

INDIANA RULES OF EVIDENCE

IVAN E. BODENSTEINER*

INTRODUCTION

By Order dated August 24, 1993 the Indiana Supreme Court adopted the Indiana Rules of Evidence (IRE), effective January 1, 1994.¹ These rules are generally similar to the Federal Rules of Evidence (FRE), with some significant differences. Part II will discuss the new rules, comparing them with both the FRE and prior Indiana law. Part I discusses the most important decisions of the past year, some of which continued the Indiana Supreme Court's move toward the FRE even before the effective date of the new IRE.

I. IMPORTANT DECISIONS IN 1993

Two controversial topics are addressed in a number of cases decided during the past year: Admissibility of prior acts² and use of prior statements of a witness as substantive evidence³. In *Lannan v. State*, the Indiana Supreme Court adopted Federal Rule of Evidence 404(b),⁴ which disallows evidence of prior acts to show action in conformity therewith (propensity), but allows it for other purposes, including proof of motive, intent, plan, and identity.⁵ This rule was applied in *Hardin v. State*⁶ where the defendant was charged with dealing in cocaine and evidence of prior drug dealings was admitted to prove common scheme or plan and identity. While "common scheme or plan" is not listed in 404(b) as one of the examples of admissible purposes of prior acts, the court noted that the list is not exclusive. Further, common scheme or plan fits within the terms "plan" and "identity."⁷ However, the court held that the evidence

* Professor of Law, Valparaiso University School of Law. B.A., 1965, Loras College; J.D., 1968, University of Notre Dame.

1. 617 N.E.2d LXXXIII (Ind. 1993).

2. See FED. R. EVID. 404(b).

3. See FED. R. EVID. 801(d)(1).

4. 600 N.E.2d 1334 (Ind. 1992). In abandoning the depraved sexual instinct exception to the general rule against admissibility of prior bad acts to show propensity, the court stated that "Rule 404(b) of the Federal Rules of Evidence provides a better basis for testing the admissibility of this sort of evidence than our existing caselaw provides." *Id.* at 1335. While *Lannan* applies retroactively, at least to cases pending on direct appeal at the time it was decided, *Pirnat v. State*, 607 N.E.2d 973 (Ind. 1993) (reserving the issue of its application to cases pending on collateral review), requires that the issue was properly preserved in the trial court and that any error in admitting evidence of prior offenses is not fundamental. See, e.g., *Posey v. State*, 624 N.E.2d 515, 517-18 (Ind. Ct. App. 1993); *Craig v. State*, 613 N.E.2d 501, 505 (Ind. Ct. App. 1993); *Stout v. State*, 612 N.E.2d 1076, 1079 (Ind. Ct. App. 1993); *Ried v. State*, 610 N.E.2d 275, 281-82 (Ind. Ct. App. 1993). In her dissent in *Reid*, Judge Barteau argues that fundamental fairness requires application of the new rule announced in *Lannan* because there was no "intentional or voluntary relinquishment of a known right" by the accused. It is not reasonable to expect counsel to anticipate a change in evidentiary rules and object to the introduction of evidence under a then well-recognized rule like the depraved sexual instinct rule. *Id.* at 282. See also *Martin v. State*, 622 N.E.2d 185, 187 (Ind. 1993) (where the accused objected to evidence of past sexual misconduct both in a motion in limine and on two occasions prior to testimony of the witness, the issue was not waived even though he did not object at the time the testimony was actually introduced).

5. See, e.g., *Hatton v. State*, 626 N.E.2d 442, 443 (Ind. 1993); *Thompson v. State*, 625 N.E.2d 1322, 1324 (Ind. Ct. App. 1993).

6. 611 N.E.2d 123 (Ind. 1993).

7. *Id.* at 129.

should not have been admitted to show plan because the prior acts were not similar enough to the charged offense to constitute Hardin's "signature" and there was no evidence that the prior acts were part of a preconceived plan that included the charged offense.⁸ Further, the prior acts could not be used to show identity because the evidence did not show who committed the charged crime.⁹

Hardin demonstrates that, when seeking to introduce evidence of prior acts, the prosecution has to do more than merely recite a purpose that generally fits within Rule 404(b). The prior acts must be relevant to the identified purpose or issue and the issue should be in dispute. For example, in *James v. State*,¹⁰ involving a prosecution for possession of marijuana found in the automobile of the sister of the accused, the trial court admitted evidence of the defendant's prior drug conviction and probation status for the purpose of showing both his knowledge of drugs and his intent to possess them.¹¹ The appellate court held that the evidence was improperly admitted because the issue was whether the defendant knew there was marijuana in the car, not whether he knew what marijuana was.¹² In addition, possession of marijuana in the past does not support an inference of intent to possess it at a later time. Further, admission of evidence of the prior acts was not harmless in light of the prosecutor's continual reference to this evidence.¹³

The court in *Hardin* explicitly adopted Rule 403,¹⁴ which gives trial courts the discretion to exclude relevant evidence where its probative value is substantially outweighed by (a) the danger that it will cause unfair prejudice, confuse the issues or mislead the jury or (b) considerations related to delay, waste of time or needless cumulative evidence.¹⁵ More importantly, the court held that evidence admissible under 404(b) is subject to exclusion based on Rule 403.¹⁶ The greater the similarity, the greater the danger that the jury will use the evidence for the forbidden reason—to show action in conformity therewith. Therefore, while dissimilarity between the prior acts and the charged act makes it more difficult to satisfy Rule 404(b), if the acts are too similar Rule 403 is more likely to bar admission.¹⁷

8. *Id.* at 130. See also *Hazelwood v. State*, 609 N.E.2d 10, 16-17 (Ind. Ct. App. 1993) (mere fact that the defendant attempted to defraud insurance companies on more than one occasion did not show a common scheme or plan, however, it did show intent and was therefore admissible).

9. 611 N.E.2d at 130.

10. *James v. State*, 622 N.E.2d 1303 (Ind. Ct. App. 1993).

11. *Id.* at 1308. In representing the accused in criminal cases, defense counsel should take advantage of the notice provision in Rule 404(b) so that the prosecution is forced to disclose its intended use of prior acts before trial. *Id.*

12. *Id.* at 1309. Cf. *McGuire v. State*, 613 N.E.2d 861, 863-64 (Ind. Ct. App. 1993) (testimony about previous uncharged drug transactions properly admitted to show intent).

13. *Id.* at 1310. Cf. *Martin v. State*, 622 N.E.2d 185, 188 (Ind. 1993) (evidence of Martin's prior sexual misconduct with his daughter twenty years earlier improperly admitted under Rule 404(b), but admission harmless because of other evidence of deviate sexual conduct and child molesting); *Taylor v. State*, 615 N.E.2d 907, 912-13 (Ind. Ct. App. 1993) (admission of uncharged misconduct as part of *res gestae* erroneous, but harmless).

14. FED. R. EVID. 403 (exclusion of relevant evidence on grounds of unfair prejudice).

15. 611 N.E.2d at 128-29.

16. *Id.* at 129.

17. Cf. *Wickizer v. State*, 619 N.E.2d 947 (Ind. Ct. App. 1993) (where the accused was charged with child molesting and argued that his intent in touching the child's genitals was not sexual gratification, the trial court did not err in admitting, under Rule 404(b), for the purpose of refuting the argument that the touchings were not sexually oriented, evidence that the accused touched the genitals of two others when they

Application of Rule 403 in conjunction with 404(b) is demonstrated in *Brim v. State*,¹⁸ where Brim was charged with beating his lover and his identity as the assailant was the primary factual issue in the trial. The court held that evidence of prior beatings was properly admitted because the beatings were sufficiently similar to the charged beating to constitute a "signature"—the victim was the same, all were alcohol related, and the accused grabbed the victim's head or hair and bounced her head into a hard surface.¹⁹ Because Brim's identity as the assailant was "hotly disputed" during trial, the court concluded that "the probative value of the evidence of the prior beatings was not substantially outweighed by the potential for unfair prejudice."²⁰ Noting there had been no admonishment nor limiting instruction regarding the purpose for which the prior beatings could be used by the jury, the court indicated that "the use of a cautiously worded limiting instruction in cases involving evidence of uncharged misconduct is available upon request and is to be encouraged."²¹ Therefore, it appears the Rule 403 balance was struck in favor of the prosecution because evidence of the prior beatings was crucial to the "hotly disputed" 404(b) issue of identity.

