RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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INTRODUCTION

The Indiana Rules of Evidence ("Rules") have been in place only since 1994. Although many cases have been decided interpreting the Rules, many areas remain uncertain. This uncertainty applies both to interpretation of various aspects of the Rules, as well as their similarity to and differences from the Federal Rules of Evidence.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2005, and September 30, 2006. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. In General

Rule 101(a) provides that the Rules are applicable to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[1] Where the "rules do not cover a specific evidence issue, common or statutory law shall apply."[2] This system of varying sources of interpretation and authority leave the Rules open to debate in many areas.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.[3]

B. Applicability in Probation Revocation Hearing

In *Whatley v. State*,[4] the State had successfully requested during a probation revocation hearing that the court take judicial notice of a probable cause affidavit.[5] The information contained in the affidavit had convinced the court to revoke Whatley's probation.[6] On appeal, Whatley argued that the probable cause affidavit was inadmissible hearsay.[7]

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1. IND. R. EVID. 101(a).
2. *Id.*
3. *See* Williams v. State, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (citing Harrison v. State, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)); Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996) (citing *Harrison*, 644 N.E.2d at 1251 n.14)).
4. 847 N.E.2d 1007 (Ind. Ct. App. 2006).
5. *Id.* at 1011.
6. *Id.* at 1009.
7. *Id.* at 1010.

While agreeing that the affidavit was hearsay, the court refused to overturn the revocation of Whatley's probation.[8] In reaching its decision, the court noted that Rule 101(c)(2) provides that the Rules do not apply in probation proceedings,[9] and that trial court judges are allowed to consider "any relevant evidence bearing some substantial indicia of reliability" during probation revocation hearings.[10]

C. Failure to Make Offer of Proof

In *Dylak v. State*,[11] Dylak appealed, in part, based on his contention that the court had erred when it sustained the State's objection to allow Dylak's expert witness to testify as to the cause of a crash.[12] Dylak had failed to make an offer of proof, and on appeal, he argued that his expert should have been given an opportunity to testify on the subject in question.[13]

The court held that Dylak had waived any appeal of this point by failing to make an offer of proof in accordance with Rule 103.[14] The court further noted that the reason for requiring an offer of proof is that it allows the "trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded."[15]

In *State v. Wilson*,[16] the State appealed, in part, because the court of appeals had held that the State had waived its objection to the exclusion of the testimony of Wilson's wife by failing to make a proper offer of proof.[17] The court of appeals had relied on the Indiana Supreme Court's decision in *Hilton v. State*.[18]

In *Hilton*, the court had held that "an offer of proof should indicate the facts sought to be proved and establish the 'competency, and relevancy of the offered.'"[19] "*Hilton* went on to find the offer of proof . . . insufficient because

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8. *Id.* at 1010-11.

9. *Id.* at 1010 (citing IND. R. EVID. 101(c)(2)).

10. *Id.* (citing Cox v. State, 706 N.E.2d 547, 551 (Ind. 1991)); *but cf. In re* Z.H., 850 N.E.2d 933, 941 (Ind. Ct. App. 2006) (concluding that while the Rules explicitly do not apply to preliminary juvenile matters, the Rules must be applied to "the full evidentiary hearing given a juvenile facing a State petition to place the juvenile on the sex offender registry").

11. 850 N.E.2d 401 (Ind. Ct. App. 2006).

12. *Id.* at 407-08.

13. *Id.* at 408.

14. *Id.* (quoting IND. R. EVID. 103(a)(2)) (stating that error can not be predicated on a ruling admitting or excluding evidence unless a party's substantial rights are affected and, at trial, the "'substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked'").

15. *Id.* at 408; *see, e.g.*, Harmon v. State, 849 N.E.2d 726, 729 (Ind. Ct. App. 2006) (allowing appeal of a ruling at trial where a proper offer of proof was made).

16. 836 N.E.2d 407 (Ind. 2005).

17. *Id.* at 408.

18. *Id.* at 409 (citing Hilton v. State, 648 N.E.2d 361 (Ind. 1995)).

19. *Id.* (quoting *Hilton*, 648 N.E.2d at 362).

it 'lack[ed] specificity and fail[ed] to establish such material facts as when the conversation took place, where the conversation took place, and who was present at the time.'"[20] The *Hilton* court also held that an offer of proof must vouch for the testimony to be offered.[21] The court reconsidered this position in *State v. Wilson*.[22] The court stated that:

> The language in *Hilton* that would require time and place and other details overstates the requirements for an adequate offer of proof. An offer of proof should show the facts sought to be proved, the relevance of that evidence, and the answer to any objection to exclusion of the evidence. Details that are immaterial to ultimate facts are not necessary. Where and when a conversation took place ordinarily are irrelevant to any issue before the court. To the extent *Hilton* suggests they are generally required it is disproved.[23]

The court also disapproved of language from *Hilton* suggesting that offers of proof must vouch for the proffered testimony.[24] This requirement was altered to state that "[t]he attorney making an offer of proof must have a good faith and reasonable belief that the witness will testify as the attorney states, but the attorney is not a warrantor of the witness's reliability."[25]

D. Completeness Doctrine

In *Sanders v. State*,[26] Sanders appealed his conviction for felony child molestation.[27] After being charged with the crime, Sanders had written an unsolicited letter of apology to the court.[28] At trial, the State had successfully redacted a reference in the letter to the victim having been a victim of prior molestation.[29] Sanders argued that the redaction violated the completeness doctrine and took his comments out of context while preventing his counsel from presenting a full reading of the evidence.[30]

Rule 106 requires that where a "writing or recorded statement or part thereof

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20. *Id.*
21. *Id.*
22. *Id.* at 410.
23. *Id.*
24. *Id.*
25. *Id. Wilson* also discussed at length purported changes to the spousal immunity law enacted as a part of the 1998 recodification of portions of the Indiana Code. *See id.* at 410-14. Because the recodification process is undertaken by the Legislature with the understanding that substantive changes are not being made, and because the prior spousal privilege law continued to exist, the 1998 changes were held to be ineffective. *See id.*
26. 840 N.E.2d 319 (Ind. 2006).
27. *Id.* at 322.
28. *Id.* at 320-21.
29. *Id.* at 321.
30. *Id.* at 322.

is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it."[31] However, inclusion of the redacted portions would violate Rule 412,[32] and the letter, even taken as a whole, contained admissions of guilt and apology.[33] Exclusion of the redacted portions would not have placed the letter in any more favorable context.[34]

II. JUDICIAL NOTICE

Lutz v. Erie Insurance Exchange[35] involved a dispute as to fault in an automobile accident.[36] Lutz claimed that the trial court should have taken judicial notice both of the fact that the other party admitted the traffic light was red in her answer and that the light was actually red.[37] The trial court declined to take notice of either item.[38]

The court held that under Rule 201, the fact that the light was allegedly red is not the type of fact appropriate for judicial notice because it is subject to reasonable dispute.[39] However, because the other party had admitted the light was red in her answer, it was judicially noticeable as a part of a pleading because parties should present their cases assuming that facts admitted by other parties require no proof.[40]

III. RELEVANCE AND PROBATIVE VALUE VERSUS PREJUDICIAL

A. Relevance

In *Lee v. Hamilton*,[41] an exhibit for impeachment purposes containing prior allegations of fault against another party was excluded at trial.[42] Lee argued on appeal that this evidence was relevant and should have been admitted under Rule 401.[43] Although the evidence was relevant, Rule 403 also calls for the exclusion

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31. IND. R. EVID. 106.

