *Patterson v. State*,¹ was carried to its logical, although perhaps not reasonable, extreme in *Flewallen v. State*.² In *Patterson* the court held that extrajudicial statements

IND. CODE § 31-4-1-26 (1976) authorizes recovery for "accrued support" for not more than two years prior to the bringing of the action.

²²⁵IND. CODE §§ 31-4-1-1 to 33, 31-4-2-1, -2 (1976).

²²⁶*Id.* §§ 31-6-6-1 to 22 (Supp. 1978) (effective Oct. 1, 1979).

²²⁷*Id.* § 31-4-1-13 (1976) (repealed effective Oct. 1, 1979).

²²⁸*Id.* § 31-4-1-16.

²²⁹*Id.* §§ 31-4-1-20, -22, -24.

²³⁰*Id.* § 31-4-1-19.

²³¹*Id.* §§ 31-6-3-3(5), -7-15 (Supp. 1978) (effective Oct. 1, 1979).

²³²*Id.* § 31-6-6-2.

²³³*Id.* § 31-1-11.5-17 (1976).

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¹263 Ind. 55, 324 N.E.2d 482 (1975).

²368 N.E.2d 239 (Ind. 1977).

made by witnesses available for cross-examination may be used as substantive evidence.³ It should be noted, however, that the statements in *Patterson* were arguably admissible for limited purposes, and the holding only meant that no limiting instructions were necessary.⁴

The appellant in *Flewallen* was convicted of second degree murder. At trial, prior statements of six witnesses made to the police, coroner, and grand jury were used as substantive evidence by the state over objection by the appellant. Two statements were read only after those witnesses had been questioned concerning the events. The remaining four witnesses were called for the purpose of authenticating their respective statements which were read to the jury before the witnesses were asked any relevant questions. The majority upheld the state's use of extrajudicial statements, citing the court's holding in *Patterson*.⁵ The dissent warned, however, that

³In *Patterson* the court made reference to FED. R. EVID. 801(d) which provides in part:

Statements which are not hearsay. A statement is not hearsay if—

- (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his prior testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence of motive

The court then went beyond the federal rule and held that, if the declarant is available for cross-examination, his extrajudicial statement is not hearsay, even if it were not made under oath. The court noted that the advisory committee on the federal rules of evidence had not required that prior inconsistent statements be made under oath in order to be substantive evidence, and concluded that the availability of the declarant for cross-examination is an adequate safeguard. 263 Ind. 55, 58, 324 N.E.2d 482, 485. The court, however, did not justify going beyond the federal rule as it relates to prior consistent statements. Unlike what has become known as the *Patterson* rule, the federal rule, both as proposed and as passed by Congress, permits the use of a prior consistent statement only under limited circumstances created when the opposite party opens the door for its admission.

⁴Two statements were admitted without limiting instructions. One was admitted after the defendant had confronted a prosecution witness with parts of a prior statement, seeking to impeach her. Thereafter, the court permitted the prosecution to introduce the entire written statement. Even if the entire statement were not substantive evidence, the prosecution would be permitted to introduce it in order to present to the jury the context of the excerpts referred to by the defense so as to rebut any inference that her present testimony was inconsistent with her prior statement. See *Carroll v. State*, 263 Ind. 696, 338 N.E.2d 264 (1975); FED. R. EVID. 106. The second statement was offered by the state as a prior inconsistent statement in an effort to impeach its own witness, who was also the wife of the accused. Assuming that the state had shown a proper foundation for impeaching its own witness, her prior statement was admissible for purposes of impeachment. See M. SEIDMAN, *THE LAW OF EVIDENCE IN INDIANA* 33 (1977).

⁵368 N.E.2d at 241.

the majority sanctioned indiscriminate use of extrajudicial statements and relieved the state of any obligation to even attempt to prove its case through testimony given in open court.⁶ The dissent determined this approach to be a vastly different use of extrajudicial statements than that sanctioned by the United States Supreme Court in *California v. Green*⁷ where: "The Court was therefore required to choose between permitting substantive evidentiary use of his prior statements and the total loss of relevant and necessary evidence."⁸

Criticism of the majority opinion appears to be justified. At least four of the statements served no purpose other than to bolster the in-court testimony of the state's witnesses, thereby allowing the state to have its witnesses repeat their testimony while giving more emphasis to its content. As it would be improper for the court to permit the state's witnesses to repeat their testimony over objection on direct examination,⁹ it is equally improper to permit the state to use prior statements for that purpose. The out-of-court statements held admissible in *Flewallen* were by no means necessary in order for the jury to obtain information it would not otherwise have been able to receive.¹⁰

Inherent in dicta of *Samuels v. State*,¹¹ is the premise *Flewallen* allows extreme permissiveness. *Samuels*, which may have overruled *Flewallen*, has limited the application of the *Patterson* rule. *Samuels* was convicted, in a jury trial, of committing a felony (robbery) while armed and was sentenced to twenty years confinement. In his appeal of the conviction, he attempted to have the court reconsider its decision in *Patterson*. His attempt was unsuccessful because the extrajudicial statement used at trial was admitted only for purposes of impeachment and was, therefore, admissible even under the traditional hearsay rule.

After recognizing that the *Patterson* decision "has been both praised and condemned by knowledgeable lawyers, judges and writers,"¹² the *Samuels* court endeavored to limit *Patterson* by

⁶*Id.* at 243 (DeBruler, J., dissenting).

⁷399 U.S. 149 (1970).

⁸368 N.E.2d at 243 (DeBruler, J., dissenting).

⁹"Many times the same question will be asked of a witness after it has been asked and answered The general rule is not to permit such questioning because repetition may give excessive emphasis to selected evidence." E. BROWNLEE, TRIAL JUDGES GUIDE, OBJECTIONS TO EVIDENCE § 2.3 (1974).

¹⁰"Although there were some minor conflicts, most of the statements were consistent with the statements given by the witnesses on the stand, though the previous statements were more detailed in each case." 368 N.E.2d at 241.