The second controversial topic addressed in recent Indiana decisions is the use of a witness' prior statements as substantive evidence. Rule 801(d)(1)²² makes three types of prior statements of a witness admissible as substantive evidence if the witness testifies at the trial and is subject to cross examination concerning the statements. Under 801(d)(1)(C) a prior statement is defined as non-hearsay if it is "one of identification of a person made after perceiving the person." This rule was applied in *Brim v. State*²³ where the victim of a beating was allowed to identify the accused as the person who beat her even though she could not remember the beating. She also testified that her memory comes and goes, and that she remembered making a statement to the police regarding the beating. In the recorded statement given to the police approximately ten months after the beating and admitted at trial, the victim recalled the details of the beating and identified the accused as the person who beat her. The question on appeal was whether the victim's memory was "so severely impaired that she could not be meaningfully cross-examined concerning her prior statement."²⁴

The *Brim* court resolved this issue by relying on the Supreme Court's decision in *United States v. Owens*.²⁵ In *Owens*, the Supreme Court held that the testimony of

were children; however, the court did not discuss the application of Rule 403).

18. 624 N.E.2d 27 (Ind. Ct. App. 1993). See also *McGuire v. State*, 613 N.E.2d 861 (Ind. Ct. App. 1993).

19. *Id.* at 34-35.

20. *Id.* at 35.

21. *Id.* at 35 n.3.

22. FED. R. EVID. 801(d)(1). This rule was adopted by the Indiana Supreme Court in *Modesitt v. State*, 578 N.E.2d 649, 653-54 (Ind. 1991), which overruled *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975), but only prospectively. Thus *Patterson* continues to control cases tried before *Modesitt*. See, e.g., *Saintignon v. State*, 616 N.E.2d 369, 372 (Ind. 1993); *Dausch v. State*, 616 N.E.2d 13, 16-17 (Ind. 1993); *Alva v. State*, 605 N.E.2d 169 (Ind. 1993). The decision in *Modesitt* addressed only the use of prior statements as substantive evidence, not the use of prior inconsistent statements for impeachment. *Dixon v. State*, 621 N.E.2d 1152, 1156 (Ind. Ct. App. 1993).

23. 624 N.E.2d 27 (Ind. Ct. App. 1993).

24. *Id.* at 31.

25. 484 U.S. 554 (1988).

a witness to a lack of recollection about the underlying event satisfies both the confrontation clause of the sixth amendment to the U.S. Constitution and the "subject to cross-examination concerning the statement" requirement of Rule 801(d)(1).²⁶ The requirement of cross-examination is satisfied if the declarant "is placed on the stand, under oath, and responds willingly to questions."²⁷ While "limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists," an assertion of memory loss does not produce that effect.²⁸ Rather, an assertion of memory loss "is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement."²⁹ With this analysis, the court in *Brim* declared that since the victim took the stand, was under oath, and responded willingly to the questions posed, she was available for cross examination.³⁰

II. THE NEW INDIANA RULES OF EVIDENCE

Following is a comparison of the IRE with both the FRE and prior Indiana law and practice. Where the rules are similar or the same, cases interpreting the FRE will provide guidance in interpreting the IRE,³¹ but such decisions are not binding even where the language of the FRE and the IRE is identical. More than thirty states have adopted some version of the Uniform Rules of Evidence (URE), which are similar to the IRE. Decisions from the courts in those states will help guide the interpretation of the IRE.

A. Article I: General Provisions

1. Rule 101: Scope.³²—Indiana's new Rule of Evidence 101 is similar to FRE

26. *Id.* at 564.

27. *Id.* at 561.

28. *Id.* at 561-62.

29. *Id.* at 562.

30. *Brim*, 624 N.E.2d at 32. If a witness "testifies to a lack of memory of the subject matter of [her] statement," IND. R. EVID. 804(a)(3), she is unavailable and "former testimony" is admissible as a hearsay exception. IND. R. EVID. 804(b)(1).

31. *See supra* notes 25-29 and accompanying text for an example of an Indiana court's reliance on the U.S. Supreme Court's interpretation of a federal rule for guidance.

32. These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in this rule.

(a) General Applicability. These rules apply in all proceedings in the courts of the State of Indiana except as 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. If these rules do not cover a specific evidence issue, common or statutory law shall apply. The word "judge" in these rules includes referees, commissioners and magistrates.

(b) Rules of Privilege. The rules and laws with respect to privileges apply at all stages of all actions, cases, and proceedings.

(c) Rules Inapplicable. The rules, other than those with respect to privileges, do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

1101, giving direction to the application of the evidentiary rules. However, there is some modification in Indiana's rule to accommodate a state judicial system. Further, section (a) suggests that the IRE will control over a conflicting state statute.³³ Other than providing that the evidence rules override conflicting statutes, Indiana's new Rule 101 is generally consistent with prior Indiana law and practice.

2. *Rule 102: Purpose and Construction.*³⁴—Indiana Rule of Evidence 102 is the same as FRE 102 and is generally consistent with prior Indiana law and practice. Even though rule 102 provides that the “rules shall be construed to secure fairness . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined,” it should not be viewed as a license to ignore the rules of evidence.³⁵

3. *Rule 103: Rulings on Evidence.*³⁶—IRE 103 is the same as FRE 103, with only slight wording modifications. Indiana Rule 103(a)(2) requires a “proper offer of proof” to make the substance of the evidence known while the federal rule requires it to be “made known to the court by offer.” Further, IRE 103(d) uses “fundamental” rather than FRE's “plain” to describe the type of error that can be noticed by the court even though it was not raised.³⁷

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

IND. R. EVID. Rule 101.

33. This is confirmed in *Brim v. State*, 624 N.E.2d 27, 33 (Ind. Ct. App. 1993), holding that IND. CODE § 35-37-4-14, which makes evidence of a previous battery admissible to show motive, intent, etc., is a “nullity” in light of the Indiana Supreme Court's adoption of FED. R. EVID. 403 and 404(b), in *Hardin*, *supra*, and *Lannan*, *supra*. The court in *Brim* also suggested that the legislative attempt to revive the depraved sexual instinct rule, IND. CODE § 35-37-4-15 (effective Feb. 1, 1994), is a nullity. *Id.* n.2.

34. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. IND. R. EVID. 102.

35. See David A. Schlueter, *Emerging Problems Under the Federal Rules of Evidence*, A.B.A. SEC. OF LIT. (2d ed. 1991).

36. (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, 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.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error. Nothing in this rule precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

IND. R. EVID. 103.

37. Neither of these differences appears significant.

While the Indiana rule is generally consistent with prior Indiana law and practice, 103(a)(2) makes it clear that an offer of proof is required on cross examination where the substance of the evidence is not clear from the context of the question.

4. *Rule 104: Preliminary Questions.*³⁸—IRE is the same as FRE 104, except “presence” is added to the first sentence of section (c).³⁹ The rule is generally consistent with prior Indiana law and practice.

5. *Rule 105: Limited Admissibility.*⁴⁰—IRE 105 is the same as FRE 105 except, when informing the jury on the restricted scope of the evidence, Indiana substitutes “admonish” for “instruct”. This change avoids application of Trial Rule 51(D) which limits the number of tendered instructions.

The new IRE is generally consistent with prior Indiana law and practice, although the rule now makes the admonition mandatory when requested.⁴¹

6. *Rule 106: Remainder of or Related Writing or Recorded Statements.*⁴²—IRE 106 is the same as FRE 106 and is generally consistent with prior Indiana law and practice. Neither the Indiana rule nor the federal rule indicates whether the remainder of an admitted writing or recorded statement sought to be introduced must be otherwise admissible.