32. Rule 412 provides that in a "prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted." IND. R. EVID. 412.

33. *Sanders*, 840 N.E.2d at 322-23.

34. *Id.* at 323.

35. 848 N.E.2d 675 (Ind. 2006).

36. *Id.* at 677.

37. *Id.* at 678.

38. *Id.* at 677-78.

39. *Id.* at 678. Rule 201 states that a judicially-noticed fact "must be one not subject to reasonable dispute" as it is either generally known or "capable of accurate and ready determination" in a manner that cannot be reasonably questioned. IND. R. EVID. 201(a).

40. *Lutz*, 848 N.E.2d at 678.

41. 841 N.E.2d 223 (Ind. Ct. App. 2006).

42. *Id.* at 227-28.

43. *Id.* at 227-29. Rule 401 states that relevant evidence is "evidence having any tendency

of such evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[44] The court held that the evidence had potential to confuse the issues or mislead the jury, which substantially outweighed its probative value, and was properly excluded by the trial court.[45]

In *Smith v. Johnston*,[46] Smith was a doctor who negligently placed a catheter in Johnston, causing damage to a breast implant and possibly delaying Johnston's cancer treatment while the damage was repaired.[47] Johnston's estate made claims for both wrongful death as well as bodily injury.[48] The jury found for Johnston on the bodily injury claim and for the defendant on the wrongful death claim.[49] On appeal, Smith argued that an exhibit detailing medical expenses related to cancer treatment from the date of the negligent catheter placement until Johnston's death was improperly admitted.[50]

Smith argued that this evidence should not have been admitted because Johnston did not prove that these expenses were made necessary by Smith's negligent action.[51] The court pointed out that the law does not require that medical bills be shown to be reasonable and necessary before they are admissible, but only that they be reasonable and necessary to be recoverable and that the admission of evidence is first and foremost a question of relevancy.[52] Under Rule 401, "[e]vidence is relevant if it has '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.'"[53] Because the exhibit contained evidence of medical expenses incurred after Smith's negligent actions, the evidence was relevant and admissible under both the wrongful death and the wrongful injury claims.[54]

B. Probative Versus Prejudicial

Smith also argued that the evidence should have been excluded under Rule 403 because the expenses were for treatment of cancer, which was not caused by

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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." IND. R. EVID. 401.

44. *Lee*, 841 N.E.2d at 229 (quoting IND. R. EVID. 403).

45. *Id.*

46. 854 N.E.2d 388 (Ind. Ct. App. 2006).

47. *Id.* at 389.

48. *Id.*

49. *Id.*

50. *Id.* at 390.

51. *Id.*

52. *Id.* (quoting Chemco Transport, Inc. v. Conn, 506 N.E.2d 1111, 1115 (Ind. Ct. App. 1987)).

53. *Id.* at 390-91 (quoting IND. R. EVID. 401).

54. *Id.* at 391.

Smith's negligent actions.[55] Smith believed that this evidence confused the jury, while Johnston argued that the delay in cancer treatment caused by the negligent catheter placement led to additional expense and eventually death.[56] However, because the issue of causation was unclear, the court held that the danger of confusion was not substantially outweighed by its probative value.[57]

In *Ray v. State*,[58] Ray appealed his conviction for unlawful possession of a firearm by a serious violent felon ("SVP").[59] At trial, Ray had offered to stipulate that he had a prior conviction for a qualifying crime under the statute prohibiting firearm possession by SVPs.[60] However, the trial judge had insisted that the jury know exactly what the prior crime had been.[61]

On appeal, Ray argued that allowing the jury to know that he had a prior conviction for robbery, rather than simply informing them that he had a qualifying prior conviction, was unduly prejudicial.[62] The court held that the danger of unfair prejudice substantially outweighed the probative value of this evidence and that the trial court had abused its discretion by allowing the evidence of the prior robbery conviction.[63] There was danger of unfair prejudice in admitting the specific conviction for robbery, while Ray had offered to stipulate that he had a qualifying prior conviction. Thus, the naming of the specific prior conviction added nothing but the possibility of unfair prejudice. However, the court found this error to be harmless.[64]

C. Evidence of Other Crimes, Wrongs or Acts

In *Earlywine v. State*,[65] Earlywine appealed his conviction for intimidation.[66] At trial, various witnesses had been allowed to testify about their fear of

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55. *Id.* Rule 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." IND. R. EVID. 403.

56. *Smith*, 854 N.E.2d at 391-92.

57. *Id.* at 392; *see also* Southtown Prop., Inc. v. City of Fort Wayne, 840 N.E.2d 393, 403 (Ind. Ct. App. 2006).

58. 846 N.E.2d 1064 (Ind. Ct. App. 2006).

59. *Id.* at 1066.

60. *Id.*

61. *Id.* at 1067.

62. *Id.* at 1068.

63. *Id.* at 1069-70.

64. *Id.* Ray did not challenge the sufficiency of the evidence, he had testified to facts regarding robberies in Indiana and Kansas, and the term "Serious Violent Felon" had not been used at trial. *Id.*; *but see* Gray v. State, 841 N.E.2d 1210, 1220 (Ind. Ct. App. 2006) (holding that Gray's counsel should have requested bifurcation because the generic charge of SVF left the jury wondering as to what crime Gray had committed).

65. 847 N.E.2d 1011 (Ind. Ct. App. 2006).

66. *Id.* at 1012.

Earlywine.[67] Earlywine argued that admission of this evidence was improper under Rule 404(b),[68] which provides that:

> 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, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .[69]

The court held that this evidence had been properly admitted.[70] Evidence about the fear of Earlywine did not refer to a prior crime, wrong, or act.[71] In addition, the witness had testified that the fear was mental or emotional and that it did not stem from any physical altercation.[72] This was further proof that the jury had not improperly considered evidence of any prior batteries Earlywine may have committed on the witness.[73]

In *Samaniego-Hernandez v. State*,[74] Samaniego Hernandez ("Samaniego") had conducted a drug buy with an undercover officer. Police officers later obtained a search warrant and found additional drugs in Samaniego's residence. At trial, Samaniego argued that he had no knowledge of the drugs and that his involvement with the drug buy should have been excluded as evidence of a prior bad act under Rule 404(b).[75]

The court found that such evidence may be admissible if the evidence is probative of the defendant's motive and is inextricably bound up with the charged crime,[76] and that inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that subject.[77] Samaniego put the evidence at issue by attempting to show he had no knowledge of the drugs, and therefore the evidence was relevant to show knowledge.[78]

Although the evidence was found relevant, the court continued to consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Rule 403.[79] The court found that the offered evidence of the prior drug buy was highly probative on the issue of Samaniego's knowledge of the drugs, and had been properly admitted.[80]

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67. *Id.*
68. *Id.* at 1013.
69. *Id.* (quoting IND. R. EVID. 404(b)).
70. *Id.* at 1014.
71. *Id.*
72. *Id.*
73. *Id.* at 1013-14.
74. 839 N.E.2d 798 (Ind. Ct. App. 2005).
75. *Id.* at 802.
76. *Id.* (citing Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003)).
77. *Id.* (quoting Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000)).
78. *Id.* at 803.
79. *Id.*
80. *Id.* at 803-04.