¹¹372 N.E.2d 1186 (Ind. 1978).

¹²*Id.* at 1187.

stating: "It appears that the rule drawn from *Patterson* may well be in need of reconsideration. To the extent that it has, on some occasions, been used to support the admission of out-of-court statements as a mere substitute for available in-court testimony, it has been misapplied."¹³ Although *Samuels* makes no reference to the court's decision in *Flewallen*, the two opinions are clearly inconsistent.

The future of the *Patterson* rule is uncertain after *Samuels*. Nonetheless, some reasonable conclusions may be reached about the direction that should be taken in future cases. Extrajudicial statements made by witnesses available for cross-examination have long been admissible when offered to prove something other than that which is asserted in the statement.¹⁴ An example of such non-hearsay use of an extrajudicial statement is found in *Samuels*, where the statement was admissible for impeachment. Traditionally, if a statement is used for this limited purpose, the opposing party has been permitted to have an instruction limiting the use of the evidence.¹⁵ The value of a limiting instruction has been questioned by legal scholars¹⁶ and in *Samuels* the court stated: "At most, he would have been entitled to have the jury admonished against considering the evidence for purposes other than impeachment—*relief of questionable value . . .*"¹⁷

It appears that the low value of limiting instructions should be recognized by the court in permitting otherwise admissible extrajudicial statements of available witnesses to be used as substantive evidence. Limiting the *Patterson* rule to those situations in which the statement is already admissible for some other purpose will lend support for eliminating a party's use of carefully prepared extrajudicial statements, a subject of some concern to the legal scholars who have considered rules similar to that adopted in *Patterson*.¹⁸

¹³*Id.*

¹⁴"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein." *Harvey v. State*, 256 Ind. 473, 476, 269 N.E.2d 759, 760 (1971) (quoting *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)). Thus, where the testimony or written evidence is offered merely to show that the prior statement was made, without concern for the truth of the statement, it is not hearsay. See MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE §§ 33-37, at 66-75 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; FED. R. EVID. 801(c).

¹⁵See 372 N.E.2d at 1188.

¹⁶Professor Cleary states, "Allowing [a prior inconsistent statement] as substantive evidence pays an added dividend in avoiding the ritual of a limiting instruction unlikely to be heeded by a jury." MCCORMICK, *supra* note 14, § 251 at 604.

¹⁷372 N.E.2d at 1187 (emphasis added).

¹⁸UNIFORM RULES OF EVIDENCE 63 (1953) (superseded 1974), provided:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) . . . A statement previously made by a

Situations where the extrajudicial statements would not be admissible for other purposes, such as those in which a witness suffers a true loss of memory, should be dealt with on a case-by-case basis using a standard similar to that set by Federal Rules of Evidence 803(24) and 804(5).¹⁹

B. Separation of Witnesses

Separation of witnesses, a common prophylactic measure taken at trials and hearings, is the subject of two recent decisions. In *Brannum v. State*,²⁰ the appellant was convicted of first degree murder. A witness for the state, Melvin Dean Burns, was in the custody of the county sheriff. Even though Burns and his common law wife were charged with the same murder as the appellant, they were permitted to plead guilty to manslaughter. During the trial Burns testified that the sheriff had discussed the case with him and had attempted to influence him to testify in favor of the appellant. Circumstances indicated some concert between appellant and the sheriff.

Although the sheriff had been in the courtroom during the testimony of several witnesses, and a separation of witnesses rule had been imposed at appellant's request, appellant sought to call the

person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness . . .

The California Law Revision Commission recommended against adoption 63(1) of the UNIFORM RULES OF EVIDENCE as it

would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination. The prohibition against leading questions on direct would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost.

4 CALIF. L. REV'N COMM'N REPORTS, RECOMMENDATIONS AND STUDIES, TENTATIVE RECOMMENDATION RELATING TO THE UNIFORM RULES OF EVIDENCE—HEARSAY EVIDENCE 307, 313 (1962). Compare this prediction with the actions of the prosecution in *Flewallen*.

¹⁹These exceptions to FED. R. EVID. 802, the federal hearsay rule, permit the use of a statement not specifically covered by any other exception but having equivalent circumstantial guarantees of trustworthiness and the court determines:

(i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.

The adverse party must also be given notice sufficiently in advance of the hearing to provide him with a fair opportunity to prepare to meet the evidence. FED. R. EVID. 804(5).

²⁰366 N.E.2d 1180 (Ind. 1977).

sheriff as a witness. Burns' testimony had made the calling of the sheriff a matter of great importance to the defense. Appellant planned to impeach Burns by testimony that no attempt had been made by the sheriff to influence him. Defense counsel's move to permit the sheriff to testify was based on the grounds that he was not a regularly scheduled witness, and that there was no knowledge on the part of the defense or the witness that his testimony would be needed.²¹ Although the prosecution entered no objection, the judge sua sponte ruled that the witness could not testify due to the separation of witnesses rule.²² The supreme court correctly found this to be an abuse of the trial court's discretion.²³

If there is no connivance or collusion by the party calling the witnesses, it is accepted law that the court, within its discretion, can permit a witness to testify even though the witness has violated the court's separation of witnesses order.²⁴ Further, refusing to permit such a witness to testify, where the party calling the witness is not at fault for the violation, has been held to be prejudicial error.²⁵ Applying the standards announced in prior cases to *Brannum*, it is clear that the judge's ruling was an abuse of discretion, particularly because the prosecution made no objection to the testimony.²⁶

The court was faced with circumstances quite different from those found in *Brannum* in *In re Wireman*.²⁷ Wireman, an attorney, was the respondent in a disciplinary proceeding conducted by the hearing officer. At the start of the proceedings, the respondent requested and was granted a closed hearing. On several occasions the hearing officer admonished witnesses, in the presence of counsel, not to disclose their testimony to anyone outside the hearing room. There was, however, unlike *Brannum*, no formal separation of witnesses.