B. Article II: Judicial Notice

*Rule 201.*⁴³—Indiana’s rule on judicial notice is generally similar to the federal

38. (a) Questions of Admissibility Generally. 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, subject to the provisions of subdivision (b). In making its determination, it is not bound by the Rules of Evidence, except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the presence and hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

IND. R. EVID. 104.

39. If “presence” is interpreted literally, it could eliminate “side bar” conferences.

40. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. IND. R. EVID. 105.

41. See, e.g., *Brim v. State*, 624 N.E.2d 27, 35 n.3 (Ind. Ct. App. 1993) (limiting instruction is available upon request in cases involving evidence of uncharged prior acts).

42. When a writing or recorded statement or part thereof 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. IND. R. EVID. 106.

43. (a) Kinds of Facts. A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

rule. IRE 201(a) is the same as FRE 201(b), except that Indiana adds, “[a] court may take judicial notice of a fact.” Further, IRE sections (c) - (g) are the same as the FRE. Indiana removes the federal limitation to adjudicative facts,⁴⁴ and IRE 201(b), providing for judicial notice of certain law, is not in the FRE.

Because prior Indiana law is less than clear, it is difficult to state the changes. However, a few comments are appropriate. First, the mandatory language in section (d) appears to represent a change from prior discretion. Second, in civil cases section (g) makes judicially noticed facts binding on the jury, in contrast to a rebuttable presumption. Third, codified municipal ordinances can now be judicially noticed.

C. Article III: Presumptions in Civil Actions and Proceedings

*Rule 301.*⁴⁵—IRE 301 is generally the same as FRE 301, with the addition that “[a] presumption shall have continuing effect even though contrary evidence is received.”

The first sentence of the IRE is generally consistent with prior Indiana law, providing that a presumption affects only the burden of production, not the burden of persuasion, and disappears once contrary evidence is introduced. However, the addition of the second sentence represents a change because now the presumption will have a continuing effect even after contrary evidence is introduced. In a jury trial the party relying upon the presumption will be entitled to an instruction advising the jury that the law creates a presumption and that it should consider the presumption along with the other evidence.

D. Article IV: Relevancy

(b) *Kinds of Laws.* A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, and (5) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) *When Discretionary.* A court may take judicial notice, whether requested or not.

(d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be Heard.* A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing the Jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

FED. R. EVID. 201.

44. The federal rules provide that judicial notice governs only adjudicative facts. FED. R. EVID. 201(a).

45. In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received. IND. R. EVID. 301.

1. *Rule 401: Definition of "Relevant Evidence."*⁴⁶—IRE 401 is the same as FRE 401. Although there is a change in the language, the rule is generally consistent with prior Indiana law and practice. Under the new rule, relevancy has two aspects: (1) probative value, and (2) fact of consequence (formerly "material" fact). Therefore, it is no longer necessary to state, "objection, irrelevant and immaterial." "Irrelevant" alone, along with an appropriate explanation, will suffice.

2. *Rule 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.*⁴⁷—IRE 402 is essentially the same as FRE 402, with a slight modification in the "except as otherwise provided" clause.⁴⁸ This rule, with its reference to "by statute not in conflict with these rules," supports IRE 101(a) insofar as it provides that the evidentiary rule will control when there is a conflicting state statute. The rule is consistent with prior Indiana law and practice.

3. *Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Undue Delay.*⁴⁹—Although IRE 403 is generally the same as FRE 403, only the federal rule provides for exclusion of relevant evidence based on a "waste of time." The new rule is generally consistent with prior Indiana law and practice, but it may modify Indiana cases excluding evidence because of "unfair surprise." However, in light of discovery and pretrial proceedings, particularly in civil cases, a continuance is usually a more appropriate remedy if there is unfair surprise. Finally, in applying IRE 403, a recent Indiana case, *Barnes v. Barnes*,⁵⁰ suggests that only marginally relevant evidence should be excluded by this balancing test.

4. *Rule 404: Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.*⁵¹—Indiana's 404(a) is the same as FRE 404(a). A prior case,

46. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. IND. R. EVID. 401.

47. All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible. IND. R. EVID. 402.

48. The federal rule provides that relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." FED. R. EVID. 402.

49. Although 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. IND. R. EVID. 403.

50. 603 N.E.2d 1337, 1343 (Ind. 1992).

51. (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other Crimes, Wrongs, or Acts. 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, provided that upon request by the

Niemeyer v. McCarthy,⁵² applied the “character of victim” exception to civil cases while the new IRE 402(a)(2) is limited to criminal cases. Despite this distinction, section (a) of the rule is generally consistent with prior Indiana law.

Indiana’s 404(b) does not include “opportunity” as one of the other admissible purposes of character. Since *Lannan v. State*,⁵³ prior Indiana law is the same as section (b) of IRE 404. Several observations related to Rule 404(b) are in order. First, except for the notice provision, section (b) applies to civil as well as criminal cases. Second, Rule 403 can be used to exclude evidence otherwise admissible under 404(b).⁵⁴ Third, the court determines whether the prior act is probative of a fact of consequence other than character, per 104(a), and whether there is “evidence sufficient to support a finding” that the act was committed, per 104(b). However, the jury, per 104(b), ultimately determines whether the prior act occurred and whether the party against whom it is offered committed it; that is, whether it is relevant.⁵⁵ Finally, defense attorneys in criminal cases should routinely submit a request to determine whether the prosecution intends to offer 404(b) evidence.

5. *Rule 405: Methods of Proving Character*.⁵⁶—The first part of section IRE 405(a) and all of section (b) are the same as FRE 405. The notice provision, the third sentence of section (a), is not in the FRE.

Allowing use of opinion testimony, possibly including that of an expert (psychologist or psychiatrist), represents at least a clarification and probably a change in Indiana law.⁵⁷ The notice provision is also new to Indiana and may be very helpful to the accused in determining whether to use character evidence.

6. *Rule 406: Habit; Routine Practice*.⁵⁸—IRE 406 is the same as FRE 406. The rule is generally consistent with prior Indiana law and practice, although prior law

accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

IND. R. EVID. 404.

52. 51 N.E.2d 365, 367 (Ind. 1943).

53. 600 N.E.2d 1334 (Ind. 1992) (abandoning the depraved sexual instinct exception in adopting Federal Rule of Evidence 404(b)).

54. See *Hardin v. State*, 611 N.E.2d 123, 128 (Ind. 1993).

55. See *Huddleston v. United States*, 485 U.S. 681 (1988).

56. (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Upon reasonable pre-trial notice by the accused of the intention to offer character evidence, the prosecution in a criminal case shall provide the accused with any relevant specific instances of conduct to be used in cross-examination.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

IND. R. EVID. 405.

57. Allowing opinion testimony greatly expands the character evidence available in a trial.

58. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. IND. R. EVID. 406.

more clearly allowed evidence of an organization's routine practice rather than an individual's habit.⁵⁹

7. *Rule 407: Subsequent Remedial Measures.*⁶⁰—IRE 407 is the same as FRE 407 and is generally consistent with prior Indiana law and practice. Neither the FRE nor the IRE addresses application of the rule to strict liability cases. Prior Indiana cases suggest that the rule would apply to strict liability,⁶¹ while the federal circuits are split.⁶²

8. *Rule 408: Compromise and Offers to Compromise.*⁶³—IRE 408 is similar to FRE 408, with a couple of changes. The third sentence of the FRE, “[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations,” is omitted from IRE⁶⁴ while the last sentence of the Indiana rule, concerning dispute resolutions, is not found in the FRE.

Contrary to Indiana common law, the new IRE 408 does not allow evidence of conduct or statements made in compromise negotiations to be admitted. Otherwise the rule is generally consistent with prior Indiana law and practice.

