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Witnesses
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CHAPTER 6

WITNESSES

I. COMPETENCE - RULE 601

A. OFFICIAL TEXT:

Every person is competent to be a witness except as otherwise provided in these rules or by statute.

B. PROCEDURE FOR DETERMINING WITNESS COMPETENCE

1. Definition and test of competency

Competency is defined as "the legal or mental ability to provide testimony." Miller, 12 *Indiana Evidence* 751 § 601.101 (4th ed.). The test for competency of a witness is whether the witness has sufficient mental capacity to perceive, to remember, and to narrate an incident he has observed and understand, and to appreciate the nature and obligation of an oath. Ware v. State, 376 N.E.2d 1150 (Ind. 1978). Competency to testify as a witness is a separate issue from a witness's credibility; competency is a matter for the trial court itself to decide, whereas credibility is a question for the finder(s) of fact, e.g., the jury. Archer v. State, 996 N.E. 2d 341, 346 (Ind. Ct. App. 2013) (*citing* to Kien v. State, 866 N.E. 2d 377 (Ind. Ct. App. 2007)); See also Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001).

2. Timing of objection or raising of issue

A motion for a psychiatric examination of a witness must be made before the witness's testimony enters the record. Little v. State, 413 N.E.2d 639, 645 (Ind. Ct. App. 1980). Witness incompetency to testify cannot be established on cross-examination but must be resolved prior to witness testifying. Roller v. State, 602 N.E.2d 165 (Ind. Ct. App. 1992).

> Young v. State, 500 N.E.2d 735 (Ind. 1986) (where an objection to a witness's competence is made during trial, the court may satisfy its duty by permitting counsel to fully voir dire the witness before making a decision).

3. Burden of proof

There is a split of authority as to whether Rule 601 requires the proponent to establish competency if competency is challenged or requires the opponent of the witness to establish incompetency. See, e.g., Bellmore v. State, 602 N.E.2d 111, 117, *reh'g den.* (Ind. 1992) (there is a presumption of competency); Ware v. State, 376 N.E.2d 1150, 1151 (Ind. 1978); and Aldridge v. State, 779 N.E.2d 607 (Ind. Ct. App. 2002); but see Newsome v. State, 686 N.E.2d 868 (Ind. Ct. App. 1997) (holding that Rule 601 "does not create [a] burden-shifting presumption," following Russell v. State, 540 N.E.21d 1222 (Ind. 1989) and noting that

Bellmore pre-dates the adoption of the Indiana Rules of Evidence); Buchanan v. State, 742 N.E.2d 1018 (Ind. Ct. App. 2001), *sum. aff'd*, 767 N.E.2d 967 (Ind. 2002); Haycraft v. State, 760 N.E.2d 203 (Ind. Ct. App. 2001); and Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001).

Prior to the adoption of the Indiana Rules of Evidence, there was a clear presumption of witness competency. Gosnell v. State, 376 N.E.2d 471 (Ind. 1978). After the adoption of the Rules of Evidence, the Court of Appeals found that Rule 601 does not include a presumption of competency for all witnesses. Newsome v. State, 686 N.E.2d 868 (Ind. Ct. App. 1997). Such a presumption would preclude a trial court from making any preliminary inquiries into a witness's competency, and courts would be restricted to addressing the competency of a witness only upon one of the parties' challenges. Id.

4. Duty to ensure minimal standards of competency

Despite the plain language of Rule 601, courts are still permitted to conduct a special inquiry into the competence of a witness. Aldridge v. State, 779 N.E.2d 607 (Ind. Ct. App. 2002); Burrell v. State, 701 N.E.2d 582, 585 (Ind. Ct. App.1998). In fact, courts have an obligation to ensure that a minimal standard of competency is met by any potential witness, although courts have "great latitude in the procedure" used to determine competency. Haycraft v. State, 760 N.E.2d 203, 209 (Ind. Ct. App. 2001); Newsome v. State, 686 N.E.2d 868 (Ind. Ct. App. 1997). However, an individual defendant does not necessarily have a constitutional right to be present at the competency hearing.

> Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658 (1987) (competency hearing of two potential child witnesses held in judge's chambers with defense counsel present, but not defendant, did not deny defendant his right to confrontation or cross-examination where hearing did not address any substantive matters and defendant still had and used the opportunity to fully cross-examine each witness during the courtroom proceedings).

5. Psychiatric examination of witness

a. Procedure

When, before trial, the defendant files a sworn petition for examination of a state's witness for competency, the trial court has a duty to schedule a hearing to make an informed decision as to the witness's competency. Antrobus v. State, 254 N.E.2d 873 (Ind. 1970). If evidence during a competency hearing raises a doubt as to the witness's competency to testify, the court should order the witness to be examined by a psychiatrist unless the State can show a paramount interest in denying the petition for an examination. Hughes v. State, 546 N.E.2d 1203, 1209 (Ind. 1989); Tolbert v. State, 391 N.E.2d 823, 825-26 (Ind. 1979).

The following cases found no error in refusing to require a psychiatric examination after a competency hearing. Hughes v. State, 546 N.E.2d 1203, 1209 (Ind. 1989); Goolsby v. State, 517 N.E.2d 54 (Ind. 1987); Chadwick v. State, 362 N.E.2d 483 (Ind. 1977); and Mengon v. State, 505 N.E.2d 788 (Ind. 1987). The only case in which the trial court abused its discretion in failing to require a psychiatric examination is Antrobus v. State, 254 N.E.2d 873 (Ind. 1970).

b. Effect

Expert testimony as to a witness's competency is not conclusive upon the issue. Smith v. State, 285 N.E.2d 275 (Ind. 1972); see also State v. Kolb, 318 N.E.2d 382 (Ind. Ct. App. 1974).

6. Question for the court, not jury

Determination of competency is the responsibility of the judge, and the responsibility continues throughout trial. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658 (1987). See Rule 104(a). Rule 601 is subject to the limitations of Rule 602 (requirement of personal knowledge) and Rule 603 (oath or affirmation).

C. PERSONS INCOMPETENT BY STATUTE

When the Indiana Rules of Evidence were adopted, Rule 601 incorporated existing Indiana statutory law rendering certain persons incompetent to testify.

1. Insane persons

"Except as otherwise provided by statute, persons who are insane at the time they are offered as witnesses are not competent witnesses, whether or not they have been adjudged insane." Ind. Code 34-45-2-2. See Antrobus v. State, 254 N.E.2d 873 (Ind.1970). A person who is affected with mental illness or who has previously been adjudged insane may be a competent witness depending entirely upon his or her mental condition as determined by the court at the time of trial. Grecco v. State, 166 N.E.2d 180 (Ind. 1960), *reh. den.*, *cert. den.*; Crider v. Crider, 635 N.E.2d 204, 214 (Ind. Ct. App. 1994); Young v. State, 500 N.E.2d 735 (Ind. 1986).

a. Plea of insanity

A plea of insanity by a witness in another criminal case does not render the witness incompetent to testify where there is other evidence that the witness is legally sane. Chadwick v. State, 362 N.E.2d 483, 485 (Ind. 1977).

b. Civil Commitment

Fact that witness is civilly committed at psychiatric hospital at time testimony offered is relevant to issue of competence, but not conclusive. Wallace v. State, 426 N.E.2d 34 (Ind. 1981).

Morris v. State, 360 N.E.2d 1027 (Ind. Ct. App. 1977) (witness testified while committed to a mental hospital).

Young v. State, 500 N.E.2d 735 (Ind. 1986) (no error in finding witness competent to testify despite fact that witness had been released from mental institution two years before being offered as witness).

c. Psychiatric therapy

Thorton v. State, 653 N.E.2d 493 (Ind. Ct. App. 1995) (complaining witness with six different personalities was not incompetent to testify due to "integration therapy"; there was no evidence that therapy methods caused the witness to fill in memory gaps with fantasy).

2. The "Dead Man's Statutes"

Ind. Code 34-45-2-4 *et. seq*., apply only to certain civil suits, where they "prevent false claims against an estate by sealing the lips of a surviving party when the lips of the other party have been sealed by death." Given v. Cappas, 486 N.E.2d 583 (Ind. Ct. App. 1985).

PERSONS INCOMPETENT BY CASE LAW

3. Age: Children

The former statute regarding competence of children under ten years of age was repealed in 1990. Now, all children, regardless of age, are presumed competent to testify. To be qualified to testify, a child need not be model witness, have an infallible memory, or refrain from making inconsistent statements. Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991).

However, when competency is questioned, a child must demonstrate to the court that he can meet the same standard of competency as any witness, which is that he: (1) understands the difference between telling the truth and telling a lie, (2) knows he is under compulsion to tell the truth, and (3) knows what a true statement actually is. Newsome v. State, 686 N.E.2d 868, 870 (Ind. Ct. App. 1997); Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991). There is a split in authority as to whether it is the opponent's burden of proving incompetency or the proponent's burden of proving competency. Aldridge v. State, 779 N.E.2d 607 (Ind. Ct. App. 2002) (disagreeing with the holding in Newsome, *supra,* and Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001), that the proponent must prove competency, and holding that contrary, i.e., that the opponent must prove the child incompetent).

D.G. v. State, 947 N.E.2d 445 (Ind. Ct. App. 2011) (trial court erred by not assessing competency of a six-year-old complaining witness before allowing her to testify about being molested by a teenage boy).

Proving that a child knows what a true statement is cannot be satisfied by a flat statement such as: "I know what the truth is," but can be satisfied by asking the child to give example of someone telling a lie. Newsome, 686 N.E.2d at 870.

Newsome v. State, 686 N.E.2d 868, 870 (Ind. Ct. App. 1997) (although child stated she would be punished for telling lie, she did not provide any examples of the difference indicating she truly understood difference between telling truth and lie; thus, prosecutor failed to lay foundation for testimony and trial court erred in finding child competent; however, error was harmless because subsequent testimony established competency). See also Howard v. State, 816 N.E.2d 948 (Ind. Ct. App. 2004), *rev'd on other grounds,* 853 N.E.2d 461.

Haycraft v. State, 760 N.E.2d 203 (Ind. Ct. App. 2001) (child witness' statement that he would be punished for telling a lie was insufficient, by itself, to establish competency, but was valuable in determining whether the child understood the difference between truth and a lie).

Buchanan v. State, 742 N.E.2d 1018 (Ind. Ct. App. 2001) (through examples and understanding that lies lead to punishment, State demonstrated six-year-old knew difference between truth and lie), *sum. aff'd*, 767 N.E.2d 967 (Ind. 2002).

Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991) (in a bench trial where the judge was both the trier of fact and law, trial court did not abuse its discretion in finding three-year-old competent).

Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001) (fact that child's testimony at trial could be interpreted as ambiguous goes to child's credibility, not his competency).

Aldridge v. State, 779 N.E.2d 607 (Ind. Ct. App. 2002) (defendant failed to show that five and six-year-old children could not distinguish between the truth and a lie or that they did not understand the need to tell the truth at trial and were therefore incompetent to testify).

Harris v. Thompson, 698 F.3d 609 (7th Cir. 2012) (trial court erred in excluding a six-year-old child as incompetent merely because the child stated that he believed in Santa Claus and Spiderman; "[a] child's belief in Santa Claus and Spiderman does not make the child's testimony about his real-life experiences unreliable").

4. Mental retardation

Test of competency is whether witness has sufficient mental capacity to perceive, to remember and to narrate the incident observed and to understand and appreciate the nature and obligation of an oath. Stafford v. State, 455 N.E.2d 402 (Ind. Ct. App. 1983).

Stafford v. State, 455 N.E.2d 402 (Ind. Ct. App. 1983) (25-year-old victim with mental age of six or seven-year-old child was competent due to report filed by two court-appointed psychiatrists, including examiner's expert opinion that she had "mental capacity to understand oath as she equates this to telling a lie").

Ware v. State, 376 N. E. 2d 1150 (Ind. 1978) (complaining witness had a chronological age of 28 but according to her psychiatrist, had a mental age between 7 and 9; she was found competent to testify based on her psychiatrist's testimony and trial court's questioning of the witness.)

5. Intoxication and drug use

Witness is not incompetent to testify solely because he is under influence of narcotics at the time of testimony, unless drug ingestion causes impairment of one of the traditional, essential elements of competency. Boyko v. State, 566 N.E.2d 1060, 1063 (Ind. Ct. App. 1991).

Jones v. State, 445 N.E.2d 92 (Ind. 1983) (witness's intoxication at time of incident about which he is to testify went to his credibility, not his competency).

D. INCOMPETENCY BY RULE

1. Judge in case

See Rule 605 (Competency of judge as witness).

McDonald v. State, 775 N.E.2d 1195 (Ind. Ct. App. 2002) (defendant's right to due process was not violated when trial court permitted bailiff to testify at trial, held in absentia, because bailiff was not key witness who identified photo as the defendant and his testimony was cumulative of other evidence).

2. Juror in case

See Rule 606 (Competency of juror as witness).

3. Privileges

See also Rule 501, Privileges.

E. COMPETENCE ESTABLISHED BY CONSTITUTION

"No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion." Indiana Constitution, Article 1, Section 7; Ind. Code 34-45-2-12.

F. EFFECT OF INCOMPETENCE FINDING

1. Incompetent witness "unavailable"

A person who is found incompetent is "unavailable as a witness" under Rule 804(a)(4). See, e.g., Gregory v. North Carolina, 900 F.2d 705, 707, n.6 (4th Cir. 1990), *cert. den*. 498 U.S. 879. However, a witness declared incompetent may regain competency and testify. Bonham v. State, 644 N.E.2d 1223 (Ind. 1994). Moreover, statements made while the witness was competent may be admissible. Id.

2. Defendant's rights may override rule

The State may not arbitrarily deny a criminal defendant the right to present witnesses whose testimony would be relevant and material to the defense. Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925 (1967) (statute which disqualified alleged accomplices from testifying on behalf of defendants in criminal cases violated 6th Amendment rights to compulsory process and to present evidence).

II. REQUIREMENT OF PERSONAL KNOWLEDGE - RULE 602

A. OFFICIAL TEXT:

A witness may testify to a matter only if 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 consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

B. PERSONAL KNOWLEDGE MUST BE SHOWN BEFORE WITNESS TESTIFIES

1. Foundational requirement

Rule 602 creates a foundational requirement for a witness to testify. Prior Indiana law held that a witness took the stand clothed with the presumption that he had personal knowledge of the facts to which he was testifying. Miller, 12 *Indiana Evidence* 79 § 602.101 n.4 (4th ed.); see, e.g., Ross v. State, 9 Ind. App. 35, 36 N.E. 167, 169 (1894).

2. Threshold of admissibility

The threshold of admissibility is very low. The proponent of the witness's testimony need only present evidence "sufficient to support a finding" that the witness has personal knowledge of the matter. This issue is for the court under Rule 104(b). In practice, the proponent of the evidence will often go "far beyond the minimal showing needed to satisfy Rule 104(b)," since the jury's evaluation of the testimony "might turn on whether the jury is convinced that the witness accurately observed the event in question...." Imwinkelried, *Evidentiary Foundations*, § 3.03[1] (9th Ed. 2015).

Dunn v. State, 919 N.E.2d 609 (Ind. Ct. App. 2010) (Defendant's girlfriend's voicemail message to victim that Defendant acted out of jealousy when he hit victim was based on personal knowledge even though girlfriend testified, she did not see Defendant hit victim; other witnesses testified she saw the incident and tried to stop Defendant. ("Evidence of personal knowledge *may*, *but need not, consist of testimony of the witness*." Rule of Evid. 602)).

Baran v. State, 639 N.E.2d 642 (Ind. 1994) (officer's inability to remember every detail of facts leading up to motorist's arrest went only to weight, and not to admissibility).

Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (witness' testimony that she told Defendant on day his girlfriend's body was discovered that he should go to girlfriend's home or "they would assume he did it," did not violate Rule 602; witness did not testify as to what "they" actually thought, but only to fact that she told Defendant others might be suspicious).

"Unless the evidence clearly shows that the witness does not have [personal] knowledge, the witness's assertion of personal knowledge ordinarily will suffice to admit the testimony and to permit the trier of fact to evaluate the weight to be given to the testimony." Miller, 12 *Indiana Evidence* 798-99 § 602.102 (4th ed.).

3. Hypnosis

a. General rule

A witness does not have personal knowledge of a matter remembered only during or after hypnosis. This preserves prior Indiana case law. Miller, 12 *Indiana Evidence* 799 § 602.103 (4th ed.). However, the fact that a witness has undergone hypnosis does not make the witness incompetent to testify to all matters, but only regarding matters revealed through hypnosis. Forrester v. State, 440 N.E.2.d 475 (Ind. 1982).

b. Exceptions

(1) Defendant's right to testify

A defendant's right to testify in his or her own behalf under the U.S. Constitution takes precedence over the Rule 602 prohibition on hypnotically enhanced testimony. Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 2714 (1987). The Indiana Constitution, Article 1, Section 13 also gives the defendant an express "right to be heard."

(2) Defendant's right to present witnesses

"[W]hen a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet fundamental standards of due process." State v. Walton, 692 N.E.2d 496, 402 (Ind. Ct. App. 1998) (*quoting* Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704 (1987)); Chambers v. Mississippi 410 U.S. 284, 93 S. Ct. 1038 (1973)).

Note: Post-hypnotic testimony may be admissible to establish probable cause for arrest. Gentry v. State, 471 N.E.2d 263, 267 (Ind. 1984).

C. USING RULE 602 TO EXCLUDE EVIDENCE AND TO LIMIT ITS IMPACT

1. BEFORE the evidence comes in

a. Object before the testimony, on the grounds that

(1) the prosecutor has not presented evidence sufficient to show that the witness has personal knowledge of the subject of the question, or;

(2) that from the evidence already presented, the witness has been clearly shown NOT to have personal knowledge of the subject of the question.

b. Or ask the court for permission to use preliminary questions to show that the witness could not have personally perceived the matters in question.

(1) This examination may be permissible in order to support an objection under Rule 602 to letting the witness testify at all.

(2) Even if the witness is permitted to testify, an appropriate "pre-cross" may limit the impact of the witness's testimony.

2. AFTER the testimony comes in

If it becomes clear later (i.e., during cross-examination) that a witness lacks the personal knowledge he previously claimed, move to strike the testimony. Miller, 12 *Indiana Evidence* 679 § 602.101 (4th ed.); Kemp v. Balboa, 23 F.3d 211, 213 (8th Cir. 1994). If it was impossible to know the witness lacked personal knowledge prior to his testimony, then there was no opportunity to timely objection and waiver should not apply. Johnson v. State, 278 N.E.2d 577, 580 (Ind. 1972). It is similar to conditionally admitted evidence. See, e.g., Ind. R. Evid. 104(b).

D. EXCEPTIONS

1. Expert opinion testimony

Expert opinion testimony, as defined in Rule 702, need not be based on the witness's personal perceptions. Rule 602; Rule 703.

Whitham v. State, 49 N.E.3d 162, 167 (Ind. Ct. App. 2015) (doctors can base opinions on photos of person even without personal knowledge).

2. Admission of party-opponent

Admissions of party-opponent under Rule 801(d)(2) need not be based on personal knowledge. Miller, 13 *Indiana Evidence* 270 § 801.416 (4th ed.).