During the hearing it was discovered that portions of the hearing, either taped or transcribed, had been provided to witnesses by the respondent. The hearing officer suppressed the testimony of the witnesses to whom respondent had furnished this prior testimony. Respondent claimed that this ruling was error, because no formal separation of witnesses had been ordered.

²¹*Id.* at 1183.

²²*Id.* at 1184.

²³*Id.*

²⁴See *Butler v. State*, 229 Ind. 241, 97 N.E.2d 492 (1951); *Kelly v. State*, 226 Ind. 148, 78 N.E.2d 547 (1948); *Romary v. State*, 223 Ind. 667, 64 N.E.2d 22 (1945).

²⁵*McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960); *Taylor v. State*, 130 Ind. 66, 29 N.E. 415 (1891); *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N.E. 35 (1887).

²⁶The court also found that the trial judge by his conduct and demeanor improperly imposed himself on the proceedings and denied the appellant a fair trial. 366 N.E.2d at 1182.

²⁷367 N.E.2d 1368 (Ind. 1977), *cert. denied*, 98 S. Ct. 2234 (1978).

The court found the respondent's argument emphasized form over substance and denied his appeal.²⁸ It held: "[T]he record is clear that the Hearing Officer, throughout the proceeding, considered this a private hearing which incorporated the protection of an order for separation."²⁹ The court's holding is correct.

The request for a closed hearing has as its root the desire to keep possibly prejudicial information from becoming public. A motion for separation of witnesses is founded upon the belief that if witnesses discuss their testimony, or become aware of the testimony of others, the value of their evidence is diminished. Although it is clear that one may have a separation of witnesses without ordering a closed hearing, the order for a closed hearing is almost without value if witnesses and counsel are free to disclose the testimony given once they leave the courtroom. In *Wireman*, the witnesses were admonished not to discuss their testimony with anyone outside the hearing room. A similar admonishment to counsel not to disclose the testimony was not necessary because such an order was inherent in the order for a closed hearing.³⁰ Although the sanction for respondent's violations of the hearing officer's order was drastic, it was within the hearing officer's proper exercise of discretion.³¹

C. Expert Witnesses

In *Morris v. State*,³² the appellant was convicted of second degree murder. His conviction rested partly on the testimony of a physician, who was also a coroner, that the victim died from blows to his head. Although the witness had not performed an autopsy on the victim, one had been performed by another physician, a member of the coroner's staff. The physician who had performed the autopsy died on the very morning he was to testify. The autopsy report was never put into evidence; however, medical records and findings by doctors, who had treated the victim from the time of his injury to the time of his death, were admitted into evidence by agreement of the parties. The testifying physician used the records as well as the autopsy report in forming his opinion. Appellant claimed error in the admission of this expert's testimony because it was opinion based on hearsay. The court denied the appeal citing *Bivins v. State*,³³ and *Smith v. State*,³⁴ as authority for the rule that a medical doctor may

²⁸367 N.E.2d at 1372.

²⁹*Id.*

³⁰*Id.*

³¹See *Myslinski v. State*, 257 Ind. 453, 275 N.E.2d 544 (1971); *McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960).

³²364 N.E.2d 132 (Ind. 1977), *cert. denied*, 98 S. Ct. 526 (1978).

³³254 Ind. 184, 258 N.E.2d 644 (1972).

³⁴259 Ind. 187, 285 N.E.2d 275 (1972), *cert. denied*, 409 U.S. 1129 (1973).

give an opinion as to cause of death even though his opinion is partially based upon records not in evidence.³⁵ Although neither of the cases cited alone stands for the holding in *Morris*, in combination they support the ruling.

In *Bivins*, the physician who testified had performed the autopsy, unlike the physician in *Morris*. *Bivins* stands for the rule that it is not improper for a physician to state his opinion as to the cause of death, even though it goes to an ultimate issue.³⁶

The legal issue in *Smith* was similar to that in *Morris*. In *Smith* the sole issue raised on appeal was whether the testimony of two court-appointed expert witnesses should have been excluded because they had based their opinions, in part, on information gained from hospital reports, the writers of which were not present in court to be cross-examined. The court held that records not directly admissible into evidence may be used by an expert witness in formulating his opinion of a person's sanity. The holding in *Smith* is limited: "The types of records and reports which can be utilized should only be those produced by qualified personnel and the type which an expert customarily relies on."³⁷ *Morris* combined with *Smith* indicates that the Indiana Supreme Court is moving in the direction of adopting a rule similar to that contained in Federal Rule of Evidence 703.

Experts, by their very nature, depend upon "hearsay" information in reaching their opinions. The education of an expert consists of his learning many facts never presented in court and the theories and opinions of authors, scholars, and professors who will never be available for cross-examination. An expert who bases his opinion on the latest literature in his field is only acting in accord with the standards and demands of his profession.

The court should make more explicit the policy inherent in *Morris* and *Smith* which permits experts to base their testimony on information not admitted or admissible. This could be accomplished by adopting Federal Rule of Evidence 703 which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

³⁵364 N.E.2d at 138.

³⁶In *Bivins* the physician had conducted a thorough and complete autopsy upon the body. He testified extensively concerning the autopsy, and used it as the basis of his opinion. On cross-examination the defendant did not challenge the autopsy as a basis of the opinion.