In *Ramsey v. State*,[81] Ramsey had argued at trial that the two year delay between the alleged acts and the filing of charges had been due to the weak nature of the evidence against Ramsey. The State rebutted this charge by eliciting testimony from the arresting officer that the officer had been out of the county for much of that time working on another case and that this work led the police to look at Mr. Ramsey for possible involvement in a federal drug conspiracy.[82]

Ramsey argued that this testimony was prohibited under Rule 404(b) as impermissible evidence of uncharged prior bad acts. The court held that the state's purpose was merely to rebut Ramsey's contention that the delay in bringing charges was due to weakness of the evidence.[83] The trial court had given an appropriate admonishment as to the purpose for which the jury could consider this testimony, and therefore there was no error.[84]

In *Payne v. State*,[85] Payne appealed her convictions for felony murder and burglary. At trial, a portion of a letter written by Payne had been admitted which discussed "how easy a robbery or burglary target her then employer would be" and why such a target would be desirable.[86] Other than this letter, the record showed no evidence of any overt acts toward robbery or burglary, and there were no limiting instructions to the jury regarding consideration of the letter.[87]

The State first argued that the letter excerpt was admissible because it provided evidence of a pertinent trait of Payne's character and was therefore allowed under Rule 404(a).[88] Rule 404(a) provides that "[e]vidence of a person's character or trait of character is not admissible" in order to show "action in conformity" with such trait, except for "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."[89] Because Payne was not allowed to introduce evidence of her character at trial, this door was never opened and the State's argument under Rule 404(a) failed.[90]

The State also argued that the letter excerpt was admissible under Rule 404(b) because it showed evidence of her intent to commit the crimes.[91] However, Rule 404(b) is only available where the defendant has alleged a particular contrary intent, which may then be followed by an offering of evidence by the State of prior crimes, wrongs or acts to the extent relevant to prove the defendant's intent at the time of the offenses.[92] Because Payne offered no

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81. 853 N.E.2d 491 (Ind. Ct. App. 2006).
82. *Id.* at 499.
83. *Id.* at 500.
84. *Id.*
85. 854 N.E.2d 7 (Ind. Ct. App. 2006).
86. *Id.* at 18.
87. *Id.*
88. *Id.*
89. *Id.* at 18 (quoting IND. R. EVID. 404(a)).
90. *Id.*
91. *Id.*
92. *Id.* at 19 (citing Wickizer v. State, 626 N.E.2d 795 (Ind. 1993)).

particularized claim of contrary intent, the letter was inadmissible.[93] Because the State had relied heavily on the contents of the letter and the information contained in it had not been introduced otherwise, the court reversed the trial court's ruling regarding admissibility of the letter.[94]

D. Accusations of Prior Sexual Misconduct

In *Candler v. State*,[95] Candler argued that the trial court had improperly excluded evidence that his victim had previously made false allegations of sexual misconduct against her stepfather. While Rule 412 prohibits the introduction of evidence of the sexual history of the victim and provides four exceptions to this prohibition, none of the exceptions applied in this case.[96] However, a common law exception to Rule 412 survived the adoption of the Rules in 1994.[97] This exception states that prior accusations of rape are admissible where the victim has admitted the prior accusation was false, or that the prior accusation is demonstrably false.[98] Because the victim had not admitted the falsity of the prior charge and it was not demonstrably false, Rule 412 properly excluded this evidence.[99]

Candler also argued that the testimony of two witnesses should have been excluded as irrelevant.[100] These two witnesses testified that the victim had relayed incidents to them concerning abuse of the victim which had begun when the victim was five years old but not been reported until she was nearly eighteen. The court found that this evidence was marginally relevant and therefore admissible under Rule 401 because the fact that the victim told others may help account for the significant gap in time between the crimes and reporting them.[101]

In *Redding v. State*,[102] Redding appealed his conviction for child molestation. The State had presented evidence at trial that the victim had physical injuries consistent with molestation. At trial, Redding offered to provide evidence under

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93. *Id.* at 20. The court also found that the admissibility of the letter would fail under the mistake of fact or accident provisions of Rule 404(b). *Id.*

94. *Id.* at 21; *see also* Wallace v. State, 836 N.E.2d 985, 998 (Ind. Ct. App. 2005) (holding that a defendant who dresses and acts appropriately and politely at trial and denies the charges against him does not open the door to rebutting evidence by the prosecution that the defendant normally acts in a different manner; error found harmless).

95. 837 N.E.2d 1100 (Ind. Ct. App. 2005).

96. *Id.* at 1103 (citing IND. R. EVID. 412).

97. *Id.*

98. *Id.* (citing Morrison v. State, 824 N.E.2d 734, 739 (Ind. Ct. App. 2005)). The court also noted that while the legislature enacted a rape shield statute, the Rape Shield Rule controls where it differs from the statute.

99. *Id.*

100. *Id.* at 1104.

101. *Id.* at 1105.

102. 844 N.E.2d 1067 (Ind. Ct. App. 2006).

Rule 412(2) of a prior molestation of the victim by another person.[103] The trial court prohibited this evidence because it was satisfied that the victim was not confusing the two perpetrators.[104]

The court found that because the evidence of physical injuries consistent with the crime had been admitted, but Redding had not been allowed to advance the theory that someone else had caused the damage, partial corroboration had occurred.[105] In partial corroboration, evidence of a sexual injury automatically and unfairly bolsters the witness's credibility that an assault occurred, and therefore that the accused committed the crime.[106] The court reversed and remanded as Redding had not been given the opportunity to rebut the inference that he had caused the injuries in question, including the ability to cross-examine the witness regarding the prior molestation.[107]

IV. WITNESSES

A. Evidence of Prior Conviction

In *Whiteside v. State*,[108] Whiteside argued that the trial court had improperly allowed the State to introduce evidence that Whiteside's witness, Parker, had a prior conviction for auto theft. Rule 609(b) prohibits the admission of a prior conviction if more than ten years have passed since the conviction or date of release from confinement unless the court determines that the probative value of the conviction supported by facts and circumstances substantially outweigh any prejudicial effect.[109] Rule 609(b) also provides that a conviction more than ten years old is not admissible in any case unless the proponent gives advance written notice of the intent to use such evidence.[110]

Whiteside first contended that the prior conviction in question was older than the ten years allowed by Rule 609(b).[111] The parties agreed that the ten year period began to run on the date that the witness was released from prison: March 1, 1995.[112] The State argued that the date on which to consider whether ten years had passed was the date of the crime: January 22, 2005.[113] Whiteside argued that the relevant date was either the date the trial began or the date on which Parker

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103. *Id.* at 1068.

104. *Id.* Rule 412(2) provides that evidence of a victim or witness's past sexual conduct may be admitted if it is evidence that "shows that some person other than the defendant committed the act upon which the prosecution is founded." *Id.* at 1070 (citing IND. R. EVID. 412(2)).

105. *Id.*

106. *Id.* at 1070-71 (citing Turney v. State, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001)).

107. *Id.* at 1071.

108. 853 N.E.2d 1021 (Ind. Ct. App. 2006).

109. *Id.* at 1025.

110. *Id.* at 1025-26.

111. *Id.* at 1026.