3. Family history

If the declarant is unavailable as a witness, statements of the declarant's own personal or family history are not excluded by the hearsay rule even though the declarant has no personal knowledge of the matter stated. Rule 804(b)(4)(A); Miller, 13 *Indiana Evidence* 502 § 804.204 (4th ed.).

Note: Read literally, Rule 804(b)(4)(A) would merely limit the operation of the hearsay rule (Rule 802) and would not affect the operation of Rule 602. Curiously, Rule 602 does not mention Rule 804(b)(4)(A), although it does expressly mention Rule 703, another rule which similarly limits its operation.

4. Testimony as to age

A witness is competent to testify to his own age. The source of such knowledge shall be presumed valid unless otherwise established on cross examination or by preliminary

questions. Kelly v. State, 280 N.E.2d 55, 56 (Ind. 1972); Miller, 13 *Indiana Evidence* 505 § 804.204 (4th ed.).

E. VERIFIED PLEADINGS AND AFFIDAVITS AS EVIDENCE; TRIAL RULE 11

Verified motions, pleadings, or affidavits may be worded to expressly state that the signer has personal knowledge of the facts or matters alleged therein. Trial Rule 11(C). Otherwise, the signer of an affidavit is considered to represent that he either has personal knowledge or "reasonable cause to believe the existence of the facts or matters stated or alleged therein..." Trial Rule 11(C). Affidavits upon motions for summary judgment under Trial Rule 56 and in denial of execution under Trial Rule 9.2 shall be made upon personal knowledge. Trial Rule 11(C); see also City of Indianapolis v. Ervin, 405 N.E.2d 55, 64 (Ind. Ct. App. 1980).

F. HEARSAY- RULE 803

Personal knowledge is expressly or impliedly part of the foundational requirement for several of the hearsay exceptions under Rule 803. Miller, 13 *Indiana Evidence* 334-452 § 803.100 *et. seq.* (4th ed.). Below are a few examples.

Rule 803(1), Present sense impression (statement must have been made "while or immediately after the declarant perceived the event, condition, or transaction"). See Bemis v. Edwards, 45 F.3d 1369, 1373 (9th Cir. 1995).

Rule 803(5) Recorded recollection ("A record that is on a matter the witness once knows about but now cannot recall well enough to testify fully and accurately...") See Ricciardi v. Children's Hospital Medical Center, 811 F.2d 18, 23 (1st Cir. 1987).

Rule 803(6) Records of regularly conducted activity ("made at or near the time by-- or from information transmitted by--someone with knowledge...") See D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995).

Perry v. State, 541 N.E.2d 913, 918 (Ind. 1989) (when the entrant's identity is uncertain, personal knowledge may be shown by circumstantial evidence).

III. OATH OR AFFIRMATION - RULE 603

A. OFFICIAL TEXT:

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

B. REQUIREMENT OF OATH OR AFFIRMATION

1. Constitutional requirement

"The mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such oath or affirmation may be administered." Ind. Const, art. 1, § 8.

2. Statutory requirement

"Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered." Ind. Code 34-45-1-2 (formerly Ind. Code 34-1-14-2), governs proceedings where the Indiana Rules of Evidence are inapplicable under Rule 101(a)).

3. Affirmation in lieu of oath

A witness can elect to be affirmed rather than sworn. In construction of Indiana statutes, the term "oath" includes "affirmation" and "to swear" includes "to affirm." Ind. Code 1-1-4-5(16).

Federal Rule 610 bars inquiry, by the court or counsel, into why a witness chooses to affirm rather than to be sworn. U.S. v. Kaylaydjian, 784 F.2d 53, 56-57 (2d Cir. 1986).

4. Form of oath in verified pleadings

In criminal cases, including indictments, informations, probable cause affidavits, motions, etc.: Ind. Code 35-34-1-2.4(a). In civil proceedings, T.R. 11(B).

5. Interpreters

See Rule 604; Ind. Code 34-45-1-5.

C. SUFFICIENT ADMINISTRATION OF OATH

Rule 603 allows the use of either the statutory oath or another oath or affirmation designed to impress the duty to testify truthfully on the witness's conscience. No particular form of oath is required, and the form may be applied flexibly so as to be meaningful to children and mentally impaired witnesses. 13 Miller, *Indiana Evidence* 806 § 603.101 (4th ed.); see also Perry v. State, 524 N.E.2d 316, 317 (Ind. 1988) (explaining that it is not a "realistic approach" to give a child an

adult oath because that would not show "whether a small child understands that he is to tell the truth"). Whether a witness has sufficiently declared by oath or affirmation to testify truthfully is a determination to be made by the trial court. 13 Miller, *supra*, 807 § 603.101.

Saylor v. State, 55 N.E.3d 354 (Ind. Ct. App. 2017) (judge adequately administered oath by determining whether 12-year-old complaining witness could distinguish between the truth and a lie).

D. REFUSAL TO TAKE OATH, CONTEMPT

Ind. Code 34-47-2-2 provides that a person who is required by any court to be sworn in any trial or proceeding, and refuses to take an oath or affirmation, is guilty of a direct contempt of court.

U.S. v. Zizzo, 120 F.3d 1338 (7th Cir. 1997) (witness's testimony that oath to testify truthfully meant nothing to witness did not require exclusion of his entire testimony by rendering him an unsworn witness because witness took oath to tell truth, acknowledged trial court's admonishments that he was under oath, and was aware of consequences of perjury).

E. WAIVER

When there is no objection to failure to swear witness, any error is waived. Sweet v. State, 498 N.E.2d 924 (Ind. 1986); Griffith v. State, 898 N.E.2d 412, 414-15 (Ind. Ct. App. 2008). However, it is prejudicial error for the trial court to knowingly refuse to swear in a witness presented to testify when requested to do so. Tomlin v. State, 215 N.E.2d 190 (Ind. 1966).

F. PERJURY DEFINED

Ind. Code 35-44.1-2-1(a) "A person who: (1) makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true; or (2) has knowingly made two (2) or more material statements, in a proceeding before a court or grand jury, which are inconsistent to the degree that one (1) of them is necessarily false; commits perjury, a Level 6 felony..."

IV. INTERPRETERS - RULE 604

A. OFFICIAL TEXT:

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

B. QUALIFICATIONS OF THE INTERPRETER

Due to the importance of the interpreter's function, establishment of interpreter's qualifications and administration of an oath or affirmation is necessary. Mariscal v. State, 687 N.E.2d 378 (Ind. Ct. App. 1997).

1. Must qualify as expert

Rule 604 requires an interpreter to qualify as an expert within the meaning of Rule 702. Thus, the interpreter must have specialized knowledge in the language or particular form of communication sufficient to assist the trier of fact to understand the evidence. See Rule 702.

The Indiana Court of Appeals has suggested a list of questions to qualify an interpreter: (1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did you learn English? (4) How did you learn [the foreign language]? (5) What was the highest grade you completed in school? (6) Have you spent any time in the foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court? (9) Have you interpreted for this type of hearing or trial before? To what extent? (10) Are you a potential witness in this case? (11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? (14) Are you familiar with the dialect or idiomatic peculiarities of the witnesses? Angeles v. State, 751 N.E.2d 790 (Ind. Ct. App. 2001).

2. Must take oath

The interpreter must take an oath to make a true translation. Form of oath at Ind. Code 34-45-1-5: "Do you solemnly swear (or affirm) that you will justly, truly, and impartially interpret to _____ the oath about to be administered to him (her), and the questions which may be asked him (her), and the answers that he (she) shall give to such questions, relative to the cause now under consideration before this court so help you God (or under the pains and penalties of perjury)?" Angeles v. State, 751 N.E.2d 790 (Ind. Ct. App. 2001); See also Indiana Interpreter Code of Conduct and Procedure III-8.

3. Failure to object

The right to inquire into an interpreter's qualifications may be waived by failure to object. Mariscal v. State, 687 N.E.2d 378 (Ind. Ct. App. 1997) (defense counsel affirmatively consented to the particular interpreter used). The right to have an interpreter sworn may be waived by failure to object. Id.; United States v. Miller, 806 F.2d 223, 224 (10th Cir.1986).

C. RELATED ISSUES

1. Non-English-speaking criminal defendants

Whenever a trial court is put on notice that a defendant has a significant language difficulty, the court shall determine whether an interpreter is needed to protect the defendant's due process rights. A trial court is put on notice of a potential language barrier when a defendant manifests significant language difficulty or when an interpreter is specifically requested. The decision as to whether an interpreter is needed should be based on factors such as the defendant's understanding of spoken and written English, the complexity of proceedings, issues, and testimony, and whether, considering those factors, the defendant will be able to participate effectively in his defense. Nur v. State, 869 N.E.2d 472 (Ind. Ct. App. 2007).

Nur v. State, 869 N.E.2d 472 (Ind. Ct. App. 2007) (fact that defendant is originally from a foreign country, or speaks primarily a native language other than English, does not automatically put court on notice that he might have a significant language difficulty).

a. Rights involved

"The interpreter is necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one's accusers, and the right to counsel." Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989). "A criminal defendant is denied due process when the accuracy and scope of a translation at a hearing or trial is subject to grave doubt." Id; United States v. Cirrincione, 780 F.2d 620 (7th Cir.1985). Ensuring competent interpretation services is "an essential component of a functional and fair justice system." ABA, *Standards for Language Access in Courts* (February 2012).

Ponce v. State, 9 N.E.3d 1265 (Ind. 2014) (guilty plea to two counts of delivering cocaine was not knowing, intelligent and voluntary because the Spanish translation of defendant's rights under Boykin v. Alabama was inaccurate and "wholly inadequate"; it does not matter that defendant said he understood the translated advisements because this establishes only that he understood an inaccurate translation of his rights).

Diaz v. State, 775 N.E.2d 1212 (Ind. Ct. App. 2002) (case was remanded for fact-finding, where non-English speaking defendant was tried *in absentia* but the record was silent on whether he was assisted by an interpreter or was otherwise able to understand the proceedings at the pretrial conference setting the trial date).

State v. Calderon, 13 P.3d 871 (Kan. 2000) (trial court's order that translator who had been provided to defendant during evidentiary portions of trial cease working before closing arguments violated the defendant's right to be present and not subjected to the harmless error analysis).

b. Public expense

There are two types of interpreters: a proceedings interpreter to translate non-English testimony and a defense interpreter for the benefit of a non-English speaking defendant. Trial courts must always provide a court-funded proceedings interpreter, but solvent

criminal defendants who need a defense interpreter are not entitled to a court-funded defense interpreter. Arrieta v. State, 878 N.E.2d 1238 (Ind. 2008). It is an open question whether trial courts need to supply two interpreters, or if a proceedings interpreter may also serve as the defense interpreter for indigent defendants. Id.

c. Simultaneous translation

"An indigent defendant who cannot speak or understand English has a right to have his proceedings simultaneously translated to allow for effective participation." Martinez Chavez v. State, 534 N.E.2d 731, 736 (Ind. 1989); United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir.1970) (defendant's right to confrontation denied, and other rights endangered, by absence of simultaneous translation during trial).

d. Non-witness interpreters

Although Rule 604 logically applies only when an interpreter assists the trier of fact, an interpreter functioning solely to translate court proceedings to a party must still be qualified and sworn. Mariscal v. State, 687 N.E.2d 378 (Ind. Ct. App. 1997).

2. Appearance of interest or favor

A court-appointed interpreter should be free from any appearance of interest or favor toward either side of the case.

a. Police officers

Because a person acting as an interpreter in a criminal proceeding should be entirely free from any suspicion of interest in conviction or acquittal, it is improper for an arresting officer to act in the role of interpreter for the court. Bielich v. State, 189 Ind. 127, 126 N.E. 220 (1920) (vacating a guilty plea which was entered through a police officer interpreter); see 32 ALR 5th 149.

b. Family members

PRACTICE POINTER: Beware of the "interpreter" who is also a family member or who has a pre-existing personal or professional relationship to the witness as a helper, advocate, or friend. Problems that may arise include: 1. The witness may have already given the interpreter a summary, or the entirety, of their planned testimony before arriving at court and the in-court translation may conform more to the witness's out-of-court statements than to the in-court testimony. 2. The interpreter/advocate may have some personal knowledge of the subject of the testimony and may allow it to affect the translation. 3. The interpreter may attempt to influence the outcome of the proceedings by making a false translation.

c. Involvement in case

An interpreter's participation in an interview with the prosecutor and State's witnesses before trial and without defense counsel present does not create the appearance of partiality. Ozuna v. State, 703 N.E.2d 1093, 1099 (Ind. Ct. App. 1998).

In fact, an interpreter's testimony concerning American Sign Language, the nature of signing, and the interpreter's limited experiences with the victim for whom she would be interpreting did not deny the defendant an unfair trial because the interpreter also testified that she was impartial and not an advocate. Baltimore v. State, 878 N.E.2d 253 (Ind. Ct. App. 2007).

V. COMPETENCY OF JUDGE AS WITNESS - RULE 605

A. OFFICIAL TEXT:

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

B. TRIAL JUDGE BARRED FROM TESTIFYING

1. Other "witness-like" conduct by trial judge

Rule 605 also bars certain other "witness-like" conduct by a trial judge, *Committee Commentary*, Rule 605, Burns Ind. I.R.E. 605 (1998). Where a judge does not formally testify but may do so in a "less overt" way, the proper question is whether the judge's statement was merely a "fair comment" that summarized the evidence or whether it added to the evidence. Ferguson v. State, 40 N.E.3d 954 (Ind. Ct. App. 2015). For example:

a. Engaging in off-the-record fact gathering, Lillie v. U.S., 953 F.2d 1188, 1191 (10th Cir. 1992) (findings of fact relied in part on an unannounced personal view of an accident scene).

b. Relying on personal experience or knowledge to support the taking of judicial notice. See Rule 201; U.S. v. Lewis, 833 F.2d 1380, 1385 (9th Cir.1987).

c. Commenting that the judge knows a declarant to be an honorable person, Furtado v. Bishop, 604 F.2d 80, 90 (1st Cir. 1979), *cert. den.,* 444 U.S. 1035 (1980).

2. No objection necessary

As stated in the plain language of the rule, no objection is necessary to preserve a Rule 605 issue.

3. Statements of law by judge

Statements of law by the judge do not conflict with Rule 605.

> U.S. v. Maceo, 947 F.2d 1191, 1200 (5th Cir. 1991) (judge interrupted defense counsel during cross-examination to correct the attorney's misstatement of the law of plea bargains; Court held this not to be error because the judge did not testify to any fact at issue in the case, but merely corrected a point of law).

4. Jury instructions

Jury instructions are not implied testimony. U.S. v. Sanchez, 790 F.2d 245, 252 (2d Cir. 1986).

> Ferguson v. State, 40 N.E.3d 954 (Ind. Ct. App. 2015) (trial judge did not impermissibly testify when she, while admonishing jury to disregard police officers' statements about complaining witness's veracity, characterized the officers' views as "heartfelt").

C. OTHER RELEVANT LAW

1. Subsequent proceedings

Rule 605 does not apply to subsequent proceedings in which the judge does not preside; Indiana common law governs this situation. Rule 101(a); *Committee Commentary*, Rule 605, Burns Ind. I.R.E. 605 (1998). A judge may testify about matters occurring in former trials in which he presided. State v. Hindman, 159 Ind. 586, 65 N.E. 911 (1903); Cornett v. Johnson, 571 N.E.2d 572 (Ind. Ct. App. 1992).

2. When judge is a material witness

A judge should disqualify himself when, to the judge's knowledge, he is likely to become a material witness in the matter. Code of Judicial Conduct, Canon 3(E)(1)(d)(iv); see Miller, 12 *Indiana Evidence* 821-22 § 605.101 n.4 (4th ed.). Compare Rule 605, which makes no distinction between "material" and "immaterial" matters. *Committee Commentary*, Burns Ind. I.R.E. 605 (1998).

3. Appearance of bias, prejudice or partiality

A presiding judge who violates Rule 605 most likely will also create an appearance of bias, prejudice, or partiality which could support a motion for change of judge. See Indiana Criminal Rule 12(B).

VI. COMPETENCY OF JUROR AS WITNESS - RULE 606

A. OFFICIAL TEXT:

(a) **At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) **During an Inquiry into the Validity of a Verdict or Indictment.**

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) any juror's drug or alcohol use;

(B) extraneous prejudicial information was improperly brought to the jury's attention;

(C) an outside influence was improperly brought to bear on any juror; or

(D) a mistake was made in entering the verdict on the verdict form.

B. TESTIFYING IN TRIAL: RULE 606(a)

Rule 606(a) prohibits a juror from testifying before the jury in the trial of the case in which the juror is sitting. This is a very narrow and rarely encountered exception to the general rule of competency set forth in Rule 601. Miller, 12 *Indiana Evidence* 830-31 § 606.101 (4th ed.).

1. Prospective jurors as witnesses

a. Cannot be seated

The trial court must sustain a challenge for cause against any person called as a prospective juror who has been subpoenaed in good faith as a witness in the same case and against any juror related within the fifth degree to any witness subpoenaed in the case. Ind. Jury Rule 17(a)(6) and (9). The defendant's rights to present evidence and to compulsory process should support a challenge for cause on any prospective juror if it becomes apparent during voir dire that the person has relevant and material evidence. See Rule 601; see generally Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925 (1967) (State may not arbitrarily deny a criminal defendant the right to present witnesses whose testimony would be relevant and material to the defense).

b. If not seated, can testify

A member of the venire who was not actually seated on the jury is not automatically precluded from testifying by Rule 606(a). U.S. v. Kills Enemy, 3 F.3d 1201, 1204 (8th Cir. 1993), *cert. den*. 510 U.S. 1138 (1994).

2. Preservation of record

A party who wishes to oppose the calling of a juror as a witness shall be allowed to object outside the jury's presence. Rule 606(a).

C. TESTIFYING IN POST-VERDICT PROCEEDINGS: 606(b)

1. Jurors' incompetent as witnesses as to "internal matters"

Under Rule 606(b), jurors are incompetent witnesses in inquiry into the validity of a verdict or indictment, whether by testimony or affidavit, as to 'internal' matters." Miller, 12 *Indiana Evidence* 840-47 § 606.205 (4th ed.); see Godby v. State, 736 N.E.2d 252, 256 n.4 (Ind. 2000). This includes:

a. Any incident or statement occurring during the jury's deliberations

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (use of juror affidavit, indicating that jurors made "comments during trial about physical characteristics" of defense counsel and the prosecutors, was an impermissible attempt to impeach the verdict under Rule 606(b)).

Robinson v. State, 720 N.E.2d 1269 (Ind. Ct. App. 1999) (juror's affidavit stating that jury, contrary to instructions, considered defendant's failure to testify as evidence of guilt was an improper invitation to step inside the head of each juror).

b. The effect of anything on that juror's, or any other juror's vote

Johnson v. State, 700 N.E.2d 480 (Ind. Ct. App. 1998) (juror's post-verdict affidavit that other jurors psychologically coerced her to vote guilty violated 606(b)).