³⁷259 Ind. at 190, 285 N.E.2d at 276. In support of this rule, the court cited *United States v. Bohl*, 445 F.2d 54 (7th Cir. 1971), and *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971). It then held: "Such a limitation guarantees a relatively high degree of reliability and frees an expert to use the tools he normally relies upon in making any diagnosis." 259 Ind. at 191, 285 N.E.2d at 276.

by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.³⁸

D. Privilege

1. *Physician-Patient*.—The “Indiana Rule” which provides that only the personal representative of the decedent can waive a decedent’s physician-patient privilege in a will contest came under attack and met its too-long-delayed demise in *Haverstick v. Banet*.³⁹ While the statute creating the privilege speaks specifically as to the matters which fall within the scope of the privilege, it is silent as to the issues of waiver and the effect on the privilege of the patient’s death.⁴⁰ Notwithstanding the statute’s silence on these issues, Indiana law on this subject had remained constant and clear for over seventy years.⁴¹

In *Haverstick*, the defendants in the will contest argued that the personal representative was the only person who stood in the place of the deceased and, therefore, he was the only one who inherited from the deceased the right to waive the privilege. Although this was in accord with prior Indiana case law,⁴² the supreme court

³⁸FED. R. EVID. 703. The rule gives the trial judge discretion to determine whether the facts or data could be reasonably relied upon. See generally 3 J. WEINSTEIN, & M. BERGER, WEISTEIN’S EVIDENCE ¶ 703[01], at 703-04 (1977) [hereinafter cited as J. WEINSTEIN].

³⁹370 N.E.2d 341 (Ind. 1977).

⁴⁰IND. CODE § 34-1-14-5 1976 provides: “The following shall not be competent witnesses . . . Physicians as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.” Although the statute speaks in terms of competency, the courts have dealt with the statute as though it created a waivable privilege. See *Doss v. State*, 256 Ind. 174, 267 N.E.2d 385 (1971); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889); M. SEIDMAN, *supra* note 4, at 91.

⁴¹In 1889 the Indiana Supreme Court held that the administrator of the deceased’s estate was the representative of the decedent and, in seeking to uphold the will, could waive the privilege. *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889). Later in *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904), when faced with the issue of an heir’s right to waive the privilege, the court wrote:

For obvious reasons, when the controversy is among heirs and devisees, the set of such heirs or devisees who strive to overthrow the will can not, for their own benefit, and against the wishes of the other set, who desire to sustain it, waive the objection to evidence otherwise incompetent, to the detriment of the interests of those who seek to establish the will.

163 Ind. at 15, 71 N.E. at 130. Of the states which have decided cases under statutes similar to the one in question, Indiana is the only one to have adopted this rule. See Annot. 97 A.L.R.2d 393 (1964).

⁴²*Id.*

granted a petition to transfer and found the argument to be flawed. After considering the action of courts in other jurisdictions regarding this issue,⁴³ the court ruled that prior Indiana decisions were wrong and that an heir, as well as the personal representative, may waive the physician-patient privilege—a holding too long delayed.

Policy considerations underlying the privilege deal with benefits arising from promoting and protecting a confidential relationship between a patient and his physician which is primarily devoted to aiding the effective treatment of injuries and disease. Society benefits from its members receiving medical aid that they might otherwise be reluctant to request. It is felt that fear of embarrassment or other difficulties arising from the disclosure of private medical problems would prevent some people from obtaining needed medical treatment.⁴⁴

After the death of an individual, much of the policy underlying the privilege is no longer applicable. At this point, the main benefit is that it protects a decedent's reputation. The interest of society in protecting a decedent's reputation is, however, no greater than that of an heir. If an heir determines the decedent's medical history is necessary for a just determination of testamentary capacity, then the personal representative's interest in preserving the decedent's will cannot reasonably be said to outweigh the heir's interest in protecting the decedent's property from unwarranted diminution.⁴⁵

The main flaw in the earlier Indiana cases was the assumption that the paper in dispute was the will of the deceased.⁴⁶ If the very purpose of the contract is to determine whether the deceased in fact made a will, the assumption appears to be unwarranted. When the executor is also the largest legatee under the will, as in *Haverstick*, the inequitable nature of the rule becomes obvious. As stated by the Iowa Supreme Court:

The paramount purpose . . . should be to ascertain whether the instrument presented is in fact the will of the deceased. And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by

⁴³The court considered *Winters v. Winters*, 102 Iowa 53, 71 N.W. 184 (1887); *In re Koenig's Estate*, 247 Minn. 580, 78 N.W.2d 364 (1956); and *Membke v. Unke*, 171 N.W.2d 837 (N.D. 1969).

⁴⁴See generally McCORMICK, *supra* note 12, §§ 98-105, at 213-28.

⁴⁵"The power of an heir may also be conceded if we remember that the heir first, is at least equally interested in preserving the ancestor's reputation, and second, has an equal moral claim to protect the deceased from unwarranted diminution." J. WIGMORE, *LAW OF EVIDENCE* § 2291 (J. McMaughton ed. rev. 1961).

⁴⁶See *id.*

establishing or defeating the instrument as the truth so ascertained may require. The testimony of the attending physician is usually reliable, and often controlling, and to place it at the disposal of one party to such a proceeding and withhold it from the other would be manifestly partial and unjust.⁴⁷

2. *Husband-Wife*.—In *Rice v. State*,⁴⁸ the appellant raised as error the testimony of his former wife; in violation of Indiana Code section 34-1-14-5,⁴⁹ concerning private communications he made during their marriage. The record showed that appellant and his wife were married on December 20, 1972; at least the "wife" believed they were married then. On December 10, 1975, the wife filed a petition for annulment of the marriage alleging that appellant was married at the time he entered into the marriage with her and that he had told her he was unmarried. The petition asked that the marriage be declared null and void. She also testified that she was no longer married to the appellant. This testimony was given at a motion in limine through which the defense sought to suppress her testimony.

Although the state presented no evidence other than the testimony of the alleged wife, the supreme court found her testimony was sufficient to support the trial court's determination that there was no privilege between the parties. It noted that appellant could have, but chose not to, contradict his former wife's testimony.

The court was clearly correct in its holding. As the petition filed by the alleged wife for annulment of her marriage, and her statements concerning the prior marriage of the defendant did not deal with confidential communications, her testimony on this matter could not have violated the husband-wife privilege.⁵⁰ Her testimony

⁴⁷Winters v. Winters, 102 Iowa at 54, 71 N.W. at 185.

⁴⁸370 N.E.2d 902 (Ind. 1977).