112. *Id.*

113. *Id.*

testified: August 24 or August 25, 2005.[114] The court ultimately determined that the proper date on which to examine the ten year period is the date on which the witness testifies or on which the evidence is introduced.[115] Therefore, Parker's testimony fell outside the ten year limitation.[116]

Having determined that the prior conviction fell outside the ten year period, the evidence may still be admissible under Rule 609(b) if the probative value supported by specific facts and circumstances substantially outweighs the prejudicial effect.[117] Because Rule 609(b) presumes exclusion of such evidence unless the balancing test is met, the onus is on the party seeking to admit the evidence.[118] The trial court had engaged in a balancing test and found that the testimony was not that of the accused, and that the witnesses' credibility was a central issue at trial. The court found that the trial court had engaged in a proper balancing and met this criteria of Rule 609(b).[119]

Finally, the court examined the contention that the State had failed to provide written notice that it intended to use this evidence.[120] The court found that the trial court had abused its discretion in admitting this evidence, but ultimately found this to be harmless error as it went to credibility of a witness, not the defendant himself.[121]

B. Juror Misconduct

In *Shanabarger v. State*,[122] Shanabarger appealed in part based on the contention that an alternate juror had made statements that Shanabarger had desired to plead guilty to the charges at an earlier stage of the proceedings. Shanabarger argued that the failure of his counsel to immediately request a mistrial was ineffective assistance of counsel.[123] Although jurors may not typically impeach their own verdict, Rule 606(b)(2) provides that a juror may testify that "extraneous prejudicial information was improperly brought to the jury's attention."[124]

Trial counsel for Shanabarger testified that they had not heard any discussion

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114. *Id.*

115. *Id.* at 1028.

116. *Id.*

117. *Id.* at 1029.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1030.

122. 846 N.E.2d 702 (Ind. Ct. App. 2006).

123. *Id.* at 707-08; *see also* Saunders v. State, 848 N.E.2d 1117, 1123 (Ind. Ct. App. 2006) (holding that the trial court had properly excluded evidence of a witness' prior convictions for theft, conversion and forgery which were fourteen, sixteen, and eighteen years old where the trial court had admitted evidence of one crime that fell within the ten-year limitation and the additional convictions bore little relevance to the witness' testimony).

124. IND. R. EVID. 606(b)(2).

of a prior guilty plea and believed the court's admonishment of the witness to have related to the fact that the witness had been late that day.[125] The witness in question also testified that he had in fact responded to another juror by stating that he did not believe that Shanabarger had actually wanted to plead guilty at any point in the proceedings.[126] Therefore, Shanabarger failed to prove he was prejudiced by this information and the ineffective assistance of counsel claim was rejected.[127]

C. Attacking Witness' Credibility With Specific Uncharged Incidents

In *Saunders*,[128] Saunders appealed her conviction in part because the trial court had refused to allow her to present evidence of a previous, uncharged act by a witness of using a false social security number. Rule 608(b) provides that for the purposes of attacking a witness' credibility, and other than evidence of conviction of a crime as allowed by Rule 609, "specific instances may not be inquired into or proven by extrinsic evidence."[129]

Although Rule 608(b) on its face prohibits the proffered testimony, Saunders argued that this violated her Sixth Amendment right of confrontation.[130] Saunders had waived this objection at trial, but the court went on to say that her claim would fail in any case because the Indiana Supreme Court has only allowed this exception in the narrow circumstance of false accusations of rape.[131]

D. Juror Questions

In *Burks v. State*,[132] Burks appealed his convictions for attempted murder. He claimed that the trial court should have granted a mistrial because a juror was allowed to ask a question related to a subject which had been excluded through a motion in limine.[133] Rule 614 allows jurors to ask questions of witnesses,[134] but Burks claimed the trial court allowed this question submitted under Rule 614 to

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125. *Shanabarger*, 846 N.E.2d at 709.

126. *Id.*

127. *Id.*

128. *Saunders*, 848 N.E.2d at 1123.

129. *Id.* at 1122. Such evidence may be used in certain instances of cross-examination at the court's discretion. *Id.*

130. *Id.*

131. *Id.* (citing State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999)); *see also* Moore v. State, 839 N.E.2d 178 (Ind. Ct. App. 2005) (rejecting appellant's claim of entitlement to review victim's entire confidential police informant file under Rule 613 for "any prior inconsistent statements" or criminal activity).

132. 838 N.E.2d 510 (Ind. Ct. App. 2005).

133. *Id.* at 516.

134. Rule 614(d) provides that a "juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties." IND. R. EVID. 614(d).

overrule the balancing process of Rules 403 and 404.[135] The jurors had asked if the witness knew why Burks would have wanted to shoot him. A grant of motion *in limine* had excluded the potential answer that Burks had asked the witness to join his gang and sell drugs.[136]

The trial court examined Rule 404 and determined that the question posed by the jurors went to a highly relevant subject, identity and motive, and that the danger of unfair prejudice was outweighed by the potentially prejudicial effect.[137] The court noted that in addition to Rule 614, Jury Rule 20 had been adopted in January 2003. Jury Rule 20(a) provides that the "court shall instruct the jury . . . (7) that jurors may seek to ask questions of the witnesses by submission of questions in writing."[138] The court also noted that if a trial court commits error by admitting evidence precluded by a motion *in limine*, the error is in the admission of the evidence at trial, not in the violation of the trial court's own pretrial ruling.[139] The court found that the trial court had properly balanced the effect of the evidence under Rules 401, 403 and 404 and that the additional evidence had little effect on the outcome.[140]

E. Separation of Witnesses

In *K.S. v. State*,[141] K.S. appealed the determination that he had violated his probation from delinquency by attacking his sister. He appealed in part based on the fact that the trial court committed error by allowing his mother to remain in the room in spite of his request for separation of witnesses.[142] Rule 615 provides that witnesses may be excluded at the request of a party "so that they cannot hear the testimony of or discuss testimony with other witnesses."[143]

The court noted that Indiana law "designates a child's parent as a party to the proceedings and grants the parent all 'rights of parties provided under the Indiana Rules of Trial Procedure.'"[144] Because his mother was his parent, she was not covered by the order granting separation of witnesses.[145]

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135. *Burks*, 838 N.E.2d at 516.

136. *Id.*

137. *Id.* at 516-17.

138. *Id.* at 518 (quoting IND. JURY R. 20(a)).

139. *Id.* at 519 (citing Willingham v. State, 794 N.E.2d 1110 (Ind. Ct. App. 2003)).

140. *Id.* at 520.

141. 849 N.E.2d 538 (Ind. 2006).

142. *Id.* at 542.

143. *Id.* (quoting IND. R. EVID. 615).

144. *Id.* (quoting IND. CODE § 31-37-10-7 (2004)).

145. *Id.* K.S. also argued that the court should have appointed a guardian ad litem as the mother was parent to both accused and victim. However, the court noted that Indiana Code section 31-32-3-6 leaves this decision to the discretion of the juvenile court. *Id.* at 543.

V. Opinions and Expert Testimony

In *McCutchan v. Blanck*,[146] McCutchan appealed the trial court's grant of summary judgment. McCutchan sued Blanck, the previous owner of his home, due to a defective septic system.[147] The trial court had excluded numerous items from evidence, and McCutchan challenged the grant of summary judgment on this basis.[148]

The trial court had excluded portions of an affidavit filed by expert witness Mark Landrum.[149] The court noted that two criteria must be met in order for a witness to qualify as an expert.[150] The subject matter must be related to a "scientific field, business, or profession beyond the knowledge of an average layperson," and the witness must demonstrate "sufficient skill, knowledge or experience in that area so that the [witness'] opinion will aid the trier of fact."[151]

Specifically, Landrum's affidavit contained statements that a four-person family should pump a septic tank every three years, and that he had reviewed information from the defendants that they had only pumped the system three times in twenty-four years. In his opinion this was extremely neglectful.[152] The court held that the first statement was a permissible statement based on Landrum's experience.[153] However, he did not identify the information relied upon to make the final two statements and provided no evidence he had talked to the defendants and therefore the second and third statements were improper and unsupported by the evidence.[154]

Landrum's affidavit also contained statements that had the defendants properly maintained the system, it would still be in working order, and that at the time the defendants signed the disclosure statement the system was defective and defendants were experiencing problems with the system.[155] The court also found these statements impermissible as the source of the information was unidentified.