Griffin v. State, 754 N.E.2d 899 (Ind. 2001) (although testimony that there was extraneous prejudicial information or outside influences can be considered, testimony concerning the effect extraneous prejudicial or outside influences had on the juror was not to be considered by court).

c. The juror's mental processes concerning the verdict or indictment

2. Impeaching and supporting a verdict

Rule 606(b) makes no distinction between testimony impeaching, and testimony supporting, a verdict. "Accordingly, Rule 606(b) precludes jurors' testimony and affidavits that would tend to support the verdict, as well as that which would impeach." Miller, 12 *Indiana Evidence* 852-53, § 606.210 (4th ed.).

Palilonis v. State, 970 N.E.2d 713, 724 (Ind. Ct. App. 2012) ("[juror's] motive for coming forward was that she did not feel like Palilonis was guilty…which is exactly what

our Supreme Court warned would happen if juror were allowed to impeach their verdicts.").

Warger v. Shauers, 574 U.S. 40, 135 S. Ct. 521 (2014) (a party may not use Fed. R. Evid. 606(b) to secure a new trial by introducing evidence from a juror that another juror lied during voir dire).

PRACTICE POINTER: If the State files a counter-affidavit of a juror who claims the extraneous information or outside influence did not affect the outcome of their deliberations, move to strike the affidavit. This testimony is outside of the exceptions set forth in Rule of Evidence 606(b). See Griffin v. State, 754 N.E.2d 899 (Ind. 2001).

3. Exception - Sixth Amendment allows impeachment of verdicts based on racial animus or stereotypes

Notwithstanding Ind. Evidence Rule 606(b), where a juror relies on racial stereotypes or animus to convict a defendant, the normal prohibition against impeaching a verdict should be set aside, and trial court may consider evidence regarding the juror's discriminatory statement to decide if the Sixth Amendment right to jury trial has been violated.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (Colorado courts erred when they found that a jury's verdict convicting defendant of harassment and unlawful sexual contact could not be reviewed under Colo. R. Evid. 606(b), even though a juror told other jurors he believed defendant was guilty because, in his experience as a former law enforcement officer, "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women"; Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar; to qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict).

4. Exceptions-- external matters

A juror may testify to "external matters." Miller, 12 *Indiana Evidence* 845, 847-52 § 606.205 (4th ed.). This includes:

a. Drug or alcohol use by any juror

Indiana Rule 606(b) expressly permits a juror to testify about drug or alcohol use by any juror. *Contra* Federal Evid. Rule 606(b) (not containing this exception); Tanner v. U.S., 483 U.S. 107, 122, 107 S. Ct. 2739, 2748 (1987) (voluntary alcohol use by jurors is not an 'outside influence').

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (evidence that a juror consumed alcohol while the jury was sequestered, but not during deliberations, did not require reversal where defendant was unable to show actual prejudice).

Use of alcohol during deliberations renders a verdict invalid per se. Schultz v. Valle, 464 N.E.2d 354 (Ind. Ct. App. 1984); but see Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (focus is whether the jury was free from the influence of alcohol during actual deliberations).

b. Extraneous prejudicial information

Whether extraneous prejudicial information was improperly brought to the jury's attention.

Davis v. State, 770 N.E.2d 319, 325 n. 4 (Ind. 2002) (testimony concerning whether three jurors saw the defendant in restraints and their knowledge of an alleged bomb threat from defendant's family involved extraneous information and outside influences). See also Sherwood v. State, 784 N.E.2d 946 (Ind. Ct. App. 2003).

Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000) (jurors' use of the admitted two-foot-long wooden rod used to beat the victim to death, to beat a leather chair fifty times based on the pathologist's testimony was not an improper extra-judicial experiment). See also Patterson v. State, 742 N.E.2d 4 (Ind. Ct. App. 2000); Pattison v. State, 958 N.E.2d 11 (Ind. Ct. App. 2011).

Franklin v. State, 533 N.E.2d 1195 (Ind. 1989) (evidence of prior unrelated criminal conviction which accidentally made it to the jury room was extraneous prejudicial information which required a new trial). See also Schlabach v. State, 842 N.E.2d 411 (Ind. Ct. App. 2006).

Isaacs v. State, 673 N.E.2d 757 (Ind. 1996) (juror who relayed her personal experience as rape victim during deliberations did not interject extraneous information; although there may be instances where juror has specific knowledge whose use during deliberations undermines adversary system, this is not one of them).

c. Outside influence

Whether any outside influence was improperly brought to bear upon any juror. A juror "may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind." Harrison v. State, 575 N.E.2d 642, 647 (Ind. Ct. App. 1991) (*quoting* Mattox v. U.S., 146 U.S. 140, 149, 13 S. Ct. 50, 52-53 (1892)).

Kelly v. State, 555 N.E.2d 140 (Ind. 1990) (new trial required due to outside influence of half the jurors eating lunch with State's sole witness during recess in one-day trial, despite fact there was no evidence that they discussed case).

Saperito v. State, 490 N.E.2d 274 (Ind. 1986) (juror going to scene is an outside influence).

Griffin v. State, 754 N.E.2d 899 (Ind. 2001) (alternate juror who commits misconduct by participating in deliberations is an 'outside influence' within the meaning of Rule 606(b), and jurors' affidavits that the alternate juror expressed an opinion during deliberations about the defendant's guilt are admissible). See also Sanchez v. State, 794 N.E.2d 488 (Ind. Ct. App. 2003).

Wahl v. State, 51 N.E.3d 113 (Ind. 2016) (erroneous denial of motion for mistrial based on alternate juror's misconduct, based on fact he immediately involved himself in the jury deliberations and manipulated physical evidence and a DVD).

Pribie v. State, 46 N.E.3d 1241, 1251 (Ind. Ct. App. 2015) (there is a presumption of harm that State must rebut to avoid reversal when communication between bailiff and a juy occurs outside defendant's presence; State may avoid reversal if no harm or prejudice resulted from the communication).

5. Effect of extraneous prejudicial information or outside influence

A juror's belief as to how the extraneous information or outside influence affected him or the verdict is irrelevant. Rather, the court must determine the impact on the jury based on the overall circumstances. Griffin v. State, 754 N.E.2d 899 (Ind. 2001). Arguably, the Supreme Court *overruled* its holding in Wiseheart v. State, 693 N.E.2d 23, 64 (Ind. 1998) (affidavit that did not state how extraneous information affected juror was insufficient to justify relief).

D. DURING TRIAL INQUIRIES OF JURORS NOT COVERED UNDER 606

Rule 606(b), by its terms, applies only after a verdict or indictment has been rendered. See Fox v. State, 457 N.E.2d 1088 (Ind. 1984) (difference between post-verdict and pre-verdict revelation of jury exposure to prejudicial material, *citing* and distinguishing Lindsey v. State, 295 N.E.2d 819 (Ind. 1973)). Rule 606(b) does not apply when an inquiry into juror conduct is made during jury deliberations. Miller, 12 *Indiana Evidence* 838 § 606.203 (4th ed.).

"Where the trial court is presented with the possibility that the jury has been exposed to extraneous material having a potential to taint the jury's verdict, upon motion by the defendant the trial court is required to interrogate and admonish the jurors collectively and individually." West v. State, 758 N.E.2d 54, 55 (Ind. 2001); Lindsey v. State, 295 N.E.2d 819 (Ind. 1973).

For examples of jury questioning during trial, see Peters v. State, 542 N.E.2d 1340 (Ind. 1989); Matthews v. State, 476 N.E.2d 847 (Ind. 1985); and Flowers v. State, 738 N.E.2d 1051 (Ind. 2000).

Pugh v. State, 52 N.E.3d 955, 972 (Ind. Ct. App. 2016) (if trial court finds the risk of prejudice from jurors' exposure to extrajudicial matters is substantial, it should interrogate the jury collectively to determine who, if anyone, has been exposed, and then individually interrogate any such jurors away from the others. If the court discovers any degree of exposure and likely effect thereof, it must take appropriate action, including at least a collective admonishment).

PRACTICE POINTER: When warranted by the circumstances, it is crucially important to raise issues relating to the effect of outside circumstances on the juror's state of mind, or jury room misconduct, *before a verdict is reached.* Usually, the best source of this information will be the jurors themselves, who are later barred from testifying on the subject by Rule 606(b).

E. INCONSISTENT CASE LAW

CAUTION: The pre-rule (and post-rule) case law in this area is inconsistent. For a detailed discussion, see Miller, 12 *Indiana Evidence* 836-55 §§ 606.201 *et. seq*. (4th ed.).

VII. WHO MAY IMPEACH - RULE 607

A. OFFICIAL TEXT:

Any party, including the party that called the witness, may attack the witness's credibility.

B. ANY PARTY PERMITTED TO IMPEACH A WITNESS

1. Traditional rule abandoned

Rule 607, which is identical to Federal Rule of Evidence 607, abandons the traditional rule and permits a party to impeach her own witness.

a. Common law

At common law, a party was not permitted to impeach her own witnesses partly because by calling a witness a party was considered to be vouching for that witness's trustworthiness.

b. Statutory law

Ind. Code 34-1-14-15 (now repealed) permitted a party to contradict her own witness by other evidence, and by prior inconsistent statements, but prohibited a party from impeaching her own witness by evidence of bad character unless the witness was "indispensable" or in case of "manifest surprise." Anderson v. Scott, 630 N.E.2d 226, 228-230 (Ind. Ct. App. 1994) (pre-Rules case, id. at 229 n.4); see also 1 *McCormick on Evidence* § 38 (7th ed. 2013). Rule 607 does away with all these limitations.

2. Limitations: improper impeachment

a. Must have good faith basis

The questioner must have a good faith basis for believing that the impeaching fact she is disclosing is true. Mauet, *Fundamentals of Trial Techniques* 235 (3rd ed. 1992). "To attack a witness' credibility through questions designed to impeach the witness on a collateral matter, the questioner must have a reasonable basis for believing that the answer will be impeaching, and impliedly represents to the court that a denial by the witness could be disputed." Miller, 12 *Indiana Evidence* 866 § 607.104 (4th ed.); Bagnell v. State, 413 N.E.2d 1072, 1077 (Ind. Ct. App. 1980).

Michelson v. United States, 335 U.S. 469, 481, 69 S. Ct. 213, 221 (1948) (prosecutor cannot ask a groundless question to waft an unwarranted innuendo into the jury box).

Benson v. State, 762 N.E.2d 748 (Ind. 2002) (error to allow State to confront its own witness with unsubstantiated suggestion that his reluctance to testify was due to threats received while witness was incarcerated where there was no evidence of threats).

Green v. State, 756 N.E.2d 496 (Ind. 2001) (defense counsel was properly precluded from stating "your mother believes that you are a stone-cold liar" during cross of state's eyewitness; this was not an inquiry into eyewitness's reputation for truthfulness, which required Defendant to call a witness, but rather was a statement of fact and an attempt to testify in guise of asking questions).

b. Sole purpose cannot be to admit otherwise inadmissible evidence

A party may not place a witness on the stand when the party's sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment. Appleton v. State, 740 N.E.2d 122, 125 (Ind. 2001); Griffin v. State, 754 N.E.2d 899 (Ind. 2001). Nor should a party be permitted to impeach its own witness if the court finds an improper motive for impeachment. *Committee Commentary*, Burns Ind. Evid. Rules 607; U.S. v. Gossett, 877 F.2d 901 (11th Cir.1989), *cert. den*. 493 U.S. 1082 (1990).

It would be an abuse of Evid. R. 607, impeachment of own witness, for a prosecutor to call a witness whom he knew would not give useful evidence, just so the prosecutor could introduce otherwise inadmissible hearsay evidence against the defendant in hope that the jury would miss the subtle distinction between impeachment and substantive evidence--or, if it did not miss it, would ignore it. Impson v. State, 721 N.E.2d 1275 (Ind. Ct. App. 2000).

Edmond v. State, 790 N.E.2d 141 (Ind. Ct. App. 2003) (Rule 607 may not be used to introduce inadmissible evidence by calling a witness and impeaching that witness with a favorable extrajudicial statement previously made by a prior witness).

(1) Test

In determining whether abuse of the rule has occurred, the court determines whether the prosecutor examined the witness for the primary purpose of placing before the jury otherwise inadmissible evidence. Impson v. State, 721 N.E.2d 1275 (Ind. Ct. App. 2000).

Rafferty v. State, 610 N.E.2d 880 (Ind. Ct. App. 1993) (although the State impeached son's testimony with recanted allegations of uncharged sexual misconduct, he was not examined for the primary purpose of putting this evidence before the jury as substantive, but rather to see if he would corroborate another witness' claim that son had seen defendant in bed with him and the victim).

Appleton v. State, 740 N.E.2d 122, 125 (Ind. 2001) (court could not definitively declare that State placed its witness on stand for sole purpose of impeaching him). See also Edmond v. State, 790 N.E.2d 141 (Ind. Ct. App. 2003).

(2) Misuse of inconsistent statement after impeachment

Once a witness admits that he made a prior inconsistent statement, impeachment is complete, and reciting segments of the inconsistent statement is thus superfluous and error. Appleton v. State, 740 N.E.2d 122, 125 (Ind. 2001); Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004).

Martin v. State, 779 N.E.2d 1235 (Ind. Ct. App. 2002) (it was harmless error for trial court to allow State to use impeachment evidence as substantive evidence by leading witness through prior statement).

(3) Interaction with defendant's constitutional rights

A criminal defendant's rights to confront witnesses and to present evidence may allow the defendant to impeach with otherwise inadmissible evidence. Chambers v. Mississippi 410 U.S. 284, 297-98, 93 S. Ct. 1038 (1973) (pre-Rules case, rejecting application of Mississippi's statutory "voucher" rule to bar a defendant from treating his own witness as adverse).

Griffin v. State, 754 N.E.2d 899 (Ind. 2001), *aff'd on reh'g*, 763 N.E.2d 450 (defendant was not permitted to impeach his witness with hearsay evidence that witness confessed to crime; defendant called witness solely to create an opportunity to impeach him as a hostile witness) (Boehm, J., dissenting on basis of Sixth Amendment).

The Griffin holding is questionable in light of the U.S. Supreme Court's decision in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006). A defendant's right to a meaningful opportunity to present a complete defense that someone else committed the crime cannot be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. Id.

c. Cannot admit extrinsic evidence to impeach on collateral matters

"While Rule 607 allows any party to impeach a witness, it does not allow impeachment by extrinsic evidence on 'collateral matters.'" Miller, 12 *Indiana Evidence* 862-63 § 607.104 (4th ed.). On collateral matters, the cross-examiner is "bound by the answer" the witness gives and may not offer other evidence on the point solely to impeach the witness. Rule 613(b), Jackson v. State, 728 N.E.2d 147, 152-53 (Ind. 2000). "If a matter is considered collateral, [counsel] may be limited to intrinsic impeachment; the witness's testimony on direct or cross-examination stands -- the cross-examiner must take the witness's answer; and contradictory extrinsic evidence, evidence offered other than through the witness himself, is barred. When the matter is not collateral, extrinsic evidence may be introduced disputing the witness's testimony on direct examination or cross." *McCormick on Evidence*, § 49, 322 (7h ed. 2013) (footnote omitted).

(1) Non-collateral matters

If the matter is itself relevant in the litigation other than merely to contradict the witness, it is non-collateral. Miller, 12 *Indiana Evidence* 862-63 § 607.104. The following are non-collateral matters:

Bias, prejudice, or interest for or against any party to the case. See Lenover v. State, 550 N.E.2d 1328, 1331 (Ind. Ct. App. 1990) (bias due to fear); Rule 616.

Alcohol or drug use, only if pertinent to the witness' ability to recall the events on the dates in question, or if the witness is on drugs at the time of the trial, or if the witness' drug or alcohol use is so extensive that her mind is impaired. Stonebraker v.

State, 505 N.E.2d 55 (Ind. 1987); Strunk v. State, 44 N.E.3d 1 (Ind. Ct. App. 2015); and House v. State, 61 N.E.3d 1230, 1234 (Ind. Ct. App. 2016).

Lack of mental capacity. Miller, 12 *Indiana Evidence* 863-64 § 607.104.

Contradiction of the witness's testimony. Miller, § 607.104.

Matters raised on direct. A party may "open the door" to matters which would otherwise have been collateral by raising them during direct examination. "A long line of Indiana authority supports a cross-examiner's right to explore any and all phases of a general subject that has been opened up by a witness on direct examination." Rondon v. State, 711 N.E.2d 506, 520 (Ind. 1999); Ballard v. State, 318 N.E.2d 798, 806 (Ind. 1974); Miller, 12 *Indiana Evidence* 866 § 607.104 (4th ed.).

Shriner v. State, 829 N.E.2d 612 (Ind. Ct. App. 2005) (by placing his character into evidence on direct, the defendant opened the door to the fact he lied about whether he took a polygraph in the case).

(2) Collateral matters

Evidence that has no admissible purpose other than impeachment of the witness. Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003); see also McCormick on Evidence § 45, at 299 (7th ed.) ("A matter is deemed 'collateral' if the matter is irrelevant to establish a fact of consequence in the litigation, i.e., irrelevant for a purpose other than mere contradiction of the prior witness's in-court testimony.")

Henson v. State, 530 N.E.2d 768 (Ind. Ct. App 1988) (improper for State to produce witnesses to impeach defendant's claim that she had not had an affair when the issue was not material to the matter in litigation).

3. Bolstering testimony

Rule 607 does not change the common law rule that a witness's credibility may not be bolstered before it has been attacked. Miller, 12 *Indiana Evidence* 862 § 607.103 (4th ed.). See Rule 608(a).

PRACTICE POINTER: Remember to ask the court to admonish the jury whenever evidence is admitted for a limited purpose, such as for impeachment, and not as substantive evidence. If appropriate, remind the court of the limited admission of the evidence later when moving for a directed verdict.

C. ANTICIPATORY IMPEACHMENT- "DRAWING THE STING"

Rule 607 "permits a party to 'volunteer' impeaching facts on direct examination, an approach usually called 'drawing the sting.'" Mauet, *Fundamentals of Trial Techniques*, 234 §6.7 (3rd ed. 1992); U.S. v. Holly, 167 F.3d 393, 395 (7th Cir. 1999) (Federal Rules); Miller, 12 *Indiana Evidence* 862 § 607.103.

Gann v. State, 521 N.E.2d 330, 335 (Ind. 1988) ("It is common practice among trial lawyers, when faced with facts concerning their own witness which might reflect adversely if brought

out on cross-examination, to deliberately bring out the evidence on direct examination upon the theory that it has less damaging impact coming from them than if brought out on cross-examination.")

State v. Johnson, 675 N.E.2d 678, 686-87 (Ind. 1996) (on direct, State elicited testimony from one of its witnesses that the witness "was presently incarcerated in Ohio serving his sentence for a 1988 conviction of armed robbery[,] that he had four other felony convictions in two different states[, and] that he disliked the defendant [because the defendant had testified against him in another case].")

Smith v. State, 547 N.E.2d 817, 820 (Ind. 1989) ("The State, however, presumably in anticipation of [impeachment on cross-examination], questioned [the witness] on direct examination so as to reconcile some relatively innocuous conflicts in the five statements given prior to trial concerning, e.g., his denial of any involvement in the crime when initially questioned by police.")