9. *Rule 409: Payment of Medical and Similar Expenses.*⁶⁵—IRE 409 modifies the federal version of the rule in two ways: First, Indiana excludes evidence of “paying” as well as “furnishing, or offering or promising to pay” expenses.⁶⁶ Second, Indiana expressly covers expenses occasioned by damages to property, as well as injury. This rule is consistent with prior Indiana law and practice.

10. *Rule 410: Withdrawn Pleas and Offers.*⁶⁷—The second paragraph of IRE

59. A habit is one's “regular response to a repeated specific situation,” whereas character is a more general description of one's disposition.

60. When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. IND. R. EVID. 407.

61. See *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524 (Ind. Ct. App. 1984); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979).

62. Compare *Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir. 1993) (FRE 407 does not apply) with *Oberst v. International Harvester Co.*, 640 F.2d 863, 866 (7th Cir. 1980) (FRE 407 does apply).

63. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution. IND. R. EVID. 408.

64. It is not anticipated that omission of this sentence will lead to a different result under the IRE.

65. Evidence of paying or furnishing, or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury, or damage to property is not admissible to prove liability for such injury or damages. IND. R. EVID. 409.

66. The federal rule refers to “[e]vidence of furnishing or offering or promising to pay.” FED. R. EVID. 409.

67. Evidence of a plea of guilty or admission of the charge which was later withdrawn, or a plea of *nolo contendere*, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the person who made the plea or offer.

410 is the same as FRE 410. The first paragraph of IRE 410, although quite similar, is worded differently than FRE 410. The federal rule excludes evidence of "any statement made in the course of plea discussions with an attorney for the prosecuting authority . . .," thus leaving admissible similar statements made to the police. While this provision is not included in the Indiana rule, Indiana cases indicate that the courts have adopted this position.⁶⁸ The rest of the rule is generally consistent with prior Indiana law and practice.⁶⁹

11. *Rule 411: Liability Insurance.*⁷⁰—IRE 411 is the same as FRE 411 and is consistent with prior Indiana law and practice.

12. *Rule 412: Evidence of Past Sexual Conduct.*⁷¹—IRE 412 is different than FRE 412. The Indiana rule is essentially a streamlined version of the Indiana rape shield statute.⁷² Consistent with *Barnes v. Barnes*,⁷³ the rule does not apply in civil cases.

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

68. See, e.g., *Martin v. State*, 537 N.E.2d 491, 493 (Ind. 1989).

69. See IND. CODE §§ 35-35-1-4 (1993), 35-35-3-4 (1993). In holding that a confession given by the defendant during plea discussions with the prosecutor was inadmissible under IND. CODE § 35-35-3-4, the court in *Bell v. State*, 622 N.E.2d 450, 453 n.3 (Ind. 1993), noted that this rule of inadmissibility was consistent with IND. R. EVID. 410. Cf. *Mundt v. State*, 612 N.E.2d 566 (Ind. Ct. App. 1993) (defendant, as part of plea agreement, gave statement identifying Baird as an accomplice and, after the agreement was withdrawn, Baird testified against defendant; statement given *after* plea agreement is reached is not barred by the Indiana statutes governing plea negotiations).

70. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. IND. R. EVID. 411.

71. (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:

- (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
- (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.

(b) If a party proposes to offer evidence under this rule, the following procedure must be followed:

- (1) A written motion must be filed at least ten days before trial describing the evidence. For good cause, a party may file such motion less than ten days before trial.
- (2) The court shall conduct a hearing and issue an order stating what evidence may be introduced and the nature of the questions to be permitted.

(c) If the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant, the court may instruct the jury accordingly, in which case other evidence concerning the pregnancy may not be admitted.

IND. R. EVID. 412.

72. IND. CODE § 35-37-4-4 (1993). See *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994) (en banc) (application of the statute did not unconstitutionally deprive the accused of his right to testify).

73. 603 N.E.2d 1337, 1342 (Ind. 1992).

13. *Rule 413: Medical Expenses.*⁷⁴—There is no comparable provision in the FRE to IRE 413 and the new rule represents a change in Indiana law.⁷⁵ Following are several observations relating to this rule: First, the rule addresses only reasonableness, not necessity, and therefore may not ease the plaintiff's burden. Second, the "shall constitute prima facie evidence" language in the rule suggests that it is creating a rebuttable presumption, thus triggering application of Rule 301. Third, because the rule refers to "charges . . . occasioned by an injury," it will not apply to all medical bills. Finally, since the rule asserts that "[s]tatements . . . are admissible into evidence," it may eliminate hearsay and Rule 403 concerns.

E. Article V. Privileges

*Rule 501.*⁷⁶—IRE 501 is substantially different than FRE 501, which simply directs the federal courts to either federal common law or State law to determine the privilege. This rule is generally consistent with prior Indiana law and practice, although, there is very little Indiana law related to sections (c) and (d): Privileged matter disclosed under compulsion or without opportunity to claim a privilege, and comment upon or inference from claim of privilege. The existence of a privilege will

74. Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable. IND. R. EVID. 413.

75. See, e.g., *Smith v. Syd's, Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992) (party seeking to recover medical expenses must prove that the expenses were both reasonable and necessary; reasonableness can be proved, at least in part, by showing the amount paid by the plaintiff because it is assumed one would not pay an unreasonable bill; necessity is generally proved by offering testimony of medical experts).

76. (a) General Rule. Except as provided by constitution or statute as enacted or interpreted by the courts of this State or by these or other rules promulgated by the Indiana Supreme Court or by principles of common law in light of reason and experience, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(b) Waiver of Privilege by Voluntary Disclosure. A person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(c) Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

(d) Comment Upon or Inference From Claim of Privilege; Instruction. Except with respect to a claim of the privilege against self-incrimination in a civil case:

- (1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding, or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
- (2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
- (3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

continue to be determined by reference to the Indiana and U.S. Constitutions, statutes⁷⁷ and other rules promulgated by the Indiana Supreme Court.⁷⁸

F. Article VI. Witnesses

1. *Rule 601: General Rule of Competency.*⁷⁹—IRE 601, similar to the first sentence of FRE 601, expressly makes every person competent unless otherwise provided by the rules “or by act of the Indiana General Assembly.” The federal rule does not provide for the statutory exceptions. Further, the second sentence of FRE 601, adopting the appropriate state rule when state law provides the rule of decision, obviously is not needed. This rule is consistent with prior Indiana law and practice.

2. *Rule 602: Lack of Personal Knowledge.*⁸⁰—Indiana’s exclusion from personal knowledge of memory following hypnosis is the difference between IRE 602 and FRE 602. Under prior Indiana law a witness was presumed to have personal knowledge and the burden was on the opponent to raise the issue. Under the new rule, the proponent must establish personal knowledge. Two observations relating to the hypnosis provision should be noted: First, in *Rock v. Arkansas*⁸¹ the Court held that the constitution precludes categorical exclusion of the hypnotically refreshed testimony of an accused who cannot present a meaningful defense without such testimony; and second, the rule’s effect is unclear when a witness, who, for example, was a victim of sexual abuse as a child, recalls the abuse “after hypnosis,” but not as a result of the hypnosis.

3. *Rule 603: Oath or Affirmation.*⁸²—Although IRE 603 is worded differently than FRE 603, the substance is similar. IRE 603 is consistent with prior Indiana law and practice.⁸³

4. *Rule 604: Interpreters.*⁸⁴—IRE 604 is the same as FRE 604 and is consistent with prior Indiana law and practice.⁸⁵

77. Thus cases like *Shaw v. Shelby County DPW*, 612 N.E.2d 557 (Ind. 1993), holding that an Indiana statute providing a physician-patient privilege is inapplicable in proceedings to terminate parental rights, will not be affected by the new rule. See also *Hazelwood v. State*, 609 N.E.2d 10, 14-16 (Ind. Ct. App. 1993) (statutory marital privilege does not apply to communications one month before the marriage).

78. Under prior Indiana law the courts generally left it to the legislature to create a privilege. See *Scroggins v. Uniden Corp. of Am.*, 506 N.E.2d 83, 86 (Ind. Ct. App. 1987).