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146. 846 N.E.2d 256 (Ind. Ct. App. 2006).

147. *Id.* at 259-60.

148. *Id.* at 260.

149. *Id.*

150. *Id.* at 261.

151. *Id.* (citing Norfolk Southern Ry. Co. v. Estate of Wagers, 833 N.E.2d 93, 101 (Ind. Ct. App. 2005)). Rule 702 provides that if

> scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

IND. R. EVID. 702.

152. *McCutchan*, 846 N.E.2d at 261.

153. *Id.*

154. *Id.* at 261-62. In other words, no matter how smart you are, you can't make stuff up.

155. *Id.*

The court did note that Landrum was free to testify regarding the functioning of the septic tank and make expert opinions based on the experience of the plaintiffs, but that Landrum did not show how he determined the system was defective when owned by the defendants.[156]

McCutchan had also offered the affidavit of Curtis Alverson at trial. Alverson had previously attempted to buy the property but had repudiated the agreement, allegedly over his suspicion of septic issues.[157] Alverson was not an expert in septic systems, and the court found that he was testifying as a lay witness.[158] For lay witnesses, Rule 701 states that the "witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[159]

Alverson's affidavit contained the following statements of the following nature which had been excluded by the trial court: 1) by pumping the septic tank the day before a home inspection, the defendants rendered any test meaningless (improper lay witness testimony as Alverson is not a septic expert); 2) if the defendants told the truth about the pumping, they "incurred an unnecessary expense" (improper lay witness testimony as it is merely speculative); 3) Alverson did not believe the statements made by the defendants and based on the facts, he believed the defendants knew the septic system was defective (both improper because they are based on Alverson's belief about knowledge held by the Blancks rather than being based on his rational perception); and 4) Alverson had to threaten suit over earnest money and that the defendants had threatened and intimidated Alverson (both irrelevant and impermissible character evidence under Rule 404(b)).[160]

In *Gregory & Appel Insurance Agency v. Philadelphia Indemnity Insurance Co.*,[161] the trial court's ruling was remanded and the court of appeals considered what evidence might be admitted upon retrial. Elliot, an appraiser, had conducted a detailed site visit of the damaged school and made extensive calculations to perform an appraisal.[162] Refka, a public adjuster, had not visited the site and had made broad conclusions with a range of possible values from $100,000 to $500,000.[163]

While the court noted the gatekeeping function of Rule 702 which requires Refka's testimony to rest on a reliable foundation and be relevant to the issue under consideration, the court saw no need to examine Rule 702.[164] It held that

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156. *Id.* at 262.
157. *Id.*
158. *Id.*
159. *Id.* (citing IND. R. EVID. 701).
160. *Id.* at 262-63.
161. 835 N.E.2d 1053 (Ind. Ct. App. 2005).
162. *Id.* at 1061.
163. *Id.* at 1061-62.
164. *Id.*

Refka's testimony was at best cumulative of Elliot's testimony, and at worst an overly broad guess.[165] The court noted that the trial court would have been justified in excluding Refka's testimony under Rule 403 because it was merely cumulative and lacked a sufficient factual basis.[166]

In *Bankhead v. Walker*,[167] discussed *infra*, a fire chief testified at a fire commission hearing as to a medical test report which showed that Bankhead had tested positive for marijuana use.[168] At the commission hearing, the chief was unable to interpret the drug results in his testimony.[169] Bankhead argued that "he was denied the opportunity to cross-examine the person responsible for performing the drug test and that the Commission should have introduced expert scientific testimony."[170]

The court noted that Rule 702 allows for expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence."[171] The court then noted that the commission was unlikely to need assistance in interpreting the word "positive" along with the term "marijuana metabolite," and that the commission was allowed to operate with relaxed evidentiary standards.[172] The court upheld the decision of the trial court that the evidence had been properly admitted at the commission hearing.[173]

In *Troutwine Estates Development Co. v. Comsub Design & Engineering, Inc.*,[174] Troutwine had attempted to introduce expert testimony at trial showing that street drainage had been incorrectly designed by Comsub. The trial court had not allowed this testimony as it ruled that, although the proffered witness had an extensive background in civil engineering, he was not familiar with Lake County storm drain standards as they existed between the years of 1992-95.[175] Therefore, he was unfamiliar with the appropriate standard of care Comsub should have used.[176]

Troutwine argued that the trial court relied on the modified locality rule which had been abolished by the Indiana Supreme Court.[177] In *Vergara v.*

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165. *Id.* at 1062.

166. *Id.* at 1062. Rule 403 "provides that otherwise relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.'" *Id.* (citing IND. R. EVID. 403).

167. 846 N.E.2d 1048 (Ind. Ct. App. 2006).

168. *Id.* at 1050.

169. *Id.* at 1055.

170. *Id.*

171. *Id.* (quoting IND. R. EVID. 702).

172. *Id.*

173. *Id.*

174. 854 N.E.2d 890 (Ind. Ct. App. 2006).

175. *Id.* at 901.

176. *Id.*

177. *Id.*

Doan,[178] the supreme court had abolished different standards of care based on locality in the medical malpractice realm, and replaced it with a test that is the same across location, but may consider location as only one factor in examining the appropriate standard of care.[179]

However, the supreme court had limited this rule to the medical malpractice context.[180] In any case, the appropriate level of care would have included acting in accordance with the local regulations and rules of Lake County, with which the witness was unfamiliar. Without this knowledge, the witness would have been unable to provide the court with a sense of the appropriate level of care and whether that level had been breached.[181]

In *Mills v. Berrios*,[182] an expert witness had provided an affidavit regarding medical issues. Appellant argued that the affidavit was legally insufficient and should have been stricken because neither party attached or designated "the medical records relied upon by the expert in formulating his opinion."[183]

The court first looked to the relevant portion of Rule 703, which provides that experts may testify "to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field."[184] The court held that "Rule 703 allows an expert to base an opinion on facts or data made known to the expert before a hearing, even if the facts or data are neither admitted nor admissible in evidence, if the information is of the type reasonably relied upon by experts in the field."[185]

In *Vaughn v. Daniels Co.*,[186] Daniels sought to strike portions of an expert witness affidavit because the expert had relied upon documents that were hearsay and not self-authenticating. The expert had reviewed design and construction plans as well as the health and safety policy of the facility in question.[187] The court held that the documents could reasonably be the basis for the expert's opinions because they were of the type reasonable relied upon by experts in the field.[188]

Daniels also challenged the affidavits on the basis that they contained inadmissible legal conclusions.[189] Rule 704 states that:

[t]estimony in the form of an opinion or inference otherwise admissible

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178. 593 N.E.2d 185 (Ind. 1992).