However, this approach may result in waiver of the issue if the admissibility of the impeaching evidence is challenged.

Ohler v. U.S., 529 U.S. 753, 120 S. Ct. 1851 (2000) (testifying defendant who introduces evidence of a prior, impeaching conviction on direct examination to "remov[e] the sting" waives the right to challenge the admission of the impeaching conviction on appeal).

PRACTICE POINTER: When an important witness is subject to impeachment, the party offering the witness may choose to present the potentially impeaching evidence during direct examination. This can have several advantages. The offering party can control the manner in which the evidence is presented to the jury, to minimize its impact. The surprise value of the evidence may diminish. A party who presents impeaching evidence along with qualifying evidence for a witness may appear to be trying to be evenhanded and fair. The direct examiner can also invite the witness to explain or qualify the impeaching evidence as soon as it is presented. For example, if a family member of the defendant is to testify on the defendant's behalf, the direct examiner may choose to address the issue of bias (in favor of the defendant) with the witness before permitting the witness to be cross-examined. The key disadvantage to bringing up impeaching evidence on direct examination is that the party offering the evidence waives any error in its admission.

VIII. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS - RULE 608

A. OFFICIAL TEXT:

(a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.

B. IMPEACHMENT BY OPINION OR REPUTATION EVIDENCE - RULE 608(a)

1. Character for truthfulness relevant

A witness's character for truthfulness "is relevant under Rule 401 because it affects the probable truth of the facts to which the witness testified." Miller, 12 *Indiana Evidence* 870 § 608.101 (4th ed.). There are two separate kinds of evidence under Evidence Rule 608—opinion testimony concerning a witness's character for truthfulness and testimony concerning the witness's reputation for having a character for truthfulness or untruthfulness, which have different foundational requirements to ensure that a just determination in a fair proceeding is not denied. Hayko v. State, ___N.E.3d___ (Ind. Ct. App. 2022).

2. Foundation for admissibly of reputation testimony

Reputation must be general reputation, held by an identifiable group of people who have an adequate basis upon which to form an opinion, and the witness testifying to reputation must have sufficient contact with that community or society to qualify as knowledgeable of general reputation of the person whose character is attacked or supported. Bowles v. State, 737 N.E.2d 1150 (Ind. 2000). Evidence of reputation for veracity is not limited to that within the person's community of residence but should include any community or society in which he or she has a well-known or established reputation.

> Dynes v. Dynes, 637 N.E.2d 1321 (Ind. Ct. App. 1994) (work community was a substantial community for purposes of 608(a)).

To be admissible, the evidence concerning a witness' reputation for truthfulness must embody the collective judgment of the community and be derived from a group whose size constitutes an indicium of inherent reliability. While it may be that a child's community is smaller than an adult's community, the child's community must be sufficiently numerous for the opinion of

reputation to be reliable, and the members of that community must have had sufficient contacts with the child to justify an opinion of reputation. Hall v. State, 15 N.E.3d 1107 (Ind. Ct. App. 2014), *sum. aff'd*, 36 N.E.3d 459 (Ind. 2015).

Bowles v. State, 737 N.E.2d 1150 (Ind. 2000) (child complaining witness' aunt could not testify to child witness' reputation for truthfulness because she only provided sparse information regarding nature of community and extent of child's contact with community).

Norton v. State, 785 N.E.2d 625 (Ind. Ct. App. 2003) (trial court did not abuse its discretion in deciding that a family group did not amount to a substantial community of persons for purposes of Indiana Evidence Rule 608(a)); see also Hall v. State, *supra* (no error in finding community described by witness was too insular).

Personal knowledge of or experience with the witness to be impeached is not necessary for the admission of evidence concerning his/her general reputation for veracity. Head v. State, 443 N.E.2d 44 (Ind. 1982).

3. Foundation for admissibility of opinion testimony

An opinion witness under Ind. Evidence Rule 608(a), as opposed to a *reputation* witness, should meet the requirements for lay opinion under Ind. Evidence Rule 701. The opinion is limited to one that is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue. A witness' testimony about his or her perception of the victim's character for truthfulness at the time the accusations are made is particularly helpful, and cross-examination remains a beneficial tool to probe the opinion testimony in a variety of ways.

Hayko v. State, ___N.E.3d___ (Ind. Ct. App. 9/28/22) (in child molesting prosecution, trial court abused its discretion in excluding three witnesses who would testify to their opinion that C.W. was untruthful; trial court misapplied the four-part foundational requirement for reputation evidence outlined in Bowles, above and its conflation of the two foundational requirements denied defendant his right to present a defense).

4. Limitations

A party may attack or support a witness's credibility by reputation or opinion evidence relating to the witness's character for truthfulness, subject to two limitations. Rule 608(a).

a. Relate to truthfulness

A party may not use evidence of character traits, other than truthfulness, to impeach a witness under Rule 608(a). Miller, 12 *Indiana Evidence* 870 § 608.102 (4th ed.). However, evidence of character traits other than truthfulness may be admissible for some other purpose than to attack or support the credibility of a witness, and Rule 608(a) does not affect this. See, e.g., Rule 404(a)(1), (2). Miller, 12 *Indiana Evidence* 870 § 608.102.

b. Evidence of truthfulness must follow attack on character for truthfulness

If the evidence tends to prove the witness's good character for truthfulness, the witness's character for truthfulness must first have been attacked. Rule 608(a); Miller, 12 *Indiana*

Evidence 870 §608.101 (4th ed.). Whether a witness's character for truthfulness has been attacked is a matter within the trial court's discretion. U.S. v. Dring, 930 F.2d 687, 690-691 (9th Cir. 1991), *cert. den.*; Miller, 12 *Indiana Evidence* 870 § 608.105 (4th ed.).

(1) Bad reputation, crime, or misconduct

"[A]ttacks by evidence of bad reputation, bad opinion of character for truthfulness, conviction of crime, or misconduct which has not resulted in conviction, all open the door to character support." *McCormick on Evidence*, § 47, 308-09 (7th ed. 2013) (footnotes omitted).

(2) Bias or interest

Evidence of a witness's bias or interest is not an attack on the witness's character and is not a basis for permitting evidence of good character in response. Advisory Committee's Note to Federal Rule 608(a); Miller, 12 *Indiana Evidence* 876 § 608.105 (4th ed.).

(3) Inconsistent statements

The trial judge should consider "whether the inconsistency or contradiction relates to a matter on which the witness could be innocently mistaken." If the inconsistency or contradiction is "so flat that the commonsense inference is a lie rather than an innocent mistake," the judge can treat the impeachment as an attack on the witness's truthfulness. *McCormick on Evidence* § 47, 311 (7th ed. 2013).

c. Cannot vouch for testimony of witness

A witness is prohibited from making direct assertions of belief in another witness' testimony. Dietrich v. State, 641 N.E.2d 679 (Ind. Ct. App. 1994).

5. Evidence other than opinion or reputation

Rule 608(a) does not permit a party to show a witness's good character for truthfulness by evidence other than opinion or reputation evidence, even if the witness's credibility has been attacked. Miller, 12 *Indiana Evidence* 876 § 608.105 (4th ed.).

C. SPECIFIC INSTANCES OF CONDUCT - RULE 608(b)

Indiana Rule 608(b) does not permit a party to use specific instances of the witness's own conduct for impeachment on cross-examination, except as provided in Rule 609. Spivey v. State, 761 N.E.2d 831, 835 (Ind. 2002). Where the State improperly inquires into specific acts of misconduct on cross-examination, the defendant must object or waive the issue. Angleton v. State, 686 N.E.2d 803, 811 (Ind. 1997) (*citing* Rule 103(a)(1)). Rule 608(b) prohibits impeachment with prior bad acts to prevent unfair prejudice to witnesses where it does not make it any more likely than not that he is untruthful. Pierce v. State, 640 N.E.2d 730 (Ind. Ct. App. 1994).

Palmer v. State, 654 N.E.2d 844 (Ind. Ct. App. 1995) (trial court did not abuse its discretion in excluding evidence concerning police officer's drug use and related suspension from police force).

Johnson v. State, 832 N.E.2d 985 (Ind. Ct. App. 2005) (specific instances in which State's witness in drug prosecution allegedly kidnapped and robbed a third party was inadmissible to impeach credibility of state's witness).

Manuel v. State, 971 N.E.2d 1262 (Ind. Ct. App. 2012) (in domestic battery prosecution, trial court did not abuse its discretion in denying defendant the opportunity to cross-examine complaining witness about a past domestic violence charge that was dropped after State talked to the witness).

This Rule generally prohibits evidence of prior lies except where the Sixth Amendment requires such admission. But see Walton v. State, 715 N.E.2d 824 (Ind. 1999).

Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (evidence that witness had provided the court with inaccurate information as to her place of employment was improper use of specific acts of misconduct to impeach credibility).

Lambert v. State, 743 N.E.2d 719 (Ind. 2001) (evidence that witness lied on application for substance abuse treatment inadmissible).

1. Rule 608(b) codifies prior Indiana Law

Rule 608(b) codifies prior Indiana law. *Committee Commentary*, Burns Ind. I.R.E. 608 (1999). Generally, a party may not impeach a witness's character for truthfulness with evidence of specific instances of conduct, either on direct or cross-examination. Id. Indiana is in the minority of jurisdictions with this rule. Id.

2. Different than Federal Rule

Federal Rule 608(b) differs from Indiana Rule 608(b) by allowing "inquiry" into specific instances of conduct, but, like Indiana Rule 608(b), does not permit extrinsic evidence to show specific instances of conduct. Rule 608(b) prohibits both inquiry and extrinsic evidence. Miller, 13 *Indiana Evidence* 160 § 608.201 (3d ed.).

United States v. Abair, 746 F.3d 260 (7th Cir. 2014) (because the possibilities of abuse are substantial, the conduct must be sufficiently relevant to truthfulness before it can be the subject of cross-examination; here, government lacked a good faith basis for believing that defendant lied on tax and financial aid forms, thus district court erred by allowing prosecutor to ask a series of accusatory and prejudicial questions about them on cross-examination under Rule 608(b)).

3. Exceptions

a. Court's discretion when truthfulness attacked

Where one witness has testified as to the character for truthfulness or untruthfulness of another witness and is being cross-examined, the trial court has discretion to permit the cross-examining party to inquire about specific instances of conduct which are probative of the subject's character for truthfulness or untruthfulness. Rule 608(b).

b. Opening the door to character

Where "a party 'places his character in issue' by presenting his own character evidence, evidence of specific prior acts may be relevant and material to those issues of the case." Miller, 12 *Indiana Evidence* 878-79 § 608.207 (4th ed.); Hensley v. State, 448 N.E.2d 665, 667 (Ind. 1983); Jackson v. State, 366 N.E.2d 1186, 1189 (Ind. 1977).

Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002) (defendant opened door to prior specific acts of misconduct by testifying on direct that it was "not in my nature to talk about killing people").

Whitehair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995) (defendant opened the door to his less than honorable discharge from military service by repeatedly referring to his time in the service during direct in an attempt to covey that he was of good character).

c. To prove bias or prejudice: See Rule 616

Although prior misconduct is inadmissible to impeach a witness' character under Indiana Rule of Evidence 608(b), it may be admissible as a more specific attack on the witness' credibility as evidence of the witness' bias, i.e., his desire to curry favor with the State, and that his prior criminal activities gave him added incentive to cooperate with the State. Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006).

d. Defendant's Sixth Amendment right to present evidence and cross-examine

Rule 608(b), which would otherwise prohibit evidence of specific acts of untruthfulness to impeach accusing witness's credibility, must yield to the defendant's Sixth Amendment right of confrontation and right to present a full defense. Walton v. State, 715 N.E.2d 824 (Ind. 1999).

Walton v. State, 715 N.E.2d 824 (Ind. 1999) (defendant had a Sixth Amendment right to confront accuser with evidence of her prior false accusations of rape despite Rule 608(b)'s prohibition against specific acts attacking credibility).

The United States Supreme Court has noted that clearly established federal law does not provide a defendant with the right to impeach a witness through the use of extrinsic evidence. Nevada v. Jackson, 133 S. Ct. 1990 (2013).

Nevada v. Jackson, 133 S. Ct. 1990 (2013) (Ninth Circuit exceeded its authority under the AEDPA by granting habeas relief on ground that Nevada Supreme Court unreasonably applied "clearly established Federal law" when it held that respondent's right to present a defense was not violated by exclusion of extrinsic evidence through which he sought to impeach a prosecution witness).

The Indiana courts have limited the Walton holding to false accusations of sexual misconduct. Saunders v. State, 848 N.E.2d 1117 (Ind. Ct. App. 2006).

Birdwell v. State, 507 N.E.2d 645 (Ind. Ct. App. 1987) (noting federal cases and scholars who have found that perjury, false statements and false swearing are probative of truthfulness or untruthfulness, the court recognized that total prohibition

of impeachment with specific acts of misconduct is not proper; although recognizing that impeachment of officer with act of dishonesty may have affected jury's credibility determination, court adhered to Indiana law prohibiting impeachment with specific acts).

Saunders v. State, 848 N.E.2d 1117 (Ind. Ct. App. 2006) (evidence that eyewitness had lied about her Social Security number and was fired from her job, which has prevented her from getting any other jobs, was inadmissible specific instance of conduct; exclusion of the evidence did not violate defendant's Sixth Amendment right to confront witnesses); see also Jacobs v. State, 22 N.E.3d 1286 (Ind. 2015).

Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006) (Baker, J., concurring on basis that there should be another exception to Indiana Rule of Evidence 608(b)'s limitation on admission of specific acts of misconduct; when the State has offered a deal to a witness that results in avoidance of prosecution, defendant should be able to explore the prior acts of misconduct in the dismissed charges).

IX. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION - RULE 609

A. OFFICIAL TEXT:

(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 must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.

(b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than ten (10) years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one (1) 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 a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

B. GENERAL RULE- RULE 609

1. Addresses impeachment only

Rule 609 addresses the use of evidence of a witness's prior criminal convictions to impeach the witness's credibility. Rule 609 does not limit the use of evidence of prior convictions for other purposes. For example, a prior conviction may be admissible to prove that the witness is biased, rather than to impeach the witness's character for truthfulness. Ricketts v. City of Hartford, 74 F.3d 1397, 1412 (2d Cir. 1996) (Federal Rules 608(a) and 609); see, e.g., Bell v. State, 655 N.E.2d 129 (Ind. Ct. App. 1995) (prior convictions based on plea agreement admissible to show bias towards State even though plea agreement did not specify that the witness must testify against defendant).

When a party is introducing a witness's conviction for a reason other than impeachment, it is inadmissible under Indiana Rule 609. Britt v. State, 937 N.E.2d 914 (Ind. Ct. App. 2010).

> Britt v. State, 937 N.E.2d 914 (Ind. Ct. App. 2010) (where defendant admittedly was attempting to introduce witness' robbery conviction to show the witness, rather than the defendant, committed the instant robbery, trial court did not abuse its discretion by excluding the robbery even though it would have been admissible under Rule 609 for impeachment purposes).

2. Definition of conviction

a. More than a pending charge or unaccepted guilty plea

A witness may not be impeached by a specific act or charge that has not been reduced to a conviction at the time of trial. Becker v. State, 695 N.E.2d 968 (Ind. Ct. App. 1998).

> Specht v. State, 734 N.E.2d 239 (Ind. 2000) (a prior conviction includes a withheld judgment/guilty plea to a crime that had not been reduced to conviction; court had accepted plea but withheld judgment as to whether to enter plea as Class A misdemeanor upon successful completion of probation).
>
> Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65 (Ind. 2006) (a conviction does not include a guilty plea which has not yet been accepted by a court).
>
> Becker v. State, 695 N.E.2d 968 (Ind. Ct. App. 1998) (conviction does not include pending charges).

b. Before sentencing and entry of judgment

Some courts have held that a guilty verdict is admissible even though sentencing and judgment have not yet been entered. U.S. v. Mitchell, 886 F.2d 667, 670-71 (4th Cir. 1989); Miller, 12 *Indiana Evidence* 923-24 § 609.501 n.6 (4th ed.). Prior Indiana law is consistent with this view. McDaniel v. State, 375 N.E.2d 228, 230 (Ind. 1978); Miller, 12 *Indiana Evidence* 923 § 609.501 n.5 (4th ed.).

c. Includes attempt crimes

Attempt crimes are treated as the underlying crime itself. Adams v. State, 542 N.E.2d 1362 (Ind. Ct. App. 1989).

d. Includes misdemeanors

Rule 609 does not distinguish between felonies and misdemeanors. Miller, 12 *Indiana Evidence* 923 § 609.104 (4th ed.).

Miles v. State, 591 N.E.2d 642 (Ind. Ct. App. 1992) (it was reversible error to deny defendant the right to impeach State's witness with two prior misdemeanor convictions for false informing because the witness' prior convictions involved dishonesty and false statements).

3. Details of convictions

Unless the defendant opens the door as to details of the prior crimes, it is improper for the State to delve into such details beyond the fact of the prior convictions when impeaching the witness' credibility. Banks v. State, 761 N.E.2d 403 (Ind. 2002); Eckstein v. State, 526 N.E.2d 693 (Ind. 1988). The defendant is likewise prohibited from cross examining State witnesses regarding specific details of the witness' prior conviction. Newland v. State, 126 N.E.3d 928 (Ind. Ct. App. 2019).

Warren v. State, 757 N.E.2d 995 (Ind. 2001) (fact that witness used aliases in commission of prior crimes was not reasonably related to permissible impeachment and exclusion of such did not violate defendant's right to confrontation).

King v. State, 531 N.E.2d 1154 (Ind. 1998) (defendant was not entitled to have State's impeachment of him by prior rape conviction limited to evidence that the defendant had been convicted of "infamous" crime, rather than specifically revealing to jury that he had prior rape conviction).

Sasser v. State, 945 N.E.2d 201, 204 (Ind. Ct. App. 2011) (defense counsel's questioning of witness about State's exhibit was attempted to clarify the information that was already admitted as part of that exhibit; questioning did not open the door to evidence regarding the other instances in which defendant did not register as sex offender).

4. No Rule 403 analysis

Due to the use of the word "shall" in Rule 609, prior convictions which are admissible under Rule 609 are not subject to the Rule 403 balancing test. McCarthy v. State, 751 N.E.2d 753 (Ind. Ct. App. 2001); Jenkins v. State, 677 N.E.2d 624, 626-27 (Ind. Ct. App. 1997) (noting Indiana Rule 609 is different than Federal Rule 609 in this respect).

Davis v. State, 654 N.E.2d 859 (Ind. Ct. App. 1995) (impeachment of a prior crime which was the same as that for which defendant is on trial is not inadmissible due to its prejudicial value).