⁴⁹IND. CODE § 34-1-14-5 (1976) provides in part: "The following persons shall not be competent witnesses: . . . Husband and wife, as to communications made to each other." The privilege has not been applied if the wife is the victim of a criminal act by the husband. Doolittle v. State, 93 Ind. 272 (1883). It has been applied, however, subsequent to a divorce as to matters communicated during the marriage. Kreager v. Kreager, 192 Ind. 242, 135 N.E. 660 (1922). It also survives the death of the spouse. Richard v. State, 262 Ind. 534, 319 N.E.2d 118 (1974); Stanley v. Montgomery, 102 Ind. 102, 26 N.E. 213 (1885).

⁵⁰Like the rule contained in proposed FED. R. EVID. 505, which was not adopted, the husband-wife privilege in Indiana applied only to communications made privately to the spouse and not intended for disclosure to a third party. Acts may be considered communications for the purposes of this rule. Smith v. State, 198 Ind. 156, 162, 152 N.E. 803, 805 (1926). It is not, however, a rule of general incompetency. M. SEIDMAN, *supra* note 4, at 87.

is, however, clearly hearsay. She had no personal knowledge of the appellant's prior marriage. Her testimony concerning the contents of the petition for annulment was also hearsay and perhaps a violation of the best evidence rule. Nevertheless, the court's reliance upon this evidence, which would be inadmissible hearsay if offered to prove these matters at a trial on the merits, was proper. In this respect the opinion follows Federal Rule of Evidence 104(a) which provides: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."⁵¹

3. *Plea Bargaining*.—In *Wright v. State*,⁵² while denying the appeal of a convicted murderer, the Indiana Supreme Court adopted the American Bar Association's Standards Relating to Pleas of Guilty section 3.4 which states:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.⁵³

Although an earlier case had determined that evidence relating to the plea bargaining process was not admissible when offered by the state,⁵⁴ *Wright* is the first case dealing with the converse of this rule. Plea bargaining has become an accepted part of our criminal

⁵¹FED. RULES OF EVID. 104(a). The Advisory Committee to the Federal Rules of Evidence stated in discussing FED. R. EVID. 104(a):

The rule provides that the rules of evidence in general do not apply to this process [of determining the admissibility of evidence]. MCCORMICK §53, p. 123, n.8, points out that the authorities are "scattered and inconclusive," and observes: "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." This view is reinforced by practical necessity in certain situations.

Indiana would benefit by formally adopting FED. R. EVID. 104(a).

⁵²363 N.E.2d 1221 (Ind. 1977).

⁵³AMERICAN BAR ASSOCIATION, MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.4 (1968).

⁵⁴*Moulder v. State*, 154 Ind. App. 248, 289 N.E.2d 522 (1972). In *Moulder*, where the evidence was offered by the prosecution, the court held: "Any communication relating to the plea bargaining process is privileged and inadmissible in evidence unless the defendant has subsequently entered a plea of guilty which has not been withdrawn." *Id.* at 258-59, 289 N.E.2d at 528.

justice process. Full and free discussion between prosecution and defense will be stimulated by the privilege. It should be noted, however, that section 3.4 only relates to discussions and agreements with the prosecuting attorney. Plea discussions with the police are not privileged.⁵⁵

4. *Probation Officers.*—A young armed robber, in *Massey v. State*,⁵⁶ found that his statement made to a juvenile probation officer was admissible in evidence. Although under eighteen years of age at the time of the offense, he had reached his eighteenth birthday prior to talking with the officer. It was, therefore, not necessary for a parent or guardian to be present during the making of the statement.⁵⁷ His claim of privilege based on Indiana Code section 33-12-2-22,⁵⁸ a statute providing a limited confidentiality for statements made to a juvenile probation officer, was also found to be unjustified.

Viewing the entire statute, the court held that it is apparent the legislature's intent was to provide protection for juveniles within the juvenile court system.⁵⁹ The express language of the statute, however, reveals that the legislature realized situations would arise in which it would be necessary for a judge to order that the information be made available. As the appellant had been given his full *Miranda* warnings, he could have had no misunderstanding at the time he gave the statement that there was a possibility the statement could be used against him at trial.

E. Scientific Evidence

1. *Polygraph Tests.*—The state's failure to follow strict technical foundation requirements for the admissibility of a polygraph

⁵⁵See AMERICAN BAR ASSOCIATION, *supra* note 53, §3.4, Commentary.

⁵⁶371 N.E.2d 703 (Ind. 1978).

⁵⁷In order to use a confession given by a juvenile, the Indiana Supreme Court has held it is necessary for the juvenile to have a meaningful opportunity to consult with his parent or guardian. *Bridges v. State*, 260 Ind. 651, 299 N.E.2d 616 (1973); *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972).

⁵⁸The statute reads in pertinent part:

(c) All information and data obtained by a probation officer in the discharge of his official duties shall be privileged information and shall not be disclosed outside the probation department unless otherwise ordered by the court.

(d) Information or data received by a probation officer in the discharge of his official duties shall not be admitted into evidence at any fact finding hearing, except that the court may, unless otherwise prohibited by law, order information or data actually obtained by the probation officer to be so admitted . . .

IND. CODE § 33-12-2-22 (1976).

⁵⁹371 N.E.2d at 706.

test,⁶⁰ coupled with the weakness of other evidence, brought about the reversal of a conviction for theft in *Owens v. State*.⁶¹ The court of appeals adopted, in their entirety, the prerequisites for the use of polygraph test results set forth by the Arizona Supreme Court in *State v. Valdez*,⁶² and found that the county prosecutor's failure to sign a written stipulation providing that the results of the polygraph examination would be admissible at trial on behalf of either defendant or the state, prior to the defendant's submitting to the test, made the results inadmissible.⁶³ Although the appellant signed a form which purported to be a stipulation on his part and on the part of the county prosecutor waiving any objection to the admissibility of the results of the polygraph test, neither the prosecutor nor any officially recognized representative from his office signed it. Viewing the stipulation as a form of contract, the court found that, if the state is not bound by the stipulation, neither is the defendant.⁶⁴

By adopting the Arizona Supreme Court's holding in *Valdez*, the court mandated:

(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

- a. the examiner's qualifications and training;
- b. the conditions under which the test was administered;
- c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

⁶⁰Indiana follows the minority rule which allows the results of a polygraph test to be admitted by stipulation or waiver of the parties. *Reid v. State*, 259 Ind. 166, 285 N.E.2d 279 (1972). See *Moore v. State*, 369 N.E.2d 628 (Ind. 1977); *Vacendak v. State*, 264 Ind. 101, 340 N.E.2d 352, cert. denied 429 U.S. 851 (1976). See generally M. SEIDMAN, *supra* note 4, at 74-76; MCCORMICK, *supra* note 14, § 207.