79. Every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly. IND. R. EVID. 601.

80. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. IND. R. EVID. 602.

81. 483 U.S. 44, 61 (1987).

82. Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered. IND. R. EVID. 603.

83. See IND. CODE § 34-1-14-2 (1993); IND. CONST. art. I, § 8; IND. R. TRIAL P. 43(D).

84. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation. IND. R. EVID. 604.

85. See IND. CODE § 34-1-14-3 (1993); IND. R. TRIAL P. 43(F); *Martinez Chevez v. State*, 534 N.E.2d 731, 736 (Ind. 1989).

5. *Rule 605: Competency of Judge as Witness.*⁸⁶—IRE 605 is the same as FRE 605. This represents a change from prior Indiana law under which a presiding judge appears to be competent to testify pursuant to statute.⁸⁷

6. *Rule 606: Competency of Juror as Witness.*⁸⁸—IRE 606(a) is the same as FRE 606(a), excluding members of the jury from testifying. IRE 606(b) is similar to the federal rules, except it adds “drug or alcohol use by any juror” as one of the matters to which a juror may testify. This rule is generally consistent with prior Indiana law and practice.

7. *Rule 607: Who may Impeach.*⁸⁹—IRE 607 is the same as FRE 607. This rule changes prior Indiana law which precluded impeachment of one’s own non-hostile witness. However, it may be improper to call a witness for the sole purpose of impeaching the witness with, for example, a prior inconsistent statement that is otherwise inadmissible, particularly in a criminal case.⁹⁰

8. *Rule 608: Evidence of Character and Conduct of Witness.*⁹¹—IRE 608(a) follows FRE 608(a) except that “untruthfulness” is omitted from part (1) when referring to admissible evidence of character. It appears that this omission may have been inadvertent in light of the fact that “untruthfulness” is included in section (b) and the proposed commentary accompanying (a) referred to “untruthfulness”. IRE 608(a)

86. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve the point. IND. R. EVID. 605.

87. See IND. CODE §§ 34-1-14-4 (1993), 34-1-14-5 (1993).

88. (a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

IND. R. EVID. 606.

89. The credibility of a witness may be attacked by any party, including the party calling the witness. IND. R. EVID. 607.

90. See, e.g., *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984).

91. (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of the Conduct of a Witness. For the purpose of attacking or supporting the witness’s credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

IND. R. EVID. 608.

differs from prior Indiana law because it allows the use of opinion testimony to establish character.⁹²

IRE 608(b) differs substantially from FRE 608(b) in that Indiana does not permit impeachment of a witness by inferences drawn from specific instances of conduct. This section is generally consistent with prior Indiana law and practice. 9. *Rule 609: Impeachment by Evidence of Conviction of Crime.*⁹³—IRE 609(a) differs substantially from FRE 609(a) by limiting impeachment use to the specific crimes listed and making admissibility mandatory as to all of them. IRE 609(b) is essentially the same as FRE 609(b), and Indiana's subsections (c) - (e) are the same as FRE 609(c) - (e).

IRE 609(a) is consistent with prior Indiana law. IRE 609(b) modifies prior Indiana law under which the passage of time did not create a presumption of inadmissibility and, therefore, notice was not required. In *Nunn v. State*⁹⁴ the Indiana Supreme Court adopted FRE 609(c). Juvenile adjudications were not admissible under prior Indiana law, so section (d) represents a change. Section (e) is consistent with prior Indiana law and practice.

10. *Rule 610: Religious Beliefs or Opinions.*⁹⁵—IRE 610 is the same as FRE 610. This rule is inconsistent with an Indiana statute which provides that “[n]o want

92. Also, prior Indiana law allowed evidence of general moral character. See IND. CODE § 34-1-14-13 (1993).

93. (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

IND. R. EVID. 609.

94. 601 N.E.2d 334, 338 (Ind. 1992).

95. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced. IND. R. EVID. 610.

of a belief in a Supreme Being, or in the Christian religion shall render a witness incompetent[,] [b]ut the want of such religious belief may be shown upon the trial."⁹⁶

11. *Rule 611: Mode and Order.*⁹⁷—IRE 611 is the same as FRE 611 and is generally consistent with prior Indiana law and practice.

12. *Rule 612: Writing or Object Used to Refresh Memory.*⁹⁸—Although IRE 612(a) and (b) are different in language and structure from FRE 612, the effect of the rule is essentially the same, except that the Indiana rule includes an "object" in addition to a writing, and requires production of the writing or object at "the trial, hearing, or deposition in which the witness is testifying" whereas the FRE refers only to the "hearing."⁹⁹ Section (c) of the Indiana rule is very similar to FRE 612, but it includes a sentence indicating that if production at the trial, hearing or deposition is impracticable, the court may order that the writing or object be made available for inspection.

At least with regard to a writing or object used to refresh memory before testifying, the rule changes Indiana law insofar as it may, in the discretion of the court,

96. IND. CODE § 34-1-14-13 (1993).

97. (a) *Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

IND. R. EVID. 611.

98. (a) *While Testifying.* If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before Testifying.* If, before testifying, a witness uses a writing or object to refresh the witness's memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and Conditions of Production and Use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

IND. R. EVID. 612.

99. Requiring production of the writing or object at a deposition may be significant in that it gives the receiving party more time to assess its value or use at trial.

require production of the writing or object even if it includes attorney work product¹⁰⁰ or privileged information.

13. *Rule 613: Prior Statements of Witnesses.*¹⁰¹—IRE 613 is the same as FRE 613. The foundation requirements are changed substantially from prior Indiana law in that “the statement need not be shown nor its contents disclosed to the witness at the time” Although extrinsic evidence of the statement is not admissible unless the witness has an opportunity to explain or deny the statement, this opportunity does not have to be provided by the cross examining party and it does not have to be provided before introducing the statement.

14. *Rule 614: Calling and Interrogation of Witnesses by Court and Jury.*¹⁰²—IRE 614(b) and (c) are the same as FRE 614(b) and (c). However, section (a) of the Indiana rule is more restrictive than FRE 614(a), which does not require “extraordinary circumstances” before allowing the court to call witnesses. IRE 614(d), interrogation by jurors, is not included in the federal rule.

This rule is generally consistent with prior Indiana law and practice, with the exception that IRE 614(a) clarifies, and possibly expands, the authority of the court to call witnesses.¹⁰³ In addressing interrogation by jurors, *Stancombe v. State*¹⁰⁴ holds that while the practice of permitting jurors to propound questions should not be encouraged, it should not be forbidden if for the purpose of discovering the truth.

15. *Rule 615: Separation of Witnesses.*¹⁰⁵—IRE 615 is the same as FRE 615,

100. See IND. R. TRIAL P. 26(B)(3).

101. (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

IND. R. EVID. 613.

102. (a) Calling by Court. The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(d) Interrogation by Juror. 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, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

IND. R. EVID. 614.

103. See, e.g., *Isaac v. State*, 605 N.E.2d 144, 148-49 (Ind. 1992) (calling and questioning probation officer in probation revocation proceeding approved).

104. 605 N.E.2d 251 (Ind. Ct. App. 1992).

105. At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose

except for Indiana's addition of "or discuss testimony with."¹⁰⁶ This rule is generally consistent with prior Indiana law and practice, although the trial court had some discretion under prior law.

16. *Rule 616: Bias of Witness.*¹⁰⁷—There is no federal counterpart to IRE 616. While evidence of bias, prejudice or interest is generally admissible to attack the credibility of a witness, the Indiana rule simply states that it "is admissible." This creates a question as to whether Rule 403 considerations are applicable. In this author's opinion, the court should have the discretion to exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, particularly to the accused in criminal cases.

G. Article VII. Opinions and Expert Testimony

1. *Rule 701: Opinion Testimony by Lay Witnesses.*¹⁰⁸—IRE 701 is the same as FRE 701 and is consistent with prior Indiana law and practice.