5. Categories of admissible convictions

Examples of crimes which are inadmissible under IRE 609 because they are not listed in IRE 609(a) and do not involve dishonesty or false statement, see Price v. State, 656 N.E.2d 860 (Ind. Ct. App. 1996) (child molestation); Johnston v. State, 517 N.E.2d 397 (Ind. 1988) (drug offenses); Snead v. State, 490 N.E.2d 761 (Ind. 1986) (assault); Belcher v. State, 453 N.E.2d 214 (Ind. 1983) (prostitution); Small v. State, 632 N.E.2d 779 (Ind. Ct. App. 1994) (resisting arrest); Jones v. State, 467 N.E.2d 1179 (Ind. 1984) (escape and child support); Cason v. State, 672 N.E.2d 74 (Ind. 1996) (assisting a criminal); Pierce v. State, 640 N.E.2d 730 (Ind. Ct. App. 1994) (dealing drugs).

a. Infamous crimes

The prior convictions listed in Rule 609(a)(1) are crimes which were considered "infamous" at common law. A person who had been convicted of one of these crimes was incompetent to testify at common law. 1 *McCormick on Evidence,* § 42 (7th ed. 2013).

> Carson v. State, 672 N.E2.d 74 (Ind. 1996) (fact that witness originally was charged with an infamous crime does not make his conviction to a lesser which was not an infamous crime admissible).

Evidence of prior conviction in another jurisdiction is not automatically admissible to impeach simply because other jurisdiction uses label for crime that is found in Rule 609(a)(1) list. If the crime is not substantially equivalent to an Indiana crime listed, it does not qualify under Rule 609(a)(1). Brown v. State, 703 N.E.2d 1010 (Ind. 1998).

b. Crimes involving dishonesty or false statement

An inquiry into the facts underlying the conviction may be required. In order to avoid the presumption that crimes such as theft are Rule 609(a)(2) crimes, the defendant must make ameliorating facts known to the trial court through a pre-trial motion *in limine* supported by appropriate affidavits. Brown v. State, 703 N.E.2d 1010 (Ind. 1998).

> Sweet v. State, 498 N.E.2d 924 (Ind. 1986) (State showed witness' prior theft was not of a type that bespeaks of lack of veracity).

6. Codified previous Indiana law

Rule 609(a) codifies previous Indiana case law. Ashton v. Anderson, 279 N.E.2d 210 (Ind. 1972).

> Specht v. State, 734 N.E.2d 239 (Ind. 2000) (because Rule 609 was intended to codify existing law, pre-Rules law that a guilty plea to an infamous crime not yet reduced to a conviction can be used for impeachment is still good law).

C. LIMIT ON USING THE EVIDENCE AFTER 10 YEARS - RULE 609(b)

1. Presumptively inadmissible

Indiana Evidence Rule 609(b) states that evidence of a witness' conviction is not admissible if more than ten years have passed since the witness' conviction or release from confinement for it, whichever is later. "Confinement," for purposes of this rule, does not include probation. The beginning point for the ten-year period under the rule was when defendant was previously convicted. Chapman v. State, 141 N.E.3d 881 (Ind. Ct. App. 2020). Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. The date the witness testifies, or the evidence is introduced is the most appropriate termination point for determining whether a conviction falls within the ten-year limit provided by Evidence Rule 609(b). Whiteside v. State, 853 N.E.2d 1021 (Ind. Ct. App. 2006).

2. Proponent's burden

A party seeking to overcome Rule 609(b) presumption of exclusion of convictions over ten years old must support its argument for probative value with specific facts and circumstances upon which the trial court may base finding of admissibility. Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998). The trial court must also engage in a balancing test before admitting a stale conviction. Id. at 299. The following factors are useful in balancing an aged conviction's probative value against the risk of unfair prejudice: 1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness' subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue. Dowdy v. State, 672 N.E.2d 948 (Ind. Ct. App. 1996); Scalissi v. State, 759 N.E.2d 618 (Ind. 2001).

Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998) (reversible error to allow State to impeach defendant with a conviction for uttering a forged instrument which was over ten years old; the State invited jury to base decision of guilt, at least in part, on the defendant's past behavior).

Dowdy v. State, 672 N.E.2d 948 (Ind. Ct. App. 1996) (where defendant was charged with two counts of robbery, impeachment value of his prior convictions over ten years old for theft and robbery was very significant and admissible).

Whiteside v. State, 853 N.E.2d 1021 (Ind. Ct. App. 2006) (probative value of witness' auto theft conviction more than ten years old was not substantially outweighed by danger of unfair prejudice in trial for auto theft; witness' credibility was key issue and evidence did not taint credibility or call upon guilt or innocence of defendant).

Hall v. State, 769 N.E.2d 250 (Ind. Ct. App. 2002) (trial court engaged in requisite balancing test and concluded that series of witness' crimes of dishonesty demonstrated that the witness had engaged in a pattern of conduct probative of credibility; held, no abuse of discretion in admitting prior crimes of State's hostile witness that occurred over ten years ago).

Schwestak v. State, 674 N.E.2d 962 (Ind. 1996) (where defendant offered no reason why the probative value overcame the presumption of exclusion, trial court did not abuse

discretion in refusing to permit defendant to impeach prosecution witness with evidence of witness' burglary conviction that was more than ten years old).

Scalissi v. State, 759 N.E.2d 618 (Ind. 2001) (although the importance of defendant's testimony and the centrality of the credibility of defendant cut in favor of admissibility of convictions over ten years old, the court failed to consider all factors prior to admitting defendant's old conviction as impeachment; harmless error).

3. Notice

If attempting to introduce prior conviction over ten years old, the proponent must provide notice to opposing party. Commentary to Evid. R. 609(b) recommends that required notice include: 1) the date of conviction; 2) jurisdiction; 3) offense; and most importantly 4) specific facts and circumstances alleged to justify admission. The entire purpose of providing advance written notice of intent to use a stale conviction is to allow an adverse party the fair opportunity to contest use of such evidence. The notice requirement is excused when the witness is a surprise witness; a defendant is not a surprise witness even if there is a prior indication that the defendant will not testify. Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998).

Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998) (State's filing of habitual offender enhancement was not sufficient notice of old prior conviction; admission of prior conviction without proper notice constituted reversible error). See also Whiteside v. State, 853 N.E.2d 1021 (Ind. Ct. App. 2006) and Chapman v. State, 141 N.E.3d 881 (Ind. Ct. App. 2020).

Wales v. State, 768 N.E.2d 513 (Ind. Ct. App. 2002) (where the defendant opens the door to his criminal history, the State does not have to comply with notice requirement of Rule 609(b); the defendant's direct testimony left the jury with the false and incomplete impression that criminal history was attributable to drug use and thereby opened the door to his prior convictions).

4. Waiver of notice issue

Mitchell v. State, 690 N.E.2d 1200 (Ind. Ct. App. 1998) (in order to exclude stale convictions from evidence, defendant must object on grounds of staleness; objection that prior conviction for receiving, buying, and selling stolen property was not a crime of deception did not preserve the over ten-year-time lapse objection).

McCarthy v. State, 751 N.E.2d 753 (Ind. Ct. App. 2001) (failure to call former co-defendant as witness waived issue of whether co-defendant's testimony could be impeached by his prior murder conviction).

D. EFFECT OF A PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION - RULE 609(c)

A prior conviction which has been set aside as the result of a pardon or an equivalent procedure may not be used to impeach the witness under Rule 609, if: (a) the pardon was based on a finding of rehabilitation, and the witness has not been convicted of a subsequent felony, or (b) the pardon was based on a finding of actual innocence.

1. Mere pardon insufficient

For Rule 609(c) to bar use of the conviction, the trial court must find that the pardon was based on a finding of rehabilitation or on a finding of actual innocence. The burden of showing the basis of the pardon falls upon the party asserting that Rule 609(c) applies. Wright & Gold, 28 *Federal Practice & Procedure: Evidence* 298 § 6137 (2012). The "procedures to produce such pardons or their equivalents may vary from state to state. A mere restoration of civil rights is not sufficient." Miller, 12 *Indiana Evidence* 921 § 609.301 (4th ed.).

Actual rehabilitation is not sufficient without a finding of rehabilitation. Zinman v. Black & Decker (U.S.) Inc., 983 F.2d 431, 435 (2d Cir. 1993). Miller, 12 *Indiana Evidence* 921 § 609.301 n.4 (4th ed.). One court has held that Rule 609(c) permits the court in which the conviction evidence is offered to find that the witness has been rehabilitated (for purposes of the Rule) and to bar use of the conviction for impeachment purposes as a result. U.S. v. Thorne, 547 F.2d 56, 58-59 (8th Cir. 1976) (not clear error for trial court to conclude that the witness had been rehabilitated for purposes of Rule 609). Wright & Gold criticize this opinion, calling it "clearly erroneous" because such a finding by the trial court is not "equivalent" to a pardon. 28 *Federal Practice & Procedure: Evidence* 299 § 6137 (2012).

2. Overturned on appeal

Rule 609(c) does not deal with convictions which have been overturned on appeal; they are inadmissible under Rule 609(a) and (b). Wright & Gold, 28 *Federal Practice & Procedure: Evidence* 298 § 6137 (2012).

3. Compared to Federal Rule 609(c)

Indiana Rule 609(c) is worded the same as Federal Rule 609(c).

> Nunn v. State, 601 N.E.2d 334 (Ind. 1992) (prior to the adoption of the Indiana Rules of Evidence, the courts adopted the Federal Rule of Evidence 609(c) approach).

E. JUVENILE ADJUDICATIONS - RULE 609(d)

1. Presumptively inadmissible

Juvenile adjudications are only admissible for impeachment of a witness when the defendant opens the door to the credibility of the witness or the adjudication falls within an exception set forth in Ind.R.Evid. 609(d). Newman v. State, 719 N.E.2d 832 (Ind. Ct. App. 1999). Rule 609(d) permits juvenile adjudications for impeachment when the following requirements are met: (a) an adult conviction for the same offense would be admissible; (b) the witness to be impeached is not the defendant; and (c) the court is satisfied that admission of the prior adjudication is necessary for a fair determination of guilt or innocence. Miller, 12 *Indiana Evidence* 208 § 609.401 (4th ed.)

> Newman v. State, 719 N.E.2d 832 (Ind. Ct. App. 1999) (witness' juvenile adjudications did not fall within exception in Ind. R. Evid. 609(d) because the judge did not make the finding that their admission into evidence was necessary for a fair determination of the issue of guilt or innocence of the defendant; the witness did not place his character into

evidence by claiming that he did not know that car in which he and the defendant were traveling was stolen; thus, harmless error to have impeached witness with prior adjudication).

Douglas v. State, 634 N.E.2d 811 (Ind. Ct. App. 1994) (though evidence that defendant had been in Boys School was not being admitted to impeach defendant, it was erroneously admitted where it was clear that defendant had been in the Boys School before the commission of the crime for which he was being tried, and thus, left the jury with clear impression that defendant had committed prior crimes; error was harmless), *aff'd on reh'g*, 640 N.E.2d 73.

2. Sixth Amendment

Where evidence of a witness's juvenile adjudication is relevant for other forms of impeachment, e.g., in order to show bias, the right to confrontation may require admission. Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 1112 (1974).

Rule 609(d) is consistent with the case of Davis v. Alaska, which held that a criminal defendant's "right of confrontation is paramount to the State's policy of protecting a juvenile offender." Davis v. Alaska, 415 U.S. 308, 319, 94 S. Ct. 1105, 1112 (1974) (witness's juvenile adjudication tended to show not only a bad character for truthfulness, but also was also relevant to show bias and was admissible under the Sixth Amendment).

Martin v. State, 736 N.E.2d 1213 (Ind. 2000) (unlike the witness in Davis whose juvenile adjudication should have been admitted, this witness did not provide sole connection between defendant and crime and the witness did not lie about his record; further, defendant did not contend that the adjudication proved favorable treatment by the State; thus, exclusion of adjudication was not error).

F. PENDENCY OF APPEAL - RULE 609(e)

A prior conviction may be used for impeachment purposes even though an appeal may be pending. Rule 609(e), Rowan v. State, 431 N.E.2d 805, 817 (Ind. 1982). Evidence that an appeal is pending is also admissible "to qualify the probative value of the evidence" of the conviction. Rule 609(e); Saltzburg et al., 2 *Federal Rules of Evidence Manual* 1038 (7th ed.).

G. OPENING DOOR

"We will not permit Ashton to serve as a shield behind which a defendant may present false or misleading evidence." McKinney v. State, 558 N.E.2d 829 (Ind. 1990).

McKinney v. State, 558 N.E.2d 829 (Ind. 1990) (asking defendant whether he committed each of the specific Ashton crimes opened the door to the defendant's other crimes).

Stokes v. State, 908 N.E.2d 295 (Ind. Ct. App. 2009) (defendant's testimony that he had been in trouble with the law on two prior occasions, one of which involved a robbery, opened the door to State's cross-examination about his criminal record).

Roth v. State, 550 N.E.2d 104 (Ind. Ct. App. 1990) (defendant's testimony that he was not "crazy" and that he had never been treated for mental illness was merely an attempt to refute the victim's testimony the defendant had acted crazy, and the defendant did not discuss or

even allude to prior convictions, nor did he mislead jury, or put character in issue; thus, reversible error to impeach with prior non-Ashton convictions).

Jones v. State, 467 N.E.2d 1179 (Ind. 1988) (held, defense question "were you [in jail] when . . ." did not open the door to use of witness' prior convictions for impeachment).

Russell v. State, 577 N.E.2d 567 (Ind. 1991) (defendant's evidence that he had caused landlady no problems as tenant, and that employer had never seen him carrying a knife, tended to depict him as non-violent, and therefore "opened the door" to questioning from prosecutor as to an otherwise inadmissible prior misdemeanor battery conviction).

Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000) (State did not open door to witness' prior drug convictions or probation violation by presenting her as a reformed drug user who, by time of trial, understood error of her ways; witness admitted she had used and sold drugs up to an including date of defendant's arrest).

H. USE OF UNCONSTITUTIONAL CONVICTIONS

1. Constitutionally invalid prior convictions which lack reliability

If the prior conviction is constitutionally invalid under Gideon v. Wainwright, 83 S.Ct. 792 (1963), its use to impeach a criminal defendant's character for truthfulness is a denial of due process. Loper v. Beto, 405 U.S. 473, 482-83, 92 S. Ct. 1014, 1019 (1972) (un-counselled felony conviction "lacked reliability"). See Wright & Gold, 28 *Federal Practice & Procedure* 284 § 6140.

Evidence of a conviction invalid under Gideon v. Wainwright may be admissible to rebut a defense claim that the accused has no criminal record. U.S. v. Nadaline, 471 F.2d 340, 347 (5th Cir. 1973). The "Loper doctrine does not apply if the impeachment is justified by specifically false testimony given while on the witness stand." Wright & Gold, 28 *Federal Practice & Procedure* 284 § 6140 (*citing* U.S. v. Nadaline, 471 F.2d 340, 347 (5th Cir. 1973)) (*internal quotes omitted*).

2. Prior convictions not lacking reliability

The Loper doctrine does not bar the use of evidence of convictions which are tainted by constitutional problems that do not affect reliability. Wright & Gold, 28 *Federal Practice & Procedure* 285 § 6140. This includes convictions based on evidence obtained as a result of an illegal search, evidence obtained in violation of Miranda, and procedures that violated equal protection. See Wright & Gold, 28 *Federal Practice & Procedure* 285-86 § 6140.

Convictions obtained in violation of constitutional rights which affect reliability might be subject to the Loper doctrine. Wright & Gold suggest that denial of the following rights might bring a prior conviction under the Loper doctrine:

(1) Confrontation
(2) Speedy trial
(3) Notice of charges, and the opportunity to prepare a defense
(4) Compulsory process to obtain witnesses

Wright & Gold, 28 *Federal Practice & Procedure* 286 § 6140.

I. JURY INSTRUCTIONS REGARDING IMPEACHMENT BY PRIOR CONVICTIONS

1. Whether instruction is proper

Where the credibility of a witness is covered by other instructions or there is only one witness who has been impeached by prior crimes, there is no abuse of discretion by failing to instruct the jury on impeachment by prior conviction. Pope v. State, 737 N.E.2d 374 (Ind. 2000). A jury instruction solely addressing the testimony of one witness erroneously invades the province of the jury when the instruction intimates an opinion on the credibility of a witness or the weight to be given to his testimony. Id.

2. Instructions

There are no Indiana Pattern Jury Instructions on impeachment with prior crimes. However, for instructions used in federal courts, see IPDC's Jury Instructions on website.

X. RELIGIOUS BELIEFS OR OPINIONS - RULE 610

A. OFFICIAL TEXT:

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

B. RELIGIOUS BELIEF OF THE WITNESS - RULE 610

1. Inadmissible to impeach or enhance credibility

Rule 610 bars the admission of evidence of a witness's religious beliefs, or lack thereof, to impeach or enhance the witness's credibility. See Miller, *Indiana Evidence* 925 § 610.101 (4th ed.).

> U.S. v. Kaylaydjian, 784 F.2d 53, 56-57 (2d Cir. 1986) (Federal Rule 610 bars inquiry into why a witness chooses to affirm rather than to be sworn). **NOTE**: Except for punctuation, Federal Evid. R. 610 and Indiana Rule of Evidence 610 are identical.

Prosecutor's remarks concerning religion and race during closing may rise to level of misconduct. Gentry v. State, 625 N.E.2d 1268 (Ind. Ct. App. 1993); Samaniego v. State, 679 N.E.2d 944 (Ind. Ct. App. 1997).

> Myers v. State, 33 N.E.3d 1077 (Ind. Ct. App. 2015) (prosecutor did not use previously admitted evidence of witness's involvement in church and religious activities to improperly vouch for her testimony by remarking in closing argument regarding witness, "by the grace of God she came forward and told you the truth[,]" that she came forward "with great prayer," and that she was "the last of a dying breed. A generation of people where truth mattered more than anything else, where telling the truth was an oath that was taken seriously"; prosecutor's comments conveyed nothing about witness's religious beliefs, statements suggested that witness was more likely to tell the truth because of her age, not because her religious convictions compelled her to do so, and brief reference to prayer argued that witness, murder defendant's grandmother, was credible because she came forward with reservations and at great personal expense).

2. Religious beliefs v. religious training or education

Sevits v. State, 651 N.E.2d 278 (Ind. Ct. App. 1995) (trial court did not err in allowing State's witness to testify as to his religious education and training; it was not testimony concerning religious beliefs used to enhance credibility; if error, it was harmless).

3. Exclusion mandatory

Exclusion of evidence under Rule 610 is mandatory, not discretionary. See U.S. v. Teicher, 987 F.2d 112, 118-19 (2d Cir. 1993) (decided under Fed. Evid. R. 610); and Miller, 12 *Indiana Evidence* 925 § 610.101 (4th ed.).