⁶¹373 N.E.2d 913 (Ind. Ct. App. 1978).

⁶²91 Ariz. 274, 371 P.2d 894 (1962).

⁶³373 N.E.2d at 915 (quoting 91 Ariz. at 283, 371 P.2d at 900).

⁶⁴373 N.E.2d at 915.

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.⁶⁵

These prerequisites largely reflect the present Indiana law dealing with polygraph examinations; however, prior cases looked to the waiver by the party against whom the evidence was offered, not the waiver of the party offering the evidence in determining that the evidence was admissible.⁶⁶ *Owens*, in adopting the succinct and well-reasoned Arizona Supreme Court opinion in *Valdez*, held that a waiver which is not binding on both parties may be withdrawn prior to the admission of the polygraph test.⁶⁷ Thus, with this decision, the *Owens* court created new law.

2. *Trace Metal Detection*.—In *Reid v. State*,⁶⁸ the supreme court held that the results of a trace metal detection test, called TMDT, were properly admitted in evidence.⁶⁹ The test is used to reveal minute traces of metal that remain upon flesh or clothing which has come in contact with a metal object.⁷⁰ Reid, who was charged with murder accomplished with a handgun, objected to the testimony of the police officer who administered the test. The officer's testimony indicated that, on the day of the murder, the defendant's right hand had touched a metal object on the tip of the index finger, on the inside of the middle finger between the second and third joints, between the second and third joints of the little finger,

⁶⁵*Id.* (footnote omitted).

⁶⁶In *Reid v. State*, 259 Ind. 166, 285 N.E.2d 279 (1972), the supreme court stated: In view of the express waiver obtained in appellant's petition for the taking of such a test and in view of the fact he was adequately represented by counsel at the time of such waiver, he cannot now be heard to claim the state violated his right against self-incrimination by the presentation of such evidence.

Id. at 169, 285 N.E.2d at 281. The supreme court also emphasized waiver by the opposing party in *Moore v. State*, 369 N.E.2d 628 (Ind. 1977), in which it wrote: "Absent a waiver or stipulation by the opposing party, references by witnesses or counsel to the results or administration of polygraph tests, direct or indirect are inadmissible" *Id.* at 630.

⁶⁷373 N.E.2d at 915.

⁶⁸372 N.E.2d 1149 (Ind. 1978).

⁶⁹*Id.* at 1152.

⁷⁰*Id.* at 1151.

and in a half inch strip upon the palm: a configuration coinciding with the use of a handgun. Defendant's appeal, based upon the alleged unreliability of the TMDT was rejected by the *Reid* court which stated: "The TMDT, we believe, is generally recognized as reliable, and the defendant has cited us to no case wherein it has been rejected. We see no reason for rejecting evidence adduced by any scientific testing simply because it is subject to error if not properly conducted."⁷¹

A concurring opinion found the admission of the police officer's testimony was harmless error.⁷² Distinguishing its opinion from the *Reid* decision, it criticized the majority for permitting the use of the TMDT without a demonstration, to the satisfaction of the court, that the newly developed test produces reliable results which can be correctly interpreted by a trained technician.⁷³ The police officer who administered the test simply followed the manufacturer's instructions, but did not know why the test worked. Therefore, the concurring opinion found: "[I]t is error to permit the technician to state a conclusion from some manufacturer's manual."⁷⁴

It would appear that the concurring opinion's criticism is unwarranted. Although the police officer did not understand the scientific basis for the test, he had conducted the test on fifteen occasions. He had also attended a seminar presented by the test's manufacturer and was familiar with the directions for performing the test. This background was sufficient for the court to determine that the police officer was an "expert witness."⁷⁵ In determining the admissibility of the test itself, the court could properly consider hearsay evidence, such as the manufacturer's manual.⁷⁶ Absent any evidence by the appellant that the test was not generally reliable, the evidence was sufficient to support the trial court's determination that the evidence was admissible.⁷⁷

⁷¹*Id.* at 1152.

⁷²*Id.* at 1156 (DeBruler, J., concurring).

⁷³*Id.* (DeBruler, J., concurring).

⁷⁴*Id.* at 1156 (DeBruler, J., concurring).

⁷⁵Generally a court's determination of whether or not a witness is an "expert" is a matter for the trial judge's discretion. *Illinois Steel Co. v. Fuller*, 216 Ind. 180, 189, 23 N.E.2d 259, 263 (1939); *Parker v. State*, 136 Ind. 284, 288, 35 N.E. 1105, 1106 (1894); *City of Bloomington v. Holt*, 361 N.E.2d 1211, 1220 (Ind. Ct. App. 1977). See generally *MCCORMICK*, *supra* note 14, § 13, at 29.

FED. R. EVID. 702 speaks of "a witness qualified as an expert by knowledge, skill, experience, training, or education . . ." The advisory committee's note to rule 702 indicates that the scope of the rule embraces not only experts in the strictest sense of the word, *e.g.*, physicists, physicians, and engineers, but also "skilled" witnesses. The police officer in *Reid* would properly be classified as a "skilled" witness.

⁷⁶See *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 777 (1961); FED. R. EVID. 104(a).