179. *Troutwine Estates Dev. Co.*, 854 N.E.2d at 901-02 (citing *Vergara*, 593 N.E.2d at 186-87).

180. *Id.* at 902.

181. *Id.*

182. 851 N.E.2d 1066 (Ind. Ct. App. 2006).

183. *Id.* at 1071-72.

184. *Id.* at 1072 (quoting IND. R. EVID. 703).

185. *Id.*

186. 841 N.E.2d 1133 (Ind. 2006).

187. *Id.* at 1137.

188. *Id.*

189. *Id.*

> is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. (b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.[190]

The expert's opinions concerning engineering standards, procedures and design were based on his engineering knowledge and were permissible.[191] His opinions on reasonable care and proximate cause embraced issues ultimately to be decided by the trier of fact and were therefore admissible.[192] Daniels also argued that the testimony lacked foundation because the expert had simply reviewed documents and not visited the plant.[193] The court held that the affidavit was proper because "[h]ands-on experience, formal education, specialized training, study of textbooks, performing experiments and observation can provide the foundation for an expert's opinion,"[194] and although Trial Rule 56(E) requires "affidavits be made on personal knowledge, this does not mean" that the knowledge needs to be based just on first-hand experience.[195]

In *Rose v. State*,[196] Rose appealed his conviction for child molestation. At trial, a witness had repeatedly stated that he was "very convinced" by the way the child victim described the alleged molestation incident.[197] Rose argued that this was improper under Rule 704(b) because the witness was in effect testifying as to whether another witness has testified truthfully.[198] The court noted that a special problem exists with child witnesses, but in this case the expert did not testify as to whether the child was prone to exaggeration or fantasy, but rather to her credibility and how convincing her testimony had been. The court found that this testimony was improper, and in the absence of conclusive physical evidence, had improperly bolstered the child's testimony. The court reversed and remanded for a new trial.[199]

Mills also examined Rule 705, which provides that "the expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data . . . . The expert may in any event be required to disclose [those facts or data] on cross-examination."[200] The expert had relied

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190. IND. R. EVID. 704.

191. *Vaughn*, 841 N.E.2d at 1137.

192. *Id.*

193. *Id.* at 1138.

194. *Id.* (citing Summit Bank v. Panos, 570 N.E.2d 960, 965 (Ind. Ct. App. 1991)).

195. *Id.* (citing Bunch v. Tiwari, 711 N.E.2d 844, 849 (Ind. Ct. App. 1999)).

196. 846 N.E.2d 363 (Ind. Ct. App. 2006).

197. *Id.* at 355.

198. *Id.* at 366-67.

199. *Id.* at 367-69; *see also* Dylak v. State, 850 N.E.2d 401, 407-08 (Ind. Ct. App. 2006). (holding that Rule 704(b) expert witness testimony as to causation was properly excluded by the trial court due to failure to make an offer of proof).

200. Mills v. Berrios, 851 N.E.2d 1066, 1072 (Ind. Ct. App. 2006) (quoting IND. R. EVID.

upon the medical records of Methodist Hospital and OrthoIndy, and set forth his medical opinion on the matter based on these records. The court concluded that the affidavit was therefore not insufficient merely because the relevant medical records were not attached or designated.[201]

VI. HEARSAY

A. Indirect Hearsay

In *Ikemire v. State*,[202] Ikemire appealed his conviction for dealing in a controlled substance. At trial, the court had sustained a hearsay objection made by the State, which Ikemire appealed.[203] Officer Shatto had learned information from an inmate, and Ikemire attempted to have the officer testify about this information. Rather than simply ask the officer what the inmate had said, Ikemire asked the officer what he learned in that conversation.[204] The State objected, claiming that this was simply a different route to impermissible hearsay, and the court agreed. While Ikemire did not directly ask for hearsay, this was simply an alternative way to elicit the same information, prohibited by Rule 801(c).[205]

B. Non-hearsay

In *Banks v. State*,[206] Banks appealed the decision of the trial court to exclude Banks' testimony regarding what the arresting officer had told him during their encounter. Banks wished to offer the testimony to show that the officer was not telling the truth about what happened.[207] The court determined that the testimony should have been allowed pursuant to Rule 801(d)(2), which states that a statement is not hearsay if it:

> is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.][208]

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705).

201. *Id.*

202. 852 N.E.2d 640 (Ind. Ct. App. 2006).

203. *Id.* at 644.

204. *Id.*

205. *Id.* Rule 801(c) provides that "'[h]earsay' is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* (quoting IND. R. EVID. 801(c)). Rule 802 further provides that "hearsay is not admissible except as provided by law or by these rules." IND. R. EVID. 802.

206. 839 N.E.2d 794 (Ind. Ct. App. 2005).

207. *Id.* at 796.

208. *Id.* at 797 (citing IND. R. EVID. 801(d)(2)).

Because the officer's statements were made regarding a matter within the scope of his employment, they were not hearsay.[209]

C. Hearsay Exceptions

In *Reemer v. State*,[210] Reemer appealed his conviction for possession of a methamphetamine precursor. At trial, the State offered the labels found in a trash receptacle from the boxes of decongestant as evidence of the contents of the tablets found in Reemer's possession. Although the labels were hearsay because they were used to prove the truth of the matter asserted (that the tablets were a prohibited substance), the trial court admitted the labels under the hearsay exception of Rule 803(17).[211] Rule 803(17) provides that the "following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."[212]

The court first noted that the Indiana Rules of Evidence do not recognize the residual hearsay exception found in Federal Rule of Evidence 807 and its state equivalents.[213] The State had offered its label evidence under Rule 803(17)'s market report exception, which was a matter of first impression in Indiana. The court concluded that "labels of commercially marketed drugs are properly admitted into evidence under the exception provided by Evidence Rule 803(17) to prove the composition of the drug."[214]

In *Forler v. State*,[215] Forler appealed her conviction for possession of methamphetamine precursors with intent to manufacture. During a traffic stop, police officers found several items in the trunk of her car, including a can of starting fluid and a Liquid Fire bottle.[216] On appeal, Forler argued that the labels on the bottle and the can were inadmissible hearsay because the labels were used to prove the truth of the matter asserted; that the can and bottle contained ether

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209. *Id.*

210. 835 N.E.2d 1005 (Ind. 2005).

211. *Id.* at 1007.

212. IND. R. EVID. 803(17). "The [S]tate also offered the labels under [Rule] 902(5) which allows self-authentication for '[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin,'" but the court noted that this issue had not been raised at trial and self-authentication relieves the need for foundational testimony, but does not serve as a hearsay exception. *Reemer*, 835 N.E.2d at 1007 n.4 (quoting IND. R. EVID. 902(5)).

213. *Reemer*, 835 N.E.2d at 1007.

214. *Id.* at 1009. The court also held that the State had no duty to prove that pseudoephedrine hydrochloride is in fact pseudophedrine or a salt of pseudophedrine. It held that because pseudophedrine hydrochloride is an isomer of ephedrine, it falls within the statutory list of chemical reagents or precursors prohibited by Indiana Code. *Id.*

215. 846 N.E.2d 266 (Ind. Ct. App. 2006).