4. Other purposes

Rule 610 is not an absolute bar to evidence about the religious beliefs of parties (or lack thereof), but instead prohibits the use of such testimony only if it is offered for the purpose of buttressing or impugning the credibility of a witness. There may be practical, value-neutral reasons for the court to consider the parties' religious beliefs and practices that do not infringe on any of the parties' religious constitutional rights and liberties. Pawlik v. Pawlik, 823 N.E.2d 328 (Ind. Ct. App. 2005). Examples of evidence admissible for purposes other than to increase or decrease the witness's credibility include:

a. interest or bias, see Indiana Evid. Rule 616; Sevits v. State, 651 N.E.2d 278, 283 (Ind. Ct. App. 1995); U.S. v. Teicher, 987 F.2d 112, 118-19 (2d Cir. 1993) (Fed. Evid. R. 610); and U.S. v. Hoffman, 806 F.2d 703, 708 (7th Cir. 1986);

b. qualifications as an expert, see Indiana Evid. Rule 701-05; Conrad v. City and County of Denver, 656 P.2d 662, 676 (Colo.1982);

c. information relevant to witness's whereabouts at time of crime, see, e.g., People v. Calloway, 180 Mich. App. 295, 446 N.W.2d 870 (1989).

d. part of general background of witness's life. Myers v. State, 33 N.E.3d 1077 (Ind. Ct. App. 2015).

5. Related rules

See also:

a. Rule 603, requirement of oath or affirmation to testify truthfully;

b. Rule 608, use of reputation and opinion evidence regarding witness's character for untruthfulness to impeach witness;

c. Rule 501 and Ind. Code 34-46-3-1(3), clergymen's privilege against testifying with regard to certain communications (e.g., confessional).

C. OTHER PROHIBITIONS ON USE OF RELIGION

1. INDIANA CONSTITUTION, ARTICLE 1 SECTION 7

No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.

2. Indiana Code 34-45-2-12:

"Lack of belief in a supreme being or in the Christian religion does not render a witness incompetent. However, lack of religious belief may be shown upon the trial. In all questions affecting the credibility of a witness, the general moral character of the witness may be given in evidence" (As added by P.L.1-1998, SEC.41.) P.L. 1-1998, SEC. 41 rewords, recodifies, and replaces a similar provision which originally dates from 1881.

The second sentence of Ind. Code 34-45-2-12 is in direct conflict with Rule 610 and should therefore be a nullity. See Hawkins v. Auto-Owners (Mut.) Ins. Co., 608 N.E.2d 1358, 1359 (Ind. 1993) (*overruled on other grounds,* Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994)); Harrison v. State, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995), *superseded, in part, on other grounds by statute*.

XI. MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE - RULE 611

A. OFFICIAL TEXT

(a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) **Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

B. IN GENERAL - RULE 611

1. Underlying policy

The underlying policy of each subdivision of Rule 611 is the same: truth, economy, and the protection of witnesses. Wright & Gold, 28 *Federal Practice & Procedure: Evidence* 337-41 § 6162. "[T]he function of Rule 611 is to compel the trial courts to control the threats to these values presented by the manner in which the adversaries offer evidence." Wright & Gold, 28 *Federal Practice & Procedure: Evidence* 338 § 6162.

2. Broad application

Although Article VI of the Rules of Evidence is entitled "Witnesses," Rule 611 applies not only to witnesses but also to out-of-court declarants and to the presentation of all manner of real and demonstrative evidence. Wright & Gold, 28 *Federal Practice & Procedure: Evidence* 343-44 § 6163.

C. CONTROL BY COURT - RULE 611(a)

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth, (2)

avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment. Indiana Rule of Evidence 611(a).

1. Trial court must exercise control

The method the trial court uses to exercise control under Rule 611(a) is discretionary. Whether to exercise control is not discretionary. Miller, 12 *Indiana Evidence* 929 § 611.101 (4th ed.).

> State v. International Business Machines Corp., 964 N.E.2d 206, 211 (Ind. 2012) ("Trial courts have the right and duty to manage proceedings before them to insure both expedition and fairness and must be granted wide discretion in carrying out that duty…This could include, among other things, limitations on the introduction of certain evidence.").

2. Control must be consistent with a fair trial and impartiality

A trial court's decision about how to conduct a trial must balance the defendant's right to a fair trial against the court's interest in administrative efficiency. State v. Williams, 637 S.E.2d 523 (N.C. 2006).

> State v. Williams, 637 S.E.2d 523 (N.C. 2006) (a judge presiding over a first-degree murder trial abused his discretion when limiting the defense to a five-minute recess to decide whether to present evidence after the State had rested its case; granting a recess at the close of the State's case in order to allow defendant to determine whether to present evidence "is a matter of paramount importance" and could find no reasonable basis for the trial court's limitation).

"The court must strike a balance between impartiality and control. Rulings on procedural and evidentiary questions by nature are adverse to one of the parties, but partiality cannot be inferred from proper rulings." Brooks v. State, 497 N.E.2d 210, 219 (Ind. 1986).

3. Examples of control

a. Limiting prejudicial evidence and argument

The trial court can mitigate the prejudicial effect of the admission of a prior conviction where the prior conviction is an element of the crime charged by excluding evidence regarding the underlying facts of the prior felony and mitigating prosecutorial references thereto. Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App. 2001).

b. Admonishments to witnesses and counsel

"Implicit in the judge's duty to control the proceedings is the power to give reasonable admonitions to witnesses and counsel and direct the taking of testimony." Brooks v. State, 497 N.E.2d 210, 219 (Ind. 1986), *abrogated on other grounds by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007); Lawson v. State, 412 N.E.2d 759, 768 (Ind. 1980).

c. Order of proof

The order of proof in criminal cases is defined at Ind. Code 35-37-2-2. The trial court has discretion to modify the statutory order of proof by permitting witnesses to testify out of order. Ind. Code 35-37-2-2(3); Rule 611(a); Shelby v. State, 281 N.E.2d 885, 886 (1972); Miller, 12 *Indiana Evidence* 935-36 § 611.106 (4th ed.).

d. Re-opening case

Granting permission to reopen the case is within the trial court's discretion. Factors considered to determine whether there has been an abuse of discretion include whether there is any prejudice to opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request. Alvarado v. State, 89 N.E.3d 442, 447 (Ind. Ct. App. 2016).

Dixon v. State, 621 N.E.2d 1152 (Ind. Ct. App. 1993) (no abuse of discretion to re-open to allow State to introduce evidence of venue).

Saunders v. State, 807 N.E.2d 122 (Ind. Ct. App. 2004) (no abuse of discretion to allow State to reopen to identify defendant; it is not apparent that undue emphasis could have been placed on witness's return to stand to identify the defendant).

Gilman v. State, 65 N.E.3d 638 (Ind. Ct. App. 2016) (no error in permitting State to reopen its case after defendant claimed in his closing argument that he fled accident scene "out of necessity" because he believed victim would hurt him; State was entitled to present evidence of defendant's knowledge of an outstanding warrant for his arrest in an unrelated case.

Flynn v. State, 497 N.E.2d 912 (Ind. 1986) (although court noted that where defendant seeks to reopen case for purpose of testifying, the defendant's request is buttressed by the constitutional right to testify, here, trial court did not abuse discretion in refusing to allow defendant to re-open in order to testify; there was evidence the defendant was trying to frustrate process).

Komyatti v. State, 490 N.E.2d 279 (Ind. 1986) (no error in denying the defendant's motion to reopen case to allow testimony of witness who had appeared but became ill and then did not respond to subpoena until after State's closing argument; evidence would have rebutted only one statement by one State's witness).

e. Manner and mode of examination

The length and time that a witness is examined, and the manner and mode of the examination, are within the trial court's discretion. Miller, 12 *Indiana Evidence* 928-35 § 611.101-105 (4th ed.); Pitman v. State, 436 N.E.2d 74, 78 (Ind. 1982). This includes limitations on repetitive or cumulative questions. Miller, 12 *Indiana Evidence* 934 § 611.104 (4th ed.); Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990); and Galloway v. State, 529 N.E.2d 325 (Ind. 1988).

Hedges v. State, 443 N.E.2d 62 (Ind. 1982) (trial court has discretion to permit testimony in narrative form rather than by question and answer; thus, the trial court did not abuse its discretion by allowing the question "what happened next").

f. Number of witnesses

A trial court may impose reasonable limitations on the number of witnesses a party may call in support of a particular proposition or upon a particular subject. Miller, 12 *Indiana Evidence* 932 § 611.102 (4th ed.).

Smith v. State, 718 N.E.2d 794 (Ind. Ct. App. 1999) (bringing the defendant's boyfriend, whom defendant alleged inflicted injuries on her infant daughter, before jury would have been cumulative of picture of defendant and his height and weight which were placed in evidence), *abrogated on other grounds by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

But see Hubble v. Osborn, 31 Ind. 249 (1869) ("If [the disputed] fact existed[,] the appellant should have had the verdict. It was therefore important to him to establish it by the greatest possible weight of testimony. The court could not lawfully limit him to one witness upon the vital point.").

g. Recalling witnesses

A trial judge has discretion to determine whether a party may recall a witness. Ind. Evidence Rule 611(a)(1); May v. State, 338 N.E.2d 258, 260 (Ind. 1975); S.M. v. Elkhart Cty. Off., Fam. & Children, 706 N.E.2d 596 (Ind. Ct. App. 1999). The trial court may consider moving the moving party's behavior and compliance with pretrial orders when determining whether to allow the party to recall the witness. Issacs v. State, 659 N.E.2d 1036 (Ind. 1995).

Simpson v. State, 915 N.E.2d 511 (Ind. Ct. App. 2009) (trial court did not abuse its discretion in denying defendant's request to recall State's witness to impeach his testimony that he was not seeking a sentence modification in exchange for inculpatory evidence contained in letter he wrote trial court and forwarded to prosecutor. After State rested its case, trial court advised jury that witness "did have on record with this Court, unrelated to his testimony . . . a . . . letter requesting that he be housed elsewhere or released early" based on "[s]afety concerns unrelated to this case." Court could not conclude trial court prejudiced defendant's substantial rights by not letting him recall witness, even if it would have been the "better practice" to do so. Trial court's refusal to actually admit the letter as an exhibit was "probably error," but did not affect defendant's substantial rights because trial court accurately described letter to the jury.).

Shepard v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997) (trial court did not abuse discretion in allowing the State to recall accident investigator to fill in evidentiary gaps left out due to the State's desire to present evidence in chronological order).

Clark v. State, 668 N.E.2d 1206 (Ind. 1996) (trial court did not abuse discretion in prohibiting defendant from being recalled to testify to issues to which he could have testified on redirect).

h. Conditional admission

The trial court has discretion to admit evidence subject to a foundation being laid afterward. Miller, 12 *Indiana Evidence* 938 § 611.106 (4th ed); Indiana Rule of Evidence 104(b).

However, a rule requiring a testifying criminal defendant to testify before any other defense witnesses is "an impermissible restriction on the defendant's right against self-incrimination," Brooks v. Tennessee, 92 S. Ct. 1891, 1893, 406 U.S. 605 (1972), and violates the defendant's right to due process. Id. at 1895.

Book v. State, 880 N.E.2d 1240 (Ind. Ct. App. 2008) (trial court's refusal to allow defendant to wait until after he presented all of his witnesses to determine whether to testify with the caveat that he may reconsider if given case law approached the line but was not unconstitutional; the defendant never asked the court to reconsider).

Haak v. State, 695 N.E.2d 944 (Ind. 1998) (trial court did not abuse its discretion in requiring defendant to put evidence of his state of mind in issue before questioning witnesses regarding the defendant's fear where defense counsel assured court that defendant would testify).

i. Demonstrations and experiments

The trial court has the discretion to allow or refuse to allow in-court demonstrations or experiments. Miller, 12 *Indiana Evidence* 939 § 611.107 (4th ed); Yamobi v. State, 672 N.E.2d 1344 (Ind. 1996). To be admissible, courtroom demonstrations must aid, and not confuse, the finder of fact. Miller, 12 *Indiana Evidence* 940 § 611.107 (4th ed). The appellate courts will consider the following factors in deciding whether a courtroom demonstration was an abuse of discretion.

(1) Any difficulty in preserving the demonstration for challenge on appeal;

(2) the degree of accuracy of the recreation;

(3) the complexity and duration of the procedure;

(4) other available means of proving the same facts; and

(5) risk of unfairness to the defendant.

Yamobi v. State, 672 N.E.2d 1344 (Ind. 1996).

Courtroom experiments are held to the same basic requirement of similarity of conditions which is 'applicable to experimental evidence generally.' 2 *McCormick on Evidence* §217, 51 (7th ed. 2013); See also Rule 702, dealing with expert testimony.

Further, demonstrative evidence must meet the requirements of Evidence Rules 401 and 403. Dunlap v. State, 761 N.E.2d 837, 842 (Ind. 2002). Re-enactments conducted under conditions dissimilar to the crime scene are inadmissible under Evidence Rule 403. Null v. State, 690 N.E.2d 758, 762 (Ind. Ct. App. 1998).

The same principles apply to demonstrations in final argument. Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009).

D. RULE 611(b): SCOPE OF CROSS EXAMINATION

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination. Indiana Rule of Evidence 611(b).

1. Limited to scope of direct

"[T]he scope of permissible cross-examination extends to all phases of the subject matter covered in direct examination and is not limited to those parts specifically included in the direct examiner's questions." Wofford v. State, 394 N.E.2d 100, 105 (Ind. 1979). It includes all matters reasonably related to the issues put in dispute by the direct examination, and all inferences and implications arising from the testimony on direct examination. Tawdul v. State, 720 N.E.2d 1211 (Ind. Ct. App. 1999). Any matter that tends to elucidate, modify, explain, contradict, or rebut direct testimony is permissible during cross-examination. Id.

Nasser v. State, 646 N.E.2d 673 (Ind. Ct. App. 1995) (where State did not call breath test operator an expert witness, it was beyond scope for defendant to question the operator about his training at the department of toxicology; defendant was not precluded from calling operator of test as his own witness to elicit testimony he sought).

Orta v. State, 940 N.E.2d 380 (Ind. Ct. App. 2011) (trial court properly limited scope of defendant's cross examination to prevent questioning doctor about effect of voluntary intoxication on defendant's ability to form requisite mental state for murder).

a. Trial court's discretion

Where cross-examination exceeds the scope of direct, the trial court need not wait for an objection before correcting improper cross. Hudgins v. State, 451 N.E.2d 1087 (Ind. 1983). On the other hand, the trial court has discretionary power to allow cross-examination to exceed scope of direct examination. Sturma v. State, 683 N.E.2d 606 (Ind. Ct. App. 1997).

b. Constitutional limitations on trial court's discretion

(1) Right to confrontation

In criminal cases, the right of confrontation limits the trial court's discretion. Miller, 12 *Indiana Evidence* 930 § 611.101 (4th ed.). Indiana's constitutional right to confrontation is more extensive in some respects than that in the U.S. Constitution. Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999). "The right of confrontation assured by the Sixth Amendment requires that a defendant be afforded an opportunity to conduct a full, adequate, and effective cross-examination." Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999), Ingram v. State, 547 N.E.2d 823, 827 (Ind. 1989). The Indiana Constitution, Article 1, Section 13, also guarantees a criminal defendant the right to face-to-face confrontation with witnesses against him. Arndt v. State, 642 N.E.2d 224, 228 (Ind. 1994).

Any doubt regarding the legitimacy of cross-examination" must be resolved in favor of the questioner." McIntyre v. State, 460 N.E.3d 162 (Ind. Ct. App. 1982).

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) ("other indicia of reliability" of a hearsay statement is not a substitute for the Federal Sixth Amendment requirement that a defendant have the opportunity to cross-examine declarants of testimonial hearsay).

The opportunity for the defendant to cross-examine a witness during a discovery deposition may be enough to satisfy the Crawford requirement even if a defense attorney states during the deposition that the defendant does not waive their right to confront the witness at trial. Thomas v. State, 966 N.E.2d 1267 (Ind. Ct. App. 2012).

Thomas v. State, 966 N.E.2d 1267 (Ind. Ct. App. 2012) (although defense attorney claimed on the record and prior to questioning that deposition is for discovery purposes only and that defendant does not waive his right to confront, trial court did not abuse its discretion by admitting deposition into evidence when witness refused to testify at trial; defendant had the opportunity to cross-examine the witness at the deposition and his unexplained failure to do so does not change anything).

PRACTICE POINTER: Crawford v. Washington, 541 U.S. 36,124 S. Ct. 1354 (2004), held that testimonial hearsay is inadmissible against a criminal defendant under the Sixth Amendment unless the defendant has the opportunity to cross-examine the declarant, and that other "indicia of reliability" may not substitute for cross-examination. Crawford overturned Ohio v. Roberts, 448 U.S. 56 (1980), which permitted the admission of testimonial hearsay without cross-examination if the judge found that the evidence was "reliable." Two of the cases cited here, Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999) and Ingram v. State, 547 N.E.2d 823 (Ind. 1989) relied on the now-discarded Ohio v. Roberts 'other indicia of reliability' test, but the propositions for which they are cited here are still good law. For more on the right to confrontation and Crawford, see Chapter 8, *The Admissibility of Hearsay*.

(2) Right to present a defense

Although regulation of cross-examination is within the discretion of the trial court, the defendant also is entitled to present his theory of defense. Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993).

Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993) (in prosecution for performing illegal abortion, the trial court erroneously prevented cross-examination of complaining witness concerning her medical history of miscarriages because evidence was relevant to establish the defense that pregnancy was terminated by a miscarriage rather than the abortion; the defendant was also prevented from having an expert testify that woman who miscarries once is more likely to miscarry again, and from eliciting testimony that the complaining witness had told others that she had miscarried the baby the defendant was accused of aborting).

(3) Self-incrimination

(a) Witnesses other than the defendant

A witness other than the accused has no privilege to refuse to be called to testify but does have the right to refuse to give answers that may be incriminating.

Wright & Gold, 28 *Federal Practice & Procedure* 408 § 6167; U.S. Constitution, 5th Amendment. "Where a witness other than an accused testifies on direct examination[,] he waives his privilege against self-incrimination as to the questions he answered." Wright & Gold, 28 *Federal Practice & Procedure* 409 § 6167.

Where a prosecution witness asserts the constitutional privilege against self-incrimination to limit cross-examination by the accused, the accused's constitutional right to confrontation may be violated. Rule 611 does not control. Wright & Gold, 28 *Federal Practice & Procedure* 408 § 6167.

> Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965) (the defendant's inability to cross-examine a witness, who claimed the Fifth Amendment and whose entire pretrial statement was read to him while on the stand, denied the defendant his Sixth Amendment rights).

(b) The defendant

If the accused chooses to testify in a criminal case, the prosecutor is permitted to cross-examine within the proper scope but has no right to make the accused his own witness. Miller, 12 *Indiana Evidence* 950 § 611.203 (4th ed.).

(i) No waiver of privilege by testimony to preliminary matters

Rule 104(d) provides that a criminal defendant does not, by testifying on a preliminary question, become subject to cross-examination as to other issues in the case." Ind. Evid. R. 104(d).

(ii) May waive privilege only to subjects on direct

The authors of the Federal Rules of Evidence Manual recommend that "the defendant be subject to cross-examination only to the extent necessary to fairly test the statements made upon direct examination and clear inferences that might be drawn from such statements." Saltzburg et al., *Federal Rules of Evidence Manual* Vol. 3 §611.02[8] (8th ed.) (Federal Rule 611(b)). When a criminal defendant testifies, the scope of the Fifth Amendment waiver "should be fixed not by Rule 611(b)'s 'subject matter' standard but [by] the extent to which cross-examination is necessary to test the truth of the accused's direct examination." Wright & Gold, 28 *Federal Practice & Procedure* 449 § 6166.