⁷⁷Although many different standards have been applied by courts in determining the admissibility of scientific tests, the most commonly applied standard is "general ac-

F. Impeachment

1. *Prior Convictions.*—An armed robber found his appeal denied as the court of appeals en banc, in *Adams v. State*,⁷⁸ held that assault and battery with intent to commit robbery (a felony) is a crime of "dishonesty."⁷⁹ The issue arose when appellant elected to testify and on cross-examination was questioned, over objection, concerning his conviction two years earlier. As the court recognized, the issue is one of balancing the prejudice to a defendant from the danger that a jury might convict him because of his prior offense, against the degree of reasonableness of inferring present untruthfulness from his prior criminal conduct:

The inference of present untruth is most apparent where an element of the prior offense was also untruthfulness. The inference is less compelling when phrased "because the defendant has demonstrated dishonesty before, he is being untruthful now." It is least compelling when phrased, "because the defendant has previously violated a criminal statute he is being untruthful now."⁸⁰

Although stating the correct standard, the court did not apply the standard correctly. Instead, it looked to three earlier cases and mechanically applied their holdings.

In the landmark decision in *Ashton v. Anderson*,⁸¹ the supreme court held that mere conviction of a criminal offense, without regard to the nature of the crime, was not sufficiently relevant to be used for impeachment.⁸² *Ashton* created two basic categories of prior offenses admissible for impeachment. The first consisted of the modern counterparts to crimes which rendered a witness incompetent at common law.⁸³ The second category consisted of crimes of "dishonesty or false statement."⁸⁴ In *Mayer v. State*,⁸⁵ the court of appeals, applying the language in *Ashton*, held that the intent necessary to commit robbery included that necessary for theft, and that assault and battery with intent to commit robbery required

ceptance" used in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). See McCORMICK, *supra* note 14, § 203, at 488-91.

⁷⁸366 N.E.2d 692 (Ind. Ct. App. 1977).

⁷⁹See *id.* at 694.

⁸⁰*Id.*

⁸¹258 Ind. 51, 279 N.E.2d 210 (1972).

⁸²*Id.* at 60-61, 279 N.E.2d at 215.

⁸³The prior crimes which rendered a witness incompetent were treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and willful and corrupt perjury. *Id.* at 55-56, 279 N.E.2d at 212-13.

⁸⁴*Id.* at 62, 279 N.E.2d at 217.

⁸⁵162 Ind. App. 186, 318 N.E.2d 811 (1974).

proof of that same intent.⁸⁶ As the court in *Mayes* viewed theft as a crime involving dishonesty, it held that a conviction for assault and battery with intent to commit robbery was admissible for purposes of impeachment.⁸⁷ After *Mayes*, the supreme court, in *Fletcher v. State*,⁸⁸ agreed that a prior conviction for theft was usually proper impeachment evidence.

Although the holdings in *Mayes* and *Fletcher* would appear to require a similar result in *Adams*, a different ruling was possible. In *Mayes*, the defendant was charged with heroin possession, and in *Fletcher*, with commission of a felony while armed (robbery). In each case the evidence used for impeachment was not of a crime so similar to the one charged as to increase the possibility of improper use by the jury. If the question is one of balancing prejudice against probative value, the nature of the offense charged must be considered for a proper balancing of the scale.⁸⁹

In *Adams*, the defendant was charged with armed robbery. A jury, hearing of his earlier conviction for assault and battery with intent to commit robbery, would be tempted to conclude that although the defendant was not successful in his attempt the previous time, he was successful in the case at hand. As noted in the opinion, the evidence was close because there was no evidence of retrieved fruits of the crime, paraphernalia used in its commission, or of apprehension near the scene linking him to the offense.⁹⁰ His conviction rested solely upon eyewitness testimony.⁹¹

In determining whether or not to permit impeachment under such circumstances, the most important single factor is the need for defendant's testimony.⁹² Although a criminal defendant has a con-

⁸⁶*Id.* at 205, 318 N.E.2d at 822.

⁸⁷*Id.*

⁸⁸264 Ind. 132, 340 N.E.2d 771 (1976). In *Fletcher* the court was faced with a conviction under the Offenses Against Property Act, IND. CODE §§ 35-17-5-1 to 14 (1976). Conduct which would sustain a conviction for theft would previously have sustained a conviction for any one of several offenses, including larceny by trick and blackmail. The court rejected as too cumbersome any procedure which would require the trial judge to study the record of the witness' prior conviction to determine the common law equivalent. It left open, however, the possibility that evidence could be presented by opposing counsel at a motion in limine to show the prior offense did not indicate a lack of veracity. See Marple, *Evidence, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 235, 237 (1976).

⁸⁹*Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); *United States v. Bailey*, 426 F.2d 1236 (D.C. Cir. 1970).

⁹⁰366 N.E.2d at 693.

⁹¹*Id.*

⁹²"One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." 383 F.2d at 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). See generally 3 J. WEINSTEIN, *supra* note 38, ¶ 609[3], at 609-62 to 609-80.4.

stitutional right not to take the stand in his own behalf, in weighing the matter, one must consider that if he does take the stand, a prior criminal record may be revealed for purposes of impeachment. Where the crime charged is very similar to his prior convictions, the defendant may well fear that the jury will believe that since he did it before, he did it again.

When the prior conviction is for an offense denoting dishonesty, the inference of present untruthfulness is "less compelling."⁹³ In these cases a balance needs to be struck between the need for the accused's testimony and its possible misuse, with the scale tipping in favor of the defendant if the prior convictions are for offenses similar to the one charged. The evidence of prior crimes involving dishonesty would only become inadmissible for impeachment if the testimony of the accused was absolutely necessary to the defense, and a prior conviction was for an attempt to commit that offense, or for the same crime as that presently on trial. In *Adams*, the court of appeals could have weighed the necessity for the defendant's testimony together with the increased possibility of prejudice arising from the similarity of the prior conviction to the offense presently charged, against the "less compelling" inference of present dishonesty arising from the prior conviction.