2. *Rule 702: Testimony by Experts.*¹⁰⁹—Although IRE 702(a) is the same as FRE 702, Indiana adds section (b) making expert scientific testimony admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable. However, to the extent that section (b) of the Indiana rule implements *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹¹⁰ IRE 702 is consistent with federal law. In *Daubert* the Court held that the "general acceptance" standard adopted in *Frye v. United States*¹¹¹ is superseded by FRE 702 which requires the trial court to ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."¹¹² Emphasizing the importance of methodology, the Court noted that "in order to qualify as 'scientific knowledge' an inference or assertion must be derived by the scientific method."¹¹³ Pursuant to Rule 104(a),¹¹⁴ in determining whether an expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue, trial judges should consider the following factors: (1) whether the theory or technique has been tested;

presence is shown by a party to be essential to the presentation of the party's cause. IND. R. EVID. 615.

106. Even though not included in FRE 615, if requested, federal courts will generally instruct the witnesses not to discuss their testimony.

107. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible. IND. R. EVID. 616.

108. If the witness is not testifying as an expert, 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. IND. R. EVID. 701.

109. (a) 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.

110. 113 S. Ct. 2786 (1993).

111. 293 F. 1013 (D.C. Cir. 1923).

112. *Daubert*, 113 S. Ct. at 2799.

113. *Id.* at 2795.

114. FED. R. EVID. 104(a) (Questions of Admissibility Generally).

(2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the utilization of standards to control the technique's operation; and (4) whether the technique has general acceptance in the relevant scientific community.¹¹⁵

This rule changes prior Indiana law in at least three respects: First, it rejects the *Frye* standard as the exclusive method of establishing reliability.¹¹⁶ Second, it eliminates the need for a hypothetical question. Finally, it adopts the "assist the trier of fact" standard in the place of "beyond the knowledge" of an average juror.

3. *Rule 703: Bases of Opinion Testimony by Experts.*¹¹⁷—The first sentence in IRE 703 is the same as that in FRE 703. The second sentence is worded differently, but does not appear to be different in substance. Although the rule provides that an expert may disclose to the trier of fact the data relied upon in forming an opinion, it does not create an exception to the hearsay rule and, therefore, the data cannot be considered as substantive evidence unless otherwise admissible. IRE 703 is generally consistent with prior Indiana law and practice.

4. *Rule 704: Opinion on Ultimate Issue.*¹¹⁸—IRE 704(a) is similar to FRE 704(a).¹¹⁹ IRE 704(b) differs from FRE 704(b), in that the federal rule only excludes testimony relating to a "mental state or condition constituting an element of the crime charged or of a defense thereto." Indiana also excludes testimony relating to: (1) the truth or falsity of allegations, (2) whether a witness has testified truthfully, and (3) legal conclusions. This rule is generally consistent with prior Indiana law and practice.¹²⁰

5. *Rule 705: Disclosure of Facts or Data Underlying Expert Opinion.*¹²¹—IRE 705 is the same as FRE 705, as modified effective December 1, 1993. This rule is generally consistent with prior Indiana law and practice.

115. 113 S. Ct. at 2796-97.

116. For a recent application of the *Frye* standard, see *K-Mart Corp. v. Morrison*, 609 N.E.2d 17, 23-26 (Ind. Ct. App. 1993) (infrared thermography inadmissible under the *Frye* standard). See also *Burp v. State*, 612 N.E.2d 169, 172-73 (Ind. Ct. App. 1993) (reliability of procedures employed in a particular case goes to weight, not admissibility).

117. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. IND. R. EVID. 703.

118. (a) Testimony in the form of an opinion or inference otherwise admissible 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.

IND. R. EVID. 704.

119. The admissibility of evidence embracing an ultimate issue in Federal Rules of Evidence 704(a) is subject to the limitation provided in subdivision (b). The Indiana rules does not have this clause. IND. R. EVID. 704(a).

120. See, e.g., *Columbia City v. Utility Regulatory Comm'n*, 618 N.E.2d 21, 28 (Ind. Ct. App. 1993) (expert opinion on the ultimate fact in issue is admissible). Cf. *Vanness v. State*, 605 N.E.2d 777, 782 (Ind. Ct. App. 1992) (attorney's opinion on the meaning of an unambiguous provision in a dissolution decree properly excluded because it was on a matter of common knowledge).

121. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. IND. R. EVID. 705.

6. *Court Appointed Experts.*—FRE 706 provides for court appointed experts, but there is no comparable Indiana rule.

H. Article VIII: Hearsay

1. *Rule 801: Definitions.*¹²²—IRE 801(a) - (c) and (d)(2) are the same as FRE 801(a) - (c) and (d)(2). Indiana's section (d)(1) imposes two limitations not found in FRE 801(d)(1): First, subsection (B) requires that prior consistent statements be made "before the motive to fabricate arose;" and second, subsection (C) requires that the statement of identification be made "shortly" after perceiving the person.

The definition of hearsay found in 801(a) - (c) is consistent with prior Indiana law and practice.¹²³ However, Rule 801(d)(1) is now inconsistent with prior Indiana law which had adopted FRE 801(d)(1).¹²⁴ Rule 801(d)(2), statement by party-opponent, represents a formal change, defining such statements as non-hearsay rather than treating them as an exception. There is also a substantive change in subsection (D) in that the statement of an agent or employee no longer has to be made while the agent is actually working, it is sufficient if made "during the existence of the relationship".

2. *Rule 802: Hearsay Rule.*¹²⁵—Under FRE 802 hearsay is not admissible "except as provided by these rules or by other rules prescribed by the Supreme Court . . . or by Act of Congress." Indiana Rule 802 provides that hearsay is not admissible "except as provided by law¹²⁶ or by these rules." Therefore, the outcome will vary

122. The following definitions apply under this Article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *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 the declarant's testimony 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 the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose; or (C) one of identification of a person made shortly after perceiving the person; or

(2) *Statement by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth; or (C) a statement by a person authorized by the party to make a statement concerning the subject; 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; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

IND. R. EVID. 801.

123. *See, e.g.,* Craig v. State, 613 N.E.2d 501, 503-04 (Ind. Ct. App. 1993) (out-of-court statements not considered hearsay when offered to show why an officer took certain actions).

124. *Modesitt v. State*, 578 N.E.2d 649, 653-54 (Ind. 1991).

125. Hearsay is not admissible except as provided by law or by these rules. IND. R. EVID. 802.

126. It is not clear whether this preserves all exceptions established by Indiana cases and statutes.

to the extent that federal exceptions differ from Indiana exceptions. This rule is consistent with prior Indiana law and practice.¹²⁷

3. *Rule 803: Hearsay Exceptions: Availability of Declarant Immaterial.*—

a. *803(1): Present sense impression*¹²⁸

IRE 803(1) modifies FRE 803(1) by limiting the exception to statements describing or explaining a “material” event. Indiana’s rule also adds “transaction” as one of the things that can be described or explained, but it is not clear that this represents a substantive change. The hearsay exception under this rule was not a recognized exception under prior Indiana law and practice, although the “res gestae” exception included some of the statements covered by this rule.

b. *803(2): Excited utterance,*¹²⁹ *and 803(3): Then existing mental, emotional, or physical condition*¹³⁰

Both IRE 803(2) and 803(3) are the same as FRE 803(2) and FRE 803(3), and both are generally consistent with prior Indiana law and practice.

c. *803(4): Statements for purposes of medical diagnosis or treatment*¹³¹

IRE 803(4) is the same as FRE 803(4). This was not a recognized exception under prior Indiana law and practice.

d. *803(5): Recorded recollection*¹³²

IRE 803(5) is the same as FRE 803(5). This rule modifies prior Indiana law and practice in that the foundation requirement for admitting recorded recollection is now “insufficient recollection” rather than total exhaustion of memory, thereby slightly expanding the exception. In addition, the memorandum or record is only “read into evidence,” not admitted and sent to the jury room.

e. *803(6): Records of regularly conducted business activity*¹³³

127. The confrontation clauses (in the sixth amendment to the U.S. Constitution and art. I, § 13 of the Indiana Constitution) may affect the admissibility of hearsay in criminal cases.