PRACTICE POINTER: The issue of whether a testifying criminal defendant becomes subject to cross-examination about any part of the case is not settled. However, the policy of Rule 611(b) is "to prevent digressions and diversions during cross-examination from interrupting the direct examiner's case and thereby confusing the jury." Wright & Gold, 28 *Federal Practice & Procedure* 406 § 6166. "The stakes are both different and greater when measuring the extent of a Fifth Amendment waiver. [R]ecognition of a waiver that is broader than necessary to protect the truth [has] significant costs since the right against self-incrimination is a constitutional principle thought fundamental to fair criminal procedure." Wright & Gold, 28 *Federal Practice & Procedure* 406 § 6166.

2. Other limitations on cross

a. Time limitations

Marbley v. State, 461 N.E.2d 1102 (Ind. 1984) (considering limited scope of pathologist's testimony, defendant was not denied his right to confrontation by the trial court's fifty-five-minute limitation on the length of the cross-exam to expedite pathologist's return to Seattle; defendant failed to show prejudice).

Heald v. State, 492 N.E.2d 671 (Ind. 1986) (trial court did not err in denying the defendant the ability to re-cross a psychiatrist, by limiting each side to a twenty-minute cross-examination of each psychiatrist on the issue of the defendant's sanity, in light of amount of time the trial court spent in establishing foundation for each expert's opinion and their qualifications; Dickson, J., joined by Shepard, J., dissenting).

b. Safety concerns

Although the right to cross-examine a confidential informant on matters such as the informant's address is presumed, it is not absolute and may be limited if the trial court finds that the witness has a reasonable fear of danger were his address disclosed. Riley v. State, 711 N.E.2d 489 (Ind. 1999).

Pigg v. State, 603 N.E.2d 154 (Ind. 1992) (trial court committed reversible error by denying the defendant the right to cross-examine the informant on his address; there was no *in camera* hearing, and the informant was the only witness to the alleged controlled buys from the defendant; abuse of discretion could be shown without the defendant demonstrating prejudice when the informant was the only witness to critical acts and supplied crucial testimony to the defendant's conviction).

Taylor v. State, 677 N.E.2d 56 (Ind. Ct. App. 1997) (trial court properly determined that there was valid basis to exclude evidence of informant's address on cross-examination; defendant was able to cross on the areas surrounding his employment and residence, and there was sufficient evidence to support the finding that informant would be put in jeopardy by revealing his address), *abrogated on other grounds by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

Dickerson v. State, 957 N.E.2d 1055 (Ind. Ct. App. 2011) (trial court's decision to allow confidential informant to testify anonymously was not fundamental error where defendant was friends with the confidential informant, took the confidential informant's deposition, and did not establish how identifying confidential informant by number rather than name hindered his defense and cross-examination).

c. Shielding victim

The confrontation clause in both the United States and Indiana Constitution guarantee the defendant both the right to confront a witness face-to-face and the right to cross examine a witness. Casada v. State, 544 N.E.2d 189 (Ind. Ct. App 1989) (*citing* Coy v. Iowa, 108 S. Ct. 2798 (1988) and Miller v. State, 517 N.E.2d 64 (Ind. 1987)). The Indiana Constitution specifically guarantees a criminal defendant the right to face-to-face

confrontation with witnesses against him. Arndt v. State, 642 N.E.2d 224, 228 (Ind. 1994).

Brady v. State, 575 N.E.2d 981 (Ind. 1991) (admission of tape was fundamental error where child was unable to see or hear defendant and unaware of his presence during taped statement).

Casada v. State, 544 N.E.2d 189 (Ind. Ct. App 1989) (trial court's finding that the complaining witness was too distraught to testify and that it hoped that chalkboard screen would enable her to do so was not a sufficient particularized finding to outweigh the defendant's right to confront face to face; thus, reversible error to allow witness to partially testify behind screen).

Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991) (because Indiana's videotape testimony statute provides for two face-to-face encounters, it is constitutional).

Hart v. State, 578 N.E.2d 336 (Ind. 1991) (admission of pretrial videotape of child witness' testimony where defendant was in another room and could only hear the testimony violated his right to face-to-face confrontation but was not fundamental error).

But see Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990) (permitting child witness to testify by closed circuit television did not violate confrontation clause).

PRACTICE POINTER: The reasoning of Maryland v. Craig is suspect because it relied partly on Ohio v. Roberts, 448 U.S. 56 (1980), *overruled by* Crawford v. Washington, 124 S. Ct. 1354 (2004).

3. Opening the door to otherwise inadmissible evidence

When a party touches upon a subject in direct examination, leaving the trier of fact with a false or misleading impression of the facts related, the direct examiner may be held to have "opened the door" to the cross examiner to explore the subject fully, even if the matter so brought out on cross-examination would otherwise have been inadmissible. Tawdul v. State, 720 N.E.2d 1211 (Ind. Ct. App. 1999). The scope of cross-examination is not limited to those parts specifically included in direct examiner's questions. Lycan v. State, 671 N.E.2d 447 (Ind. Ct. App. 1996).

4. Re-cross, re-direct and rebuttal

Scope of re-cross examination is limited to the scope of re-direct examination. Walker v. State, 442 N.E.2d 696 (Ind. 1982). Rebuttal evidence is limited to that which tends to explain, contradict, or disprove evidence offered by the adverse party. Conley v. State, 972 N.E.2d 864, 872 (Ind. 2012). The scope of rebuttal is within the discretion of trial court. Wells v. State, 441 N.E.2d 458 (Ind. 1982).

U.S. v. Groves, 470 F.3d 311 (7th Cir. 2006) (where the trial court allowed the defendant to cross examine State's witness beyond the scope of direct, the witness became the defendant's witness for that purpose; thus, the State was allowed to call six other witnesses in rebuttal to challenge the testimony).

Hatter v. Pierce Mfg., Inc., 934 N.E.2d 1160 (Ind. Ct. App. 2010) (rebuttal testimony would have related to an issue on which plaintiff already had an opportunity to present evidence, and plaintiff admits the excluded testimony was relevant only to provide further impeachment of a defense expert plaintiff already cross-examined; thus, trial court acted within its discretion to exclude the testimony under Rule 403 as marginally relevant and leading to undue delay).

E. RULE 611(C): LEADING QUESTIONS

Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions on cross-examination; and when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. Indiana Rule of Evidence 611(c).

1. Definition of leading

"A leading question is one which 'suggests to the witness the answer desired'; 'indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer'; is in the form of an assertion of fact, or which, embodying a material fact, admits of a conclusive answer in the form of a simple 'yes' or 'no.' However, the mention of a subject to which a witness is desired to direct his or her attention is not considered to be a suggestion of an answer." Vance v. State, 860 N.E.2d 617, 619 (Ind. Ct. App. 2007) (citations omitted).

Vance v. State, 860 N.E.2d 617 (Ind. Ct. App. 2007) (prosecutor's question which required a "yes" or "no" answer and embodied a material fact was leading; harmless error).

According to Pozner and Dodd, the use of leading questions on cross-examination is "the critical advantage given to the cross-examiner that must always be pressed." Pozner & Dodd, *Cross-Examination: Science and Techniques* §8.11 (Michie 2004). "True leading questions do not merely suggest the answer, they *declare* the answer." Pozner & Dodd, *Cross-Examination: Science and Techniques* §8.13 (LexisNexis 2004).

2. Exceptions: when leading can occur on direct

While the purpose of the rule providing that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony" is to prevent substitution of the language of attorney for the thoughts of a witness as to material facts in dispute, "the use in the rule of the term "should" indicates that use of leading questions on direct examination rests within trial court's discretion." Thompson v. State, 674 N.E.2d 1307, 1309 (Ind. 1996).

a. Necessary to develop testimony

Prior case law has permitted leading questions to develop, on direct, testimony of witnesses, such as children; young, inexperienced, and frightened witnesses; special education student witnesses; and weak-minded adults. However, an apprehensive and vulnerable emotional state of a witness may well increase his or her susceptibility to suggestive questions and impair accuracy of resulting responses. Such circumstances

amplify the wisdom of proscription against leading questions. Williams v. State, 733 N.E.2d 919 (Ind. 2000).

Riehle v. State, 823 N.E.2d 287 (Ind. Ct. App. 2005) (trial court did not abuse its discretion in allowing the State to use leading questions with ten-year-old complaining witness who was extremely reluctant to testify and had no experience with criminal courts).

Lampkins v. State, 778 N.E.2d 1248 (Ind. 2002) (fact that witness had originally misled police to protect the defendant was a proper reason to allow leading questions on direct).

Stinson v. State, 126 N.E.3d 915, (Ind. Ct. App. 2019) (no error in allowing leading questions of victim who had sustained injuries which left him with limited ability to speak).

b. Adverse witness

When a party calls an adverse witness, it is within the trial court's discretion to allow both parties to use leading questions. Bonadies v. Sisk, 691 N.E.2d 1279, 1281 (Ind. Ct. App. 1998) (*citing* numerous sources). "[T]his does not mean that the unbridled use of leading questions is permitted as a matter of right." Id.

Most courts have refused to permit leading questions on cross-examination where the adverse party has been called as a witness by the opponent. Bonadies v. Sisk, 691 N.E.2d 1279, 1281 (Ind. Ct. App. 1998) (*citing* Annotation, *Cross-examination by Leading Questions of Witness Friendly to or Biased in Favor of Cross-examiner*, 38 A.L.R.2d 952, 954 (1954)).

c. Immaterial facts

Indiana Courts have noted that the policy behind prohibiting leading questions is to prevent an attorney from substituting her own language for the thoughts of the witness as to material facts in dispute. Therefore, reversal will not be required when the State asks leading questions concerning immaterial facts. Jones v. State, 982 N.E.2d 417 (Ind. Ct. App. 2013)

Jones v. State, 982 N.E.2d 417 (Ind. Ct. App. 2013) (State's leading questions were permissible because they did not address material facts in dispute).

XII. WRITING OR OBJECT USED TO REFRESH MEMORY - RULE 612

A. OFFICIAL TEXT

(a) **Right to Inspect**

(1) 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.

(2) 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.

(b) **Terms and Conditions of Production and Use.**

(1) 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.

(2) If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection.

(3) If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court must 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 must be preserved and made available to the appellate court in the event of an appeal.

(c) **Failure to Produce or Deliver the Writing or Object.** If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court must make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order must be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

B. IN GENERAL: PRESENT RECOLLECTION REFRESHED

1. Distinguished from "past recollection recorded"

Rule 612 deals with the evidentiary doctrine known as "present recollection refreshed," as distinguished from "past recorded recollection." Rule 803(5) deals with "past recorded recollection," where the witness is unable to testify from memory and the document itself is used as evidence.

2. When a witness has forgotten a fact

The witness must first state that she has forgotten a fact before examining counsel may attempt to refresh the witness's recollection.

Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011) (trial court abused its discretion by permitting State to allow complaining witness to read the transcript of her previous statement when witness had not testified that she could not recall the information sought by the prosecutor.)

When a witness testifies that she has forgotten a fact, examining counsel may hand her a writing or object in order to refresh her memory. Rule 612(a); 1 *McCormick on Evidence* § 9 (7th ed. 2013). If the writing or object revives the witness's memory, the witness is then permitted to testify from her revived memory.

a. Cannot testify from document, but from refreshed memory

The witness must testify from her 'refreshed' memory. Miller, 12 *Indiana Evidence* 272-73 § 612.101 (4th ed.). Whether the witness is testifying from her refreshed memory or from the document is an issue for the trial court to determine. Doty v. Elias, 733 F.2d 720, 725 (10th Cir. 1984); Miller, 12 *Indiana Evidence* 979 § 612.101 (4th ed.). The witness is not permitted to read from the writing and the proponent is not permitted to put the writing or object into evidence under the "present recollection refreshed" doctrine. Evans v. State, 563 N.E.2d 1251, 1261 (Ind. 1990); Clark v. State, 4 Ind. 156, 157 (1853).

The witness may (and probably should) be required to lay the document aside before proceeding with her testimony. Richardson v. State, 266 N.E.2d 51, 54 (Ind. 1971) (DeBruler, J. dissenting); Miller, 12 *Indiana Evidence* 978-79 § 612.101 (4th ed.).

b. Personal knowledge

The witness must have had personal knowledge of the matter on which her memory is refreshed. Clark v. State, 4 Ind. 156, 157 (1853).

The writing or object need not have been made by the witness. Thompson v. State, 728 N.E.2d 155 (Ind. 2000); Poore v. State, 501 N.E.2d 1058, 1061-62 (Ind. 1986); and Clark v. State, 4 Ind. 156, 157 (1853).

Thompson v. State, 728 N.E.2d 155 (Ind. 2000) (trial court erred in refusing to allow defendant to use his sister's deposition to refresh her recollection during cross, though sister did not prepare deposition).

Cole v. State, 970 N.E.2d 155 (Ind. Ct. App. 2012) (although there is no requirement that the item used to refresh the witness's memory must have been written by the witness, this evidence would have been merely cumulative of the nurse's testimony from earlier in the trial re: how much witness had had to drink).

3. Foundation

"[A] 'simple colloquy is all that is required under Rule 612: 'The witness must first state that he does not recall the information sought by the questioner. The witness should be directed to examine the writing and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.'" Thompson v. State, 728 N.E.2d 155 (Ind. 2000) (*quoting* Miller, 13 *Indiana Practice* § 612.101, at 225-26 (2d ed. 1995)).

The foundation for "present recollection refreshed" is as follows:

a. The witness states that she cannot recall a fact or event.

b. The witness testifies that a certain writing could help refresh her memory.

c. The proponent tenders the writing or object to the witness.

d. The proponent asks the witness to silently read the writing or study the object.

f. The witness states that viewing the document or object has refreshed her memory.

g. The witness then testifies from her revived memory.

Imwinkelreid & Blinka, *Criminal Evidentiary Foundations* 591-2 (LexisNexis 2016).

Hutcherson v. State, 966 N.E.2d 766 (Ind. Ct. App. 2012) (a witness's act of reading his own prior statement under Rule 612 is foundational in the sense that before proceeding, counsel must establish whether such reading was successful in refreshing the witness's memory; in circumstances involving a blind or illiterate witness, counsel may attempt to refresh the witness's recollection by reading the statement aloud, preferably outside presence of the jury).

C. PRODUCTION OF DOCUMENT TO ADVERSE PARTY

1. Used to refresh during testimony: Rule 612(a)(1)

If a witness refreshes her memory with a writing or object while testifying, the adverse party is entitled to have the writing or object produced. Rule 612(a). An adverse party entitled to access to the document or object is a party "whose interests could be harmed by the testimony that was based on refreshed memory." Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (quoting 28 Wright & Gold, Federal Practice and Procedure, § 6183, at 451).

Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (fact that refreshing of testimony with a report occurred during the defendant's cross-examination of a police officer did not change the fact that the defendant was the party who could be harmed from the officer's testimony and therefore was the adverse party).

A witness who uses a privileged document to refresh her memory while testifying will generally be held to have waived (or forfeited) the privilege by disclosing the contents of the document. Saltzburg *et al.*, *Federal Rules of Evidence Manual* Vol. 3, § 612.02[7] (8th ed.).

Beckham v. State, 531 N.E.2d 475 (Ind. 1988) (a party waives its work product privilege if the privileged material is used to refresh the memory of a witness on the stand).

Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (the State waived any work product privilege it may have had in the police report used to refresh officer's memory on cross-examination by handing the report to defense counsel for the officer's use).

Mitchem v. State, 503 N.E.2d 889 (Ind. 1987) (although the prosecutor properly withheld evidence because it was not beneficial to the defendant (prosecutor also argued work product), once exhibit was marked for identification and handed to witness to refresh his memory and witness then testified from his refreshed memory, defense counsel was entitled to see the contents of the exhibit and to use the exhibit in his cross-examination).

2. Used to refresh before testimony: Rule 612(a)(2)

If a witness uses a writing or object to refresh her memory before testifying, the 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, if the trial court determines that the interests of justice so require. Rule 612(a)(2).

D. TERMS OF PRODUCTION AND USE: RULE 612(b)

1. Right to inspect writing or object

A party entitled to have a writing or object produced under this rule is entitled to inspect it. Indiana Rule of Evidence 612(b).

a. Redaction

If the proponent claims that the writing or object contains portions which do not relate to the witness's testimony, the court must examine the document *in camera* and excise any portions not related to the witness's testimony. Rule 612(b)(3).

b. Preservation of error: offer of proof

Any portion withheld over objections must be preserved and made available to the appellate court in the event of an appeal. Indiana Rule of Evidence 612 (b)(3).

Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (where police report not made part of record and officer's refreshed testimony was cumulative of other state's evidence, error in refusing access was harmless).

c. Remedies for failure to produce or deliver the writing or object

In a criminal case, if the prosecutor "elects not to comply" with the production requirement, the trial court must either strike the testimony or, if the court in its discretion determines that the interests of justice so require, declare a mistrial. Rule 612(c).

PRACTICE POINTER: If you have reason to believe that a prosecution witness has used an undiscoverable or undisclosed document or object to refresh his or her memory before trial, seek a ruling from the trial court that the interests of justice require that the writing or object be produced. Once the trial court has so ruled, production of the writing or object is mandatory under Rule 612(c). Although the wording of the last sentence of the rule suggests that the prosecution may "elect not to comply," if the prosecutor does not produce the writing or object or make it available for inspection, the mandatory remedy provided by rule is either to strike the testimony or to declare a mistrial.

2. Right to cross-examination

A party entitled to have a writing or object produced under this rule is entitled to cross-examine the witness thereon. Indiana Rule of Evidence 612(b)(1).

If the cross-examining party introduces otherwise inadmissible portions of the writing or object to impeach the witness, the court should admonish the jury to consider the writing or

object only as it relates to the witness's credibility and not as substantive evidence. Miller, 12 *Indiana Evidence* 985 § 612.301 n.5 (4th ed.); Rule 105.

3. Right to introduce writing or object

A party entitled to have a writing or object produced under this rule is entitled to introduce in evidence those portions which relate to the testimony of the witness. Indiana Rule of Evidence 612 (b)(1).

> Thompson v. State, 728 N.E.2d 155 (Ind. 2000) (where defendant refreshed witness' memory with written statement to police, trial court erred in admitting entire statement into evidence; however, state was entitled to admit part of statement relating to that conversation; harmless error).

XIII. PRIOR STATEMENTS OF WITNESSES - RULE 613

A. OFFICIAL TEXT

(a) **Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its content to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

B. SHOWING OR DISCLOSING THE STATEMENT DURING EXAMINATION: RULE 613(a)

1. For impeachment

Cross-examination about a prior inconsistent statement is a proper method of impeachment. Rule 613(a); Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 263 (LexisNexis 2016). Rule 613 governs the use of a prior statement solely to impeach the witness by showing that his story has changed. Miller, 13 *Indiana Evidence* 285-86 § 613.101 (3d ed.).