2. *Prior Police Reports.*—The difference between intrinsic and extrinsic impeachment⁹⁴ is highlighted in *Stewart v. State*.⁹⁵ Appellant, who was convicted of assault and battery with intent to commit a felony, assigned as error the refusal of the trial court to permit his eliciting testimony that the prosecuting witness had made false police reports on prior occasions. His offer of proof indicated that a police officer would testify that the prosecuting witness had filed a crime report on November 18, 1974, stating that she had been kidnapped. Another person subsequently reported to the police that the witness had not been kidnapped. No arrests resulted from the investigation. As the evidence offered would not have proven the prior police report to be false, the testimony was properly excluded.⁹⁶

⁹³366 N.E.2d at 694.

⁹⁴Intrinsic impeachment consists of information received from the witness himself, usually during cross-examination. Extrinsic impeachment consists of evidence, other than that obtained during cross-examination, offered solely for purposes of impeachment. Generally, evidence of conduct, other than a conviction, of a witness introduced solely to show he is unworthy of belief due to bad moral character is considered collateral and may not be proved by extrinsic evidence. *People v. Rosenthal*, 289 N.Y. 482, 46 N.E.2d 895 (1943); FED. R. EVID. 608(b). Unlike the federal rule, Indiana law does not permit questions concerning prior misconduct, other than convictions, if the sole purpose is to discredit the defendant as a witness. *Henderson v. State*, 259 Ind. 248, 286 N.E.2d 398 (1972); *Hensley v. State*, 256 Ind. 258, 268 N.E.2d 90 (1971).

⁹⁵368 N.E.2d 253 (Ind. Ct. App. 1977).

⁹⁶*Id.* at 256.

The decision of the court was correct. Issues raised by evidence of possibly false police reports, unlike evidence of false police reports, would require the court to permit the state to introduce evidence that the prior reports were true in an attempt to rehabilitate the witness. This could draw the attention of the court, from the matter before it, to an alleged offense occurring years before the trial. The waste of time and confusion generated by such a collateral issue justifies the court's reluctance to permit the testimony. In such a situation, the defendant, at most, should be permitted to cross-examine the prosecuting witness concerning the prior police reports and their possible fabrication. The defendant should, however, be bound by the witness' answer. Appellant's attempt to use extrinsic evidence to attack the credibility of a witness was properly denied as the evidence offered was at best ambiguous and raised too many collateral issues.⁹⁷

G. Scope of Cross-Examination

The Indiana Court of Appeals, in *Gunn v. State*,⁹⁸ held that a criminal defendant must be permitted to establish the foundation necessary to obtain copies of witness statements and grand jury proceedings during cross-examination.⁹⁹ In order to obtain statements, the required foundation is laid if:

- (1) The witness whose statement is sought has testified on direct examination;
- (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and,
- (3) The statements relate to matters covered in the witness' testimony in the present case.¹⁰⁰

The trial court in *Gunn* upheld the state's objection that questions by the defense seeking to lay the necessary foundation were beyond the scope of direct and, therefore, improper.¹⁰¹ The *Gunn* court found an abuse of discretion in prohibiting questions aimed at satisfying the second and third of the above-mentioned foundation re-

⁹⁷Evidence of facts showing bias, interest, conviction of a crime, and want of capacity or opportunity for knowledge is not considered collateral and may be proved by extrinsic evidence. The evidence of possibly false prior police reports submitted by the defendant Stewart was offered solely to show that a witness was unworthy of belief because of prior misconduct. Such facts are considered collateral and may not be proved by extrinsic evidence. MCCORMICK, *supra* note 14, §47, at 97-100.

⁹⁸365 N.E.2d 1234 (Ind. Ct. App. 1977).

⁹⁹*Id.* at 1240.

¹⁰⁰*Antrobus v. State*, 253 Ind. 420, 427, 254 N.E.2d 873, 876-77 (1970).

¹⁰¹365 N.E.2d at 1241.

quirements.¹⁰² Any other holding by the court would have created a situation in which the defendant often could not lay an adequate foundation for discovery of prior statements by a witness until after the state had rested, and the defense could recall the witness during the presentation of the defense case. Any documents obtained at that point would no longer be of use in cross-examination, as the defense would have already had its opportunity to cross-examine prosecution witnesses.

XI. Labor Law

*Edward P. Archer**

A. Public Law 254—Public Employees

The only Indiana Supreme Court labor law case during the survey period had a significant impact on Indiana labor relations. In *Indiana Education Employment Relations Board v. Benton Community School Corp.*,¹ the court held Public Law 254,² which provided for collective bargaining between most public employees³ and their governmental employer, to be in violation of article 1, section 12 of the Indiana Constitution⁴ because the statute prohibited judicial review of Indiana Education Employment Relations Board (EERB) pre-election decisions. Section 8(g) of the law authorized judicial review for any "person aggrieved" by any "final order" of the EERB.⁵ Sections 8(d)⁶ and 8(i)⁷ of the statute, however, specifical-

¹⁰²*Id.*

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¹365 N.E.2d 752 (Ind. 1977).

²IND. CODE §§ 22-6-4-1 to 13 (1976).

³Public Law 254 applied to all public employees except policemen, firemen, professional engineers, faculty members of any university, certified employees of school corporations, confidential employees, or municipal or county health care institution employees. IND. CODE § 22-6-4-1(c) (1976). Public school teachers may organize under Public Law 217. IND. CODE §§ 20-7.5-1-1 to 14 (1976).

⁴IND. CONST. art. I, § 12.

⁵IND. CODE § 22-6-4-8(g) (1976).

⁶*Id.* § 22-6-4-8(d) provides in pertinent part, in an action by the Board for enforcement of its award: "[T]he determination by the board that an employee organization has been chosen by a majority of the employees in an appropriate unit may not be subject to review by the court."

⁷*Id.* § 22-6-4-8(i) provides:

In any proceeding for enforcement or review, of a board order held pursuant to section 8 (d) or (g) of this chapter, evidence introduced during the