216. *Id.* at 267.

and sulfuric acid.[217]

The State conceded that the labels were hearsay. Rule 803, however, contains several exceptions to the hearsay rule, and the *Forler* court examined these exceptions.[218] The court found that the Indiana Supreme Court had dealt with this issue regarding pharmaceuticals and found Rule 803(17) applicable in that because the tablets were in their original blister packs, it was sufficiently shown that the contents remained as the manufacturer packaged them.[219]

Forler contended that the Indiana Supreme Court had only applied this logic to highly-regulated pharmaceuticals, but the court stated that it saw "no indication that our supreme court intended to foreclose any consideration of other types of product labels as possibly falling under Evidence Rule 803(17)."[220] The court further noted that as both of these products were dangerous, "where a product label warns consumers that it contains dangerous ingredients, the general public reasonably relies upon the accuracy of such warnings."[221]

The court went on to state that this test has a second prong, which requires assurances that the contents of the container are the original contents.[222] In this case, the spray can had no indications of having been tampered with and reasonably appeared to contain the original content. The court found the Liquid Fire bottle to be more difficult because it had a screw off cap and the contents could have been replaced.[223] The officer had testified that in his experience the liquid appeared to be Liquid Fire and that he had done a field acid test.[224] The court held that a determination as to the sufficiency of the foundation of the officer's testimony need not be examined because even if the admission of the Liquid Fire label was erroneous, the error was harmless.[225]

In *Rolland v. State*,[226] Rolland appealed his convictions for theft and fraud upon a financial institution. At trial, the State had presented a bank fraud investigator who produced an account printout from Rolland's account showing the fraudulent transactions.[227] The State successfully argued at trial that while the report was hearsay, it was excluded from the hearsay rule by Rule 803(6). Rule 803(6) provides that a report is excluded from the hearsay rule if "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report."[228]

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217. *Id.*
218. *Id.* at 268 (quoting IND. R. EVID. 803(17)).
219. *Id.* (citing Reemer v. State, 835 N.E.2d 1005 (Ind. 2005)).
220. *Id.*
221. *Id.* at 270.
222. *Id.*
223. *Id.* at 270-71.
224. *Id.* at 271.
225. *Id.* at 270-71.
226. 851 N.E.2d 1042 (Ind. Ct. App. 2006).
227. *Id.* at 1045.
228. *Id.* (quoting IND. R. EVID. 803(6)).

On appeal, Rolland argued that the requirements of 803(6) were not met "because [the report] was printed long after entry of the information into the" bank's computer system, and therefore it is not reliable as an accurate representation of the information as entered into the account in 2004.[229] However, the fraud investigator had testified that such record is kept in the regular course of the bank's business, the information is entered by someone with personal knowledge of the transaction, and that any employee capable of making changes to the information was charged with inputting accurate information. Therefore, the trial court had not abused its discretion in admitting the report.[230]

In *Smith v. State*,[231] Smith appealed his conviction for stalking. In order to demonstrate that the defendant had violated a protective order, the State had admitted the victim's cell phone records which listed sixty-nine prohibited phone calls from the defendant.[232] Smith argued that the phone records were not properly authenticated under Rules 803(6), 901 and 902(9).[233]

The court considered that the hearsay exception language of Rule 803(6) includes the qualification that the information be "as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[234] Rule 901(a) requires that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[235] Finally, the court examined Rule 902(9), which allows for self-authentication of regular business records under Rule 803(6), provided that such record:

> is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity, and (iii) was made by the regularly conducted activity as a regular practice.[236]

Two sets of cell phone records were submitted, one showing all incoming calls to the victim's phone and one showing all incoming and outgoing calls.[237] These records were used to demonstrate that Smith made the calls in question, and that the victim never attempted to call Smith. The affidavits submitted with the cell phone records stated that the signatory was acting on behalf of the custodian of records or was otherwise qualified as a result of her position, and

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229. *Id.* at 1046.
230. *Id.*
231. 839 N.E.2d 780 (Ind. Ct. App. 2005).
232. *Id.* at 782-83.
233. *Id.* at 784-85.
234. *Id.* at 785 (quoting IND. R. EVID. 803(6)).
235. *Id.* (quoting IND. R. EVID. 901(a)).
236. IND. R. EVID. 902(9).
237. *Smith*, 839 N.E.2d at 785.

that she was in possession of a subpoena served on Verizon Wireless. The signatory also signed these affidavits as an employee of fidicianet, inc., and NeuStar, rather than Verizon.[238]

Smith argued that the State failed to lay a proper foundation for the affidavits because neither the signatory nor her employer's relationship with Verizon was sufficiently clear to indicate the trustworthiness of the documents.[239] The court restated the rule that the phrase "other qualified witness" should be given its broadest possible interpretation.[240] The signatory had verified, under penalty of perjury, that she was acting on behalf of the custodian of records or otherwise qualified. Smith had made no challenge as to the truth of the documents, and the self-authenticating documents had been properly admitted by the trial court.[241]

In *Bankhead v. Walker*,[242] Bankhead was a fireman who was suspended after a random drug test identified evidence of marijuana use. At a hearing by the Gary Fire Civil Service Commission, Chief Gilliam introduced into evidence a set of documents including the results of Bankhead's drug test and chain of custody evidence. Bankhead appealed in part based on his contention that the documents were hearsay and the certification of the documents did not fully comply with Indiana Statute.[243]

While the Commission was allowed to use relaxed evidentiary standards in its employment proceedings, the trial court had found that the certification substantially complied with Rule 803(6) as records of a regularly conducted business activity.[244] The court of appeals also found that because the Commission was allowed to use relaxed standards in introducing evidence, it was unnecessary for the Commission to fully comply with the relevant statutory provision.[245]

In *Gary v. McCrady*,[246] McCrady had been allowed to admit evidence of an affidavit submitted by the Public Access Counselor. On appeal, Gary argued that because the portions of the affidavit in question relied on statements made by others and made improper conclusions of law and opinion, they were hearsay. McCrady argued that the affidavit was nevertheless admissible based on the hearsay exception of Rule 803(8) for public records and reports.[247] The court

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238. *Id.*

239. *Id.* at 786.

240. *Id.* (citing Williams v. Hittle, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994)).

241. *Id.*

242. 846 N.E.2d 1048 (Ind. Ct. App. 2006).

243. *Id.* at 1050-51.

244. *Id.* at 1051.

245. *Id.* at 1054. Bankhead had been given notice and an opportunity to respond and therefore received sufficient due process. *Id.*

246. 851 N.E.2d 359 (Ind. Ct. App. 2006).

247. *Id.* at 363-64. Rule 803(8) exempts evidence from the hearsay rule (unless it lacks trustworthiness) where such evidence is comprised of "records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities." IND. R. EVID. 803(8).

determined that the trial court had erred by not striking the affidavit because Rule 803(8) states that findings from a special investigation of a particular complaint, case, or incident do not fall within this exception to the hearsay rule.[248]

In *Tate v. State*,[249] Tate appealed his conviction for unlawful possession of a firearm by a serious violent felon. At issue on appeal were the State's Exhibit Nineteen, which contained a "probable cause affidavit, certified information, certified commitment record, certified abstract of judgment, and certified plea agreement," regarding a 1985 burglary charge against Tate, as well as State's Exhibit Twenty-one, which contained an "officer's arrest report concerning [Tate's 1987 arrest]" for probation violation.[250]

The court found that the Exhibit Twenty-one arrest report had been properly admitted under Rule 803(6) because it merely contained biographical information and the type of charge to be brought against the defendant.[251] It did not fall under the prohibition of Rule 803(8) because it did not contain any subjective assumptions, statements, interpretations or conclusions.[252]

The court agreed with Tate's claim that Exhibit Nineteen had been improperly admitted because it did fall under the prohibition of Rule 803(8).[253] Rule 803(8) excludes from the exception:

> investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency . . .; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation . . . except when offered by an accused in a criminal case.[254]

The court held that the type of statements in a probable cause affidavit pose a risk of unreliability that the hearsay rule is designed to protect against.[255]

In *Lasater v. House*,[256] evidence of undue influence comprised of hearsay statements reporting statements made by a deceased person were prohibited as hearsay by the trial court. The court of appeals had then held that the statements were relevant to the deceased person's state of mind as she executed her most

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248. *Id.* at 364. Rule 803(8)(d) provides that "factual findings resulting from special investigation of a particular complaint, case or incident, except when offered by an accused in a criminal case." IND. R. EVID. 803(8)(d); *see also* Legacy Healthcare, Inc. v. Barnes & Thornburg, 837 N.E.2d 619 (Ind. Ct. App. 2005) (noting that Rule 803(8) does not accept investigative reports by or for an agency when offered by it in a case in which it is a party).