128. (1) Present sense impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter. IND. R. EVID. 803(1).

129. (2) Excited utterance. 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. IND. R. EVID. 803(2).

130. (3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), 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. IND. R. EVID. 803(3).

131. (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment. IND. R. EVID. 803(4).

132. (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. IND. R. EVID. 803(5).

133. (6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified

IRE 803(6) is the same as FRE 803(6), except the Indiana rule allows the proponent of the record to establish the foundation by affidavit,¹³⁴ representing a clear change in Indiana law. In addition, the rule clearly allows admission of business records that include opinions and diagnoses.¹³⁵

*f. 803(7): Absence of entry in records kept in accordance with the provisions of paragraph (6)*¹³⁶

IRE 803(7) is the same as FRE 803(7) and is generally consistent with prior Indiana law and practice.

*g. 803(8): Public records and reports*¹³⁷

Although worded differently, the first sentence of IRE 803(8) is generally consistent with FRE 803(8). The second sentence of the Indiana rule is confusing and, with the exception of subpart (c), seems inconsistent with FRE 803(8). The following are *not* within the exception created in the first sentence: (a) "investigative reports by police . . . except when offered by an accused in a criminal case." This seems to exclude the use of such reports in civil cases when they would be admissible under FRE 803(8)(B); (b) "investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party." There is no comparable provision in FRE 803(8), however, such reports would normally be excluded under the federal rule because the "circumstances indicate lack of trustworthiness;" and (d) "factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case"—FRE 803(8)(D) does not exclude such factual findings in civil cases.¹³⁸ While confusing, the rule appears generally consistent with prior Indiana law and practice.

witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. IND. R. EVID. 803(6).

134. See *In re Paternity of Tompkins*, 542 N.E.2d 1009, 1012 (Ind. Ct. App. 1989).

135. Cf. *Burp v. State*, 612 N.E.2d 169, 171-72 (Ind. Ct. App. 1993) (no error in admitting, as a business record, the results of a blood test showing the blood alcohol content).

136. (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. IND. R. EVID. 803(7).

137. (8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) 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 when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) 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).

138. Unless a "special investigation of a particular complaint" is something different than "an investigation made pursuant to authority granted by law" (first sentence of Indiana rule), this provision appears to eliminate most of the "factual findings" exception provided in the first sentence.

*h. 803(9): Records of vital statistics*¹³⁹

IRE 803(9) is the same as FRE 803(9). Although generally consistent with prior Indiana law and practice, the new rule more clearly indicates that such records are admissible to prove their entire content.

*i. 803(10): Absence of public record or entry*¹⁴⁰

IRE 803(10) is the same as FRE 803(10) and is generally consistent with prior Indiana law and practice.

*j. 803(11): Records of religious organizations;*¹⁴¹ *803(12): Marriage, baptismal, and similar certificates;*¹⁴² *803(13): Family records;*¹⁴³ *803(14): Records of documents affecting an interest in property;*¹⁴⁴ *and 803(15): Statements in documents affecting an interest in property*¹⁴⁵

Each of these Indiana rules is the same as the corresponding federal rule and none was a recognized exception under prior Indiana law or practice. However, records of documents affecting an interest in property were generally admissible as public records and statements in documents affecting an interest in property were generally admissible pursuant to Indiana statute.¹⁴⁶

*k. 803(16): Statements in ancient documents*¹⁴⁷

FRE 803(16) requires only twenty (20) years for a document to be declared ancient while the Indiana rule requires thirty (30) years. This rule is consistent with prior Indiana law and practice.

139. (9) Records of vital statistics. Records or data compilations in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law. IND. R. EVID. 803(9).

140. (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the record, report, statement, or data compilation, or entry. IND. R. EVID. 803(10).

141. (11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. IND. R. EVID. 803(11).

142. (12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter. IND. R. EVID. 803(12).

143. (13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like. IND. R. EVID. 803(13). *See also* IND. R. EVID. 902(9) (self-authentication of certified domestic records of regularly conducted activity).

144. (14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office. IND. R. EVID. 803(14).

145. (15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. IND. R. EVID. 803(15).

146. *See* IND. CODE § 32-1-2-28 (1979).

147. (16) Statements in ancient documents. Statements in a document in existence thirty years or more, the authenticity of which is established. IND. R. EVID. 803(16).

*l. 803(17): Market reports, commercial publications*¹⁴⁸

IRE 803(17) is the same as FRE 803(17). This rule expands the exception under prior Indiana law.¹⁴⁹

*m. 803(18): Learned treatises*¹⁵⁰

IRE 803(18) is the same as FRE 803(18) except "that contradict the expert's testimony" does not appear in the FRE.¹⁵¹ The learned treatises exception was not recognized under prior Indiana law and practice which limited the use of such treatises to impeachment purposes.

*n. 803(19): Reputation concerning personal or family history;*¹⁵² *803(20): Reputation concerning boundaries or general history;*¹⁵³ *803(21): Reputation as to character;*¹⁵⁴ *803(22): Judgment of previous conviction*¹⁵⁵ *and 803(23): Judgment as to personal, family, or general history, or boundaries*¹⁵⁶

Each of these Indiana rules is the same as the corresponding federal rule and was not a recognized exception under prior Indiana law and practice.

o. Other Exceptions

FRE 803(24) allows the federal courts to make "other exceptions" where certain conditions are met, but there is no similar provision in the Indiana rules.

4. Rule 804: Hearsay Exceptions: Declarant Unavailable.—

*a. 804(a): Definition of unavailability*¹⁵⁷

148. (17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. IND. R. EVID. 803(17).

149. See IND. CODE § 26-1-2-724 (1993).

150. (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direction examination, statements contained in published treatises, periodicals, or pamphlets that contradict the expert's testimony on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. IND. R. EVID. 803(18).

151. This restriction in the Indiana rule significantly limits the exception.

152. (19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history. IND. R. EVID. 803(19).

153. (20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located. IND. R. EVID. 803(20).

154. (21) Reputation as to character. Reputation of a person's character among associates or in the community. IND. R. EVID. 803(21).

155. (22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. IND. R. EVID. 803(22).

156. (23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. IND. R. EVID. 803(23).

157. (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant

IRE 804(a) is the same as FRE 804(a), except FRE 804(a)(5) includes the following after "declarant's attendance": "(or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), the declarant's attendance or testimony)." This was added to the FRE by Congress and was "designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable."¹⁵⁸ By omitting this clause, it appears that Indiana will not require an attempt to depose the witness as a condition of a finding of unavailability.

This rule is generally consistent with prior Indiana law and practice, although omission of the clause referred to above might suggest a change in the requirement that a deposition be taken, at least in some circumstances, before a declarant will be found unavailable under IRE 804(a)(5).

*b. 804(b): Hearsay exceptions*¹⁵⁹

*(i) 804(b)(1): Former testimony*¹⁶⁰

IRE 804(b)(1) is the same as FRE 804(b)(1). This rule is generally consistent with prior Indiana law and practice, with the exception that former testimony is not limited to a deposition or former trial of the same case or a case involving similar issues.

*(ii) 804(b)(2): Statement under belief of impending death*¹⁶¹

Although IRE 804(b)(2) is similar to FRE 804(b)(2), FRE limits this hearsay exception to statements made under belief of impending death to prosecutions for homicide and civil actions. The new Indiana rule expands the use of dying declarations because (1) it is no longer necessary to show that the declarant has actually died (the declarant must, however, be unavailable), and (2) the exception is no longer limited to prosecutions of homicides.

*(iii) 804(b)(3): Statement against interest*¹⁶²

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement of wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. IND. R. EVID. 804(a).