249. 835 N.E.2d 499 (Ind. Ct. App. 2005).

250. *Id.* at 508.

251. *Id.* at 509.

252. *Id.*

253. *Id.*

254. *Id.* at 508-09 (quoting IND. R. EVID. 803(8)).

255. *Id.*

256. 841 N.E.2d 553 (Ind. 2006).

recent will, and were therefore admissible under Rule 803(3).[257] Rule 803(3) provides an exception to the hearsay rule for a statement of "the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will."[258]

The Indiana Supreme Court noted that Rule 803(3) is a state-of-mind exception, and that the issue presented was not whether the decedent's statements were admissible to show her state of mind, but whether those statements could be introduced to show undue influence.[259] The trial court had specifically excluded the evidence for use to demonstrate undue influence. The court noted that hearsay is not converted to "non-hearsay simply because it tangentially involves a state of mind."[260] The issue of admitting this evidence for other purposes can be determined at trial, but the only purpose at issue here was the potential use of the evidence to demonstrate undue influence. The court affirmed the judgment of the trial court.[261]

In *Frye v. State*,[262] Frye appealed numerous convictions. After giving a police officer relevant information leading to the arrest, Frye's girlfriend had refused to testify to this information at trial. The officer then testified as to what the girlfriend had told him. The trial court had admitted this evidence under Rule 803(2), which excludes evidence from the hearsay rule a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[263]

The court pointed out that whether or not a statement constitutes an excited utterance is a factual issue subject to a clearly erroneous standard of review, similar to an abuse of discretion standard.[264] The court noted that on June 19, 2006 the United States Supreme Court issued an opinion on *Hammon,* which included the following quotation:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

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257. *Id.* at 554-55.
258. *Id.* at 556 (quoting IND. R. EVID. 803(3)).
259. *Id.*
260. *Id.*
261. *Id.*
262. 850 N.E.2d 951 (Ind. Ct. App. 2006).
263. *Id.* at 954-55 (quoting IND. R. EVID. 803(2)).
264. *Id.* at 955 (citing Hammon v. State, 829 N.E.2d 444, 449 (Ind. 2005)).

emergency.[265]

The Indiana Court of Appeals found that the girlfriend's statements fell within the nontestimonial definition set forth by the United States Supreme Court in *Hammon*. Because the testifying officer testified that a startling event occurred when an armed Frye entered a residence, and the original declarant was crying, hysterical, and her statements related to the event which was still occurring or had immediately occurred. Therefore, her statements had been made while under stress and were admissible under Rule 803(2).[266]

D. Unavailable Witnesses

In *Payne*,[267] Payne argued that the trial court erred by admitting a videotape of Carter, one of the perpetrators, walking through the crime scene with police and vividly describing the murders. At trial, Carter had refused to testify even though he was offered immunity and ordered to testify by the court.[268]

While Rule 804(b) provides that certain out of court statements against interest are exempt from the hearsay rule where the declarant is unavailable to testify at trial, Rule 804(b)(3) also provides that a "statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception."[269] While Carter also adds in the video that entry to the home was made via a second-floor window, this information had already been admitted into evidence.[270] Carter did not discuss Payne in the video, and the court found that the only purpose of admitting the video was to show that the crime had been committed as Payne suggested and to show the horrible nature of the crimes in order to attribute them to Payne. The court determined that this evidence was not harmless and reversed and remanded the case for a new trial.[271]

E. Confrontation Clause

In *Wallace v. State*,[272] the victim had identified Wallace as his attacker at the scene of the crime, in the ambulance and at the hospital. Wallace argued that while the statement at the scene was admissible as an excited utterance, the statements made in the ambulance and at the hospital were inadmissible hearsay.[273] The court found that the statements made in the ambulance and at the

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265. Hammon v. Indiana, 126 S. Ct. 2266, 2273 (2006).
266. *Frye*, 850 N.E.2d at 955.
267. 854 N.E.2d 7 (Ind. Ct. App. 2006).
268. *Id.* at 22.
269. *Id.* (quoting IND. R. EVID. 804(b)(3)).
270. *Id.*
271. *Payne*, 854 N.E.2d at 23.
272. 836 N.E.2d 985 (Ind. Ct. App. 2005).
273. *Id.* at 990.

hospital were admissible as either excited utterances or as dying declarations.[274]

Evidence is excluded from the hearsay rule where "the statement relates 'to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition.'"[275] Hearsay is also excepted and admissible where the statement is made while the declarant is "believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."[276]

Wallace further cited *Crawford v. Washington*,[277] for its proposition that the victim's statements violated his Sixth Amendment right to confront the witnesses against him.[278] The Crawford Court had determined that the Confrontation Clause of the Sixth Amendment focuses on statements which are testimonial in nature, including those made for the purpose of establishing or proving a fact and those made to police officers during an investigation. The Crawford Court had noted that an exception from the Confrontation Clause may exist for dying declarations, but declined to decide this issue in *Crawford*.[279]

The court examined the *Crawford* decision, subsequent cases in other states, and the *Hammon*[280] case in Indiana for instruction. The court rejected Wallace's argument that acceptance of the dying declarations violated his rights under the Confrontation Clause and denied him his right to cross-examine the witnesses against him. The court specifically held that the *Crawford* decision "neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused right of confrontation under the Sixth Amendment."[281]

CONCLUSION

The Rules have now been in place for well over a decade. While many issues have been addressed since the inception of the Rules, cases continue to add interpretation to the plain language of the Rules.

This process is likely to continue for years to come as practitioners and courts continue to discuss interpretation of existing decisions, the interplay between the Rules and the Federal Rules of Evidence, as well as the interpretation of similar rules in other jurisdictions. Also ongoing will be the effect of the emergence of new scientific technologies and business methods to which the Rules will continue to adapt.

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274. *Id.* at 991-92.

275. *Id.* at 991 (quoting IND. R. EVID. 803(2)).

276. *Id.* (quoting IND. R. EVID. 804(b)(2)).

277. 541 U.S. 36 (2004).

278. *Wallace*, 836 N.E.2d at 991-92. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.* at 992 (quoting U.S. CONST. amend. VI).

279. *Id.* at 995-96.

280. Hammon v. State, 829 N.E.2d 444, 452 (Ind. 2005).

281. 836 N.E.2d at 996 (citing *Crawford*, 541 U.S. at 1379 n.6).