158. *House Commn. on Judiciary, Fed. R. Evid., H.R. Rep. No. 650, 93d Cong., 1st Sess. 15 (1973).*

159. (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. IND. R. EVID. 804(b).

160. (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. IND. R. EVID. 804(b)(1).

161. (2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. IND. R. EVID. 804(b)(2).

162. (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or

The first sentence of IRE 804(b)(3) is the same as the first sentence in FRE 804(b)(3), but the second sentence of the Indiana rule differs from the second sentence of the FRE. Under the federal rule, a statement that exposes the declarant to criminal liability and is offered to exculpate the accused is *not* admissible absent a clear indication of trustworthiness through corroborating circumstances. In contrast, the Indiana rule only excludes from the exception a statement, made by someone other than the accused, that implicates both the maker and the accused, and is offered against the accused. Therefore, the federal rule is less friendly toward the accused in criminal cases. Indiana's new rule is generally consistent with prior Indiana law and practice.

(iv) *804(b)(4): Statement of personal or family history*¹⁶³

IRE 804(b)(4) is the same as FRE 804(b)(4). Although this rule is generally consistent with prior Indiana law and practice, the inclusion of statements by one "intimately associated with the other's family" seems to expand the scope of the exception in Indiana.

(v) *Other Exceptions*

Although FRE 804(b)(5) allows federal courts to make "other exceptions" where certain conditions are met, there is no similar provision in the Indiana rules.

5. *Rule 805: Hearsay within Hearsay.*¹⁶⁴—IRE 805 is the same as FRE 805 and is generally consistent with prior Indiana law and practice.

6. *Rule 806: Attacking and Supporting Credibility of Declarant.*¹⁶⁵—IRE 806 is the same as FRE 806. Since there does not appear to be prior Indiana authority for attacking the credibility of the declarant of a hearsay statement, this rule modifies prior Indiana law or, at least clarifies it.

I. Article IX: Authentication and Identification

1. *Rule 901: Requirement of Authentication or Identification.*¹⁶⁶—IRE 901 is

criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. 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. IND. R. EVID. 804(b)(3).

163. (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared. IND. R. EVID. 804(b)(4).

164. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. IND. R. EVID. 805.

165. When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. IND. R. EVID. 806.

166. (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter

the same as FRE 901, except for section (b)(8). The federal rule requires that an ancient document be in existence 20 years while Indiana's rule requires 30 years. This rule is generally consistent with prior Indiana law and practice.

2. *Rule 902: Self-authentication.*¹⁶⁷—Indiana Rules 902(3) - (8) are generally

in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 30 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method or authentication or identification provided by the Supreme Court of this State or by a statute or as provided by the Constitution of this State.

IND. R. EVID. 901.

167. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents. The original or a duplicate of a domestic official record proved in a manner provided by Trial Rule 44(A)(1).

(2) Foreign public documents. The original or a duplicate of a foreign official record proved in the manner provided by Trial Rule 44(A)(2).

(3) Official publications. Books, pamphlets, or other publications issued by public authority.

(4) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(5) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(6) Acknowledged documents. Original documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

the same as FRE 902(5) - (10), except that Indiana limits "acknowledged documents" (902(6)) to "original" documents. There is no federal provision comparable to Indiana Rule 902(9) & (10) providing for self-authentication of business records (both domestic and foreign). FRE 902(1) - (4) provide for authentication of public documents and records, while Indiana Rule 902(1) & (2) simply refer to Trial Rule 44(A). The Indiana rule is generally consistent with prior Indiana law and practice, with the exception of Indiana Rule 902(9) & (10), self-authentication of domestic and foreign business records, 902(4), self-authentication of newspapers and periodicals, and 902(5), self-authentication of trade inscriptions.

3. *Rule 903: Subscribing witness' testimony unnecessary.*¹⁶⁸—IRE 903 is the same as FRE 903 and is generally consistent with prior Indiana law and practice.

J. Article X: Contents of Writings, Recordings, and Photographs

1. *Rule 1001: Definitions.*¹⁶⁹—IRE 1001 is the same as FRE 1001 except

(7) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(8) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or prima facie genuine or authentic.

(9) Certified domestic records of regularly conducted activity. Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a domestic record of regularly conducted activity within the scope of Rule 803(6), which the custodian thereof or another qualified person certifies under oath (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. A record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(10) Certified foreign records of regularly conducted activity. Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a foreign record of regularly conducted activity within the scope of Rule 803(6), which 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. The record must be signed in a foreign country in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of that country, and the signature certified by a government official in the manner provided in Trial Rule 44(A)(2). The record is not self-authenticating under this subsection unless the proponent makes his or her intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

IND. R. EVID. 902.

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

169. For purposes of this Article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Indiana 1001(1) includes “sounds” in the definition of writings and recordings, and Indiana 1001(4) includes “facsimile transmission, or video tape” in the definition of a duplicate. This rule is generally consistent with prior Indiana law and practice.

2. *Rule 1002: Requirement of Original.*¹⁷⁰—IRE 1002 is the same as FRE 1002, but the exception clause of the IRE refers to “statute” while the FRE refers to “Act of Congress.” The rule is generally consistent with prior Indiana law and practice, except the prior “best evidence” rule in Indiana did not clearly include photographs (including X-rays) and recordings.

3. *Rule 1003: Admissibility of Duplicates.*¹⁷¹—IRE 1003 is the same as FRE 1003 and is generally consistent with prior Indiana law and practice.¹⁷²

4. *Rule 1004: Admissibility of other Evidence of Contents.*¹⁷³—IRE 1004 is the same as FRE 1004 and is generally consistent with prior Indiana law and practice.¹⁷⁴ Under this rule there is no hierarchy of “other evidence” and IRE 1004(3) clarifies that a request for production is not needed to invoke the rule.

5. *Rule 1005: Public Records;*¹⁷⁵ *Rule 1006: Summaries;*¹⁷⁶ *Rule 1007:*

(2) Photographs. “Photographs” include still photographs, x-ray films, videotapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an “original.”

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by facsimile transmission, or video tape or by other equivalent techniques which accurately reproduces the original.

IND. R. EVID. 1001.

170. To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. IND. R. EVID. 1002.

171. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. IND. R. EVID. 1003.

172. See *Wilson v. State*, 348 N.E.2d 90, 95 (Ind. Ct. App. 1976).

173. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, such party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and such party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

IND. R. EVID. 1004.

174. *But see* Trial Rule 9.2(E) (providing for inspection of the original when a document is filed with the pleadings).

175. The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise

Testimony or Written Admissions of Party,¹⁷⁷ and *Rule 1008: Functions of Court and Jury*.¹⁷⁸—Each of these Indiana rules is the same as the corresponding federal rule and is generally consistent with prior Indiana law and practice.

K. Article XI: Rules Committee

Rule 1101.¹⁷⁹—IRE 1101 provides for an evidence rules review committee. Much of what is found in FRE 1101—applicability of rules—is also found in IRE 101—scope. Although there is no comparable provision in the FRE designating an evidence rules committee, FRE 1102 does provide for amendments. There was no comparable committee under prior Indiana law.

of reasonable diligence, other evidence of the contents may be admitted. IND. R. EVID. 1005.

176. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. IND. R. EVID. 1006.

177. Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by a written admission, without accounting for the nonproduction of the original. IND. R. EVID. 1007.

178. Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. IND. R. EVID. 1008.

179. A. The Chief Justice of the Supreme Court of Indiana or a designated Justice shall serve as chairman of a permanent Evidence Rules Review Committee, which shall consist of the Chief Justice or a designated Justice, four state court trial judges, a federal court trial judge, a professor of law, and four practicing lawyers appointed to a four-year term by the Chief Justice.

B. The Evidence Rules Review Committee shall meet at the call of the Chief Justice or the designated Justice for the purpose of considering recommending amendments or additions to the Indiana Rules of Evidence. Amendments or additions may be as suggested by the Supreme Court of Indiana in current case law or the Indiana General Assembly through enactment of legislation. IND. R. EVID. 1101.