A witness may be impeached by asking him about a prior statement which is inconsistent with his trial testimony, even if the prior statement is not admissible as substantive evidence. Miller, 12 *Indiana Evidence* 988 § 613.101 (4th ed.); Humphrey v. State, 680 N.E.2d 836 (Ind. 1997), *denial of postconviction relief reversed*, 73 N.E.3d 677 (Ind. 2017). Generally, a witness's prior statement is hearsay if offered at trial as proof of the matter asserted. See Rule 801(c); Miller, 12 *Indiana Evidence* 988 § 613.101 (4th ed.). However, when the prior statements are used to impeach and rehabilitate a witness, they are not hearsay because they are not used to prove truth of matter asserted. Birdsong v. State, 685 N.E.2d 42 (Ind. 1997).

PRACTICE POINTER: For a detailed practical discussion of impeachment of a witness by a prior inconsistent statement, refer to Pozner & Dodd, *Cross-Examination: Science and Techniques* 16-1 (LexisNexis 2004).

2. Showing prior statement to witness and/or opposing counsel

The prior statement need not be shown to the witness at the time of questioning. Rule 613(a); Thompson v. State, 674 N.E.2d 1307, 1310-11 (Ind. 1996). However, the prior statement must be disclosed or shown to opposing counsel on request. Rule 613(a). It may be necessary to disclose the content to the court, too.

Gray v. State, 982 N.E.2d 434 (Ind. Ct. App. 2013) (trial court was well within its discretion in refusing to allow defendant to play tape recording when the court had no knowledge of its content; however, defendant explained that he intended to use only a specific portion of the tape and made it available to the court; court should have examined the portion of the tape defendant intended to use and determined whether it was inconsistent with officer's testimony).

Thompson v. State, 674 N.E.2d 1307, 1310-11 (Ind. 1996) (requiring counsel to tell witness which officers' interview in which the alleged inconsistent statement was made did not violate Rule 613(a)).

C. EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT: Rule 613(b)

1. Foundation: Opportunity to deny or admit the statement

a. Prior to introducing extrinsic evidence

Under Indiana Evidence Rule 613(b), the requirement that a witness be given an opportunity to explain or deny a prior inconsistent statement may be afforded to that witness at any point during the proceedings. However, the preferred method of proceeding is still the traditional method of confronting the witness with his inconsistent statement prior to its introduction into evidence. Griffith v. State, 31 N.E.3d 965 (Ind. 2015). But upon a finding that the interests of justice so require, the trial court can admit extrinsic evidence of the prior statement even if the impeachee had no opportunity to explain or deny it or if the adverse party had no opportunity to question the witness concerning the statement.

Orr v. State, 968 N.E.2d 858 (Ind. Ct. App. 2012) (trial court did not commit fundamental error by allowing the State to admit extrinsic evidence of a prior inconsistent statement without first confronting defendant).

Hilton v. State, 648 N.E.2d 361 (Ind. 1995) (no error in excluding extrinsic evidence of a prior inconsistent statement where the defendant did not ask the witness who allegedly made the statement about the statement while he was on the stand), *disapproved on other grounds by* Wilson v. State, 836 N.E.2d 407 (Ind. 2005)).

Tharpe v. State, 955 N.E.2d 836, 840 (Ind. Ct. App. 2011) (to lay a foundation to warn witness and enable him to admit, explain, or deny the prior statement, counsel should first call the witness's attention to the attendant circumstances: "the time when, the place where, and the person to whom the contradictory statement is alleged to have been made.")

Angulo v. State, 191 N.E.3d 958 (Ind. Ct. App. 2022) (no error in trial court's refusal to allow testimony from a police officer describing what a witness told him he overheard drug dealer say about his involvement in crimes; defendant did not lay a proper foundation to impeach the drug dealer with extrinsic evidence because he did not "warn" the drug dealer about his alleged statements and give him an opportunity to explain or deny them; even if a proper foundation had been laid, trial court could have excluded the statements on grounds that the witness was biased against the drug dealer and therefore not credible).

PRACTICE POINTER: Providing the witness the opportunity to explain or deny under Rule 613(b), read literally, permits the use of extrinsic evidence to impeach a witness without laying a foundation while the witness is on the stand. Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 269-70 (LexisNexis 2016). However, where defense counsel intends to impeach a witness with a prior inconsistent statement after the witness leaves the stand, counsel should always either ask the witness about the prior statement during cross-examination or ask that the witness remain subject to recall after leaving the witness stand. Otherwise, there is a risk that the trial court will rule that the extrinsic evidence is inadmissible for failure to lay a proper foundation. See, e.g., Hilton v. State, 648 N.E.2d 361 (Ind. 1995). "While such a foundation technically is no longer required in light of Rule 613(a), counsel who wishes to impeach through a prior inconsistent statement is best advised to use Indiana's earlier common law approach" requiring confrontation with the statement prior to impeachment. Miller, 12 Indiana Practice § 613.104. Note that if the interests of justice so require, the trial court may allow impeachment even though the witness is not given the chance to explain or deny the prior statement. Rule 613(b).

b. Exception

Because Rule 613(b) does not apply to statements of a party-opponent as defined by Rule 801(d)(2), the State does not have to give the defendant the opportunity to deny or admit a prior statement before admitting it into evidence. Pavey v. State, 764 N.E.2d 692, 705 n. 8 (Ind. Ct. App. 2002).

2. Impeachment when witness admits prior statement

Once a witness admits that he made a prior inconsistent statement, impeachment is complete, and reciting segments of the inconsistent statement is thus superfluous and in error. Appleton v. State, 740 N.E.2d 122, 125 (Ind. 2001); Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004).

Appleton v. State, 740 N.E.2d 122 (Ind. 2001) (after State witness testified that defendant had not even been present at scene of the crime, trial court erred in permitting the prosecution to impeach this witness by reading line-by-line from the prior inconsistent pretrial statement in which the witness described the defendant's participation in the crime; permissible impeachment was limited to specific portions of his testimony that were inconsistent with prior statements and giving him opportunity to explain those inconsistencies).

Herron v. State, 10 N.E.3d 552 (Ind. Ct. App. 2014) (reversible error where trial court allowed State to call defendant's girlfriend solely to impeach line-by-line her testimony with a pretrial statement).

Malloch v. State, 980 N.E.2d 887 (Ind. Ct. App. 2012) (prosecutor erroneously had a witness read two prior statements when she admitted making the first prior inconsistent statement and did not even testify inconsistently with the second statement; however, error was harmless because it did not place defendant in grave peril).

Martin v. State, 779 N.E.2d 1235 (Ind. Ct. App. 2002) (it was harmless error for trial court to allow State to use impeachment evidence as substantive evidence by leading witness through prior statement rather than allowing the witness to testify to his memory and impeaching when his memory is inconsistent with the statement).

D'Paffo v. State, 749 N.E.2d 1235 (Ind. Ct. App. 2001) (where complaining witnesses already explained inconsistent statements, questioning interviewer about the complaining witnesses' inconsistencies was irrelevant), *aff'd in part*, 778 N.E.2d 798.

Hall v. State, 177 N.E.3d 1183 (Ind. 2021) (no error in excluding accomplice's prior statement to police for impeachment purposes, where jury was read accomplice's deposition in its entirety and could hear accomplice admit that he lied in his prior statement to police because he did not want to look like a "cold blooded killer[,]" and once jury heard accomplice admit and explain that he lied, his impeachment on prior statement was complete and further extrinsic evidence regarding his impeachment was unnecessary; also, accomplice had opportunity to explain or deny inconsistent statement during his deposition, and he explained that he lied to avoid or lessen his potential culpability in murder).

Roberts v. State, 712 N.E.2d 23, 33 (Ind. Ct. App. 1999) (after witness admitted inconsistent statement, videotape of statement was not admissible for impeachment because impeachment was completed).

Shepherd v. State, 157 N.E.3d 1209 (Ind. Ct. App. 2020) (witness's video-recorded police interview about what time he woke defendant, what he knew about child-victim's condition, and his initial false claim that he performed cardiopulmonary resuscitation (CPR) on victim, was inadmissible to impeach witness for prior inconsistent statements, in defendant's trial for multiple offenses arising out of death of daughter of defendant's girlfriend; impeachment of witness was complete when defendant confronted witness on cross and direct examination with witness's prior statements and witness acknowledged making the inconsistent statements).

PRACTICE POINTER: The Roberts court did note Seventh Circuit law that extrinsic evidence may be admissible even though the witness admits the prior inconsistent statement, because "a party should be allowed to make his case by the most convincing evidence he can obtain[,] and extrinsic proof of a prior statement will often be far more convincing than the acknowledgment of the declarant[,] and not cumulative." Roberts v. State, 712 N.E.2d 23, 33 (Ind. Ct. App. 1999) (*quoting* U.S. v. Lashmett, 965 F.2d 179 (7th Cir. 1992)). This argument has not yet been directly decided by the Indiana Supreme Court. See, e.g., Harrison v. State, 699 N.E.2d 645, 648-49 (Ind. 1998) (not an abuse of discretion to admit statement which was cumulative evidence).

3. Impeachment when witness denies prior statement

Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. Indiana Rule of Evidence 613(b).

a. Prior statement must be inconsistent with prior testimony

For purposes of Indiana Evidence Rule 613(b), which permits impeachment of witness by extrinsic evidence of prior inconsistent statement, a statement at trial of "I am not sure" or "I don't remember" is not necessarily inconsistent with an earlier statement that provides answer to question being asked. Dunlap v. State, 761 N.E.2d 837 (Ind. 2002).

Dunlap v. State, 761 N.E.2d 837 (Ind. 2002) (it was within trial court's discretion to find that the witness's trial testimony that she tried to turn the defendant around but was not sure whether she was holding on to or touching the defendant when the shots were fired was not inconsistent with her statement to police a year and a half earlier that she grabbed the defendant while the defendant was shooting).

Appleton v. State, 740 N.E.2d 122 (Ind. 2001) (State properly impeached with the witness' pretrial statement that assailants wrapped one person's hands, feet and head with duct tape when she testified at trial that she was unsure whether the defendant and two other assailants duct taped anybody).

Dixon v. State, 967 N.E.2d 1090 (Ind. Ct. App. 2012) (in murder prosecution, trial court did not abuse its discretion when it permitted State to introduce extrinsic evidence, in the form of testimony from a police detective, as impeachment of another of State's witnesses when the witness testified she did not remember or recall telling the detective that she saw defendant get out of his car when he came to the scene).

Kubsch v. State, 866 N.E.2d 726 (Ind. 2007) (it was within trial court's discretion to rule that witness's testimony that she could not remember the police interview was not inconsistent with her statements to the police).

b. Documents used to impeach

(1) Prior unsworn statements

Although a prior unsworn statement would be hearsay if offered for the truth of the matter, that same statement offered under Rule 613 is not offered as substantive evidence but rather impeachment evidence and thus is not hearsay. See, e.g., Stoltmann v. State, 793 N.E.2d 275 (Ind. Ct. App. 2003).

(2) Unauthenticated documents

Where the proponent of the inconsistent statement only uses the statement for impeachment and does not try to admit it into evidence, authentication is not required. LeFlore v. State, 823 N.E.2d 1205 (Ind. Ct. App. 2005).

(a) Recordings

LeFlore v. State, 823 N.E.2d 1205 (Ind. Ct. App. 2005) (unauthenticated recording of phone conversations was properly used for impeachment and not admitted into evidence).

(b) Facsimiles

Hightower v. State, 735 N.E.2d 1209 (Ind. Ct. App. 2000) (where defendant tried to admit unauthenticated facsimile into evidence rather than just use it for impeachment, trial court did not abuse its discretion in denying admission).

c. Must concern a non-collateral matter

The prohibition of impeachment by extrinsic evidence of a prior inconsistent statement on a collateral matter survived the adoption of the Indiana Rules of Evidence. Jackson v. State, 728 N.E.2d 147 (Ind. Ct. App. 2004); see also Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004) (challenge to impeachment under Rule 403).

Jackson v. State, 728 N.E.2d 147 (Ind. 2000) (because officer's belief that defendant killed his wife accidentally was a collateral matter and inadmissible under Rule 704(b), extrinsic evidence of prior statement was properly excluded).

D. REHABILITATION

1. With other portions of the statement

Cross-examining a witness about a prior inconsistent statement may open the door to admission of that statement so that the fact finder can weigh the degree of inconsistency. Mayhew v. State, 537 N.E.2d 1188, 1191 (Ind. 1989). "Once a witness has been impeached on cross-examination by reference to a prior inconsistent written statement, a party may rehabilitate its witness on redirect by introducing other pertinent portions of the statement." Birdsong v. State, 685 N.E.2d 42 (Ind. 1997); Evans v. State, 643 N.E.2d 877, 882 (Ind. 1994).

2. With prior consistent statements

Where an adversary has made an express or implied charge of recent fabrication or improper influence, Rule 801(d)(1)(B) applies. However, even if not admissible as substantive evidence under Rule 801(d)(1)(B), prior consistent statements may be admissible under Rule 613 to rehabilitate an impeached witness. Moreland v. State, 701 N.E.2d 288 (Ind. Ct. App. 1998); Bassett v. State, 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).

Flake v. State, 767 N.E.2d 1004 (Ind. Ct. App. 2002) (although there was no recent fabrication and the witness's prior statement was not admissible under Rule 801, the prior consistent statement was admissible after the witness was impeached with inconsistencies between her trial testimony and deposition).

E. LIMITING INSTRUCTION

Where evidence of a prior inconsistent statement is admitted to impeach a witness but not as substantive evidence, a jury instruction such as the following may be appropriate.

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] [made a written statement] [in former testimony testified] [acted in a manner] inconsistent with his testimony in this case. Evidence of this kind may be considered by you in deciding the value of the testimony of the witness. Indiana Pattern Jury Instruction No. 12.1300 (3/2015 ed.).

NOTE: that former Pattern Jury Instruction 12.19, permitting the use of prior inconsistent statements as substantive evidence, no longer reflects current law in Indiana and should not be given. Humphrey v. State, 680 N.E.2d 836 (Ind. 1997), *denial of post-conviction relief reversed*, 73 N.E.3d 677 (Ind. 2017). In Humphrey v. State, 73 N.E.3d 677 (Ind. 2017), defendant's trial

counsel was ineffective for not asking that the jury by correctly instructed that the State witness's unsworn statement could be considered only for impeachment, for not objecting to the trial court's incorrect instruction, for not tendering a correct instruction, and for erroneously telling the jury in closing argument that the prior inconsistent statement could be used in deciding whether defendant was guilty.

PRACTICE POINTER: Where the State is requesting the above instruction and the defendant feels the instruction will unduly call attention to unfavorable evidence, object on the ground that the instruction is misleading by erroneously singles out on piece of evidence. See, e.g., Dill v. State, 741 N.E.2d 1230 (Ind. 2001); Ludy v. State, 784 N.E.2d 459 (Ind. 2003); and Marks v. State, 864 N.E.2d 408 (Ind. Ct. App. 2007).

F. IMPEACHMENT OF THE TESTIFYING DEFENDANT

1. Use of illegally obtained prior inconsistent statements

a. Fifth Amendment violation

Although statements by the defendant, made in response to in-custody interrogation, without the warnings required by, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), may not be used in the State's case-in-chief, they are admissible to impeach a defendant who testifies. Page v. State, 689 N.E.2d 707, 710 (Ind. 1997); Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215 (1975); Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971).

b. Sixth Amendment violation

Statements of the defendant taken in violation of the Sixth Amendment's "prophylactic rule" announced in Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404 (1986), are also admissible to impeach the defendant. Michigan v. Harvey, 494 U.S. 344, 110 S. Ct. 1176 (1990).

c. Violation of right to consult with guardian

Purcell v. State, 406 N.E.2d 1255 (Ind. Ct. App. 1980) (a statement taken from a juvenile obtained in violation of the mandates of Lewis v. State, 288 N.E.2d 138 (Ind. 1972) [right to consult with parent or guardian before making a statement], is admissible for impeachment, if defendant takes the stand and makes an inconsistent statement).

d. Due process violation

The defendant cannot be impeached by his statements obtained under coercion or duress. Page v. State, 689 N.E.2d 707, 710 (Ind. 1997); New Jersey v. Portash, 440 U.S. 450, 459, 99 S. Ct. 1292, 1297 (1979); Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978).

e. Fourth Amendment violation

Maciejack v. State, 404 N.E.2d 7, 11 (Ind. 1980) (evidence obtained through an illegal search was admissible to impeach defendant's testimony that she had lost television and air conditioner in the fire).

2. Use of post-arrest silence

Use of a testifying defendant's post-arrest silence to impeach him is unconstitutional. Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976). However, the defendant may open the door to post-arrest silence by implying that he cooperated with the police. Vitek v. State, 750 N.E.2d 346 (Ind. 2001).

3. Illegally obtained evidence cannot be used to impeach other defense witnesses

The impeachment exception to the rule prohibiting admission of illegally seized evidence applies only to impeachment of the defendant - not all defense witnesses. James v. Illinois, 493 U.S. 307, 110 S. Ct. 648 (1990). Expanding the rule to permit impeachment of all defense witnesses with the defendant's excluded statement would create an intolerable chill on the defendant's right to present witnesses, would not prevent perjury more than the threat of subsequent perjury prosecution and would dilute the exclusionary rule's deterrent effect on police misconduct. Id.

James v. Illinois, 493 U.S. 307, 110 S. Ct. 648 (1990) (trial court erred in allowing State to impeach defense witness who testified the defendant had black hair with the defendant's illegally obtained admission that he changed his hairstyle the day after offense "in order to change his appearance").

XIV. CALLING AND INTERROGATION OF WITNESSES BY COURT AND JURY - RULE 614

A. OFFICIAL TEXT:

(a) **Calling by Court.** The court may not call a witness except in extraordinary circumstances or as provided for court-appointed experts. All parties are entitled to cross-examine any witness called by the court.

(b) **Questioning by Court.** The court may question a witness regardless of who calls the witness.

(c) **Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

(d) **Questioning by Juror.** A juror may be permitted to propound questions to a witness by submitting them in writing to the judge. The judge will decide whether to submit the questions to the witness for answer. The parties may object to the questions at the time proposed 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.

B. JUDGE'S AUTHORITY TO CALL WITNESSES: RULE 614(a)

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. Indiana Rule of Evidence 614(a).

1. Different than common law and federal rule

At common law, the trial court was permitted to call witnesses. 1 *McCormick on Evidence* § 8 (7th ed.). According to McCormick, the trial court's power to call witnesses was most often used in criminal cases to circumvent the common law rule against a party impeaching his own witness. Where the prosecution needed the testimony of a hostile witness, the court had the discretion to call the witness to the stand, thereby freeing the prosecutor to cross-examine and impeach the witness if needed. 1 *McCormick on Evidence* § 8, 42-43 (7th ed. 2013). This practice would be objectionable under Indiana Rule 614(a). Also note that Indiana Rule 607 permits a party to impeach its own witness.

Federal Rule 614(a) gives the trial court much broader authority to call witnesses than Indiana Rule 614(a).

2. Authority to call expert witnesses

An Indiana trial court's authority to call expert witnesses is governed by statute. Miller, 12 *Indiana Evidence* 1013 § 614.102 (4th ed).

a. Defendant's competence

If the trial court has reasonable grounds to believe that the "defendant lacks the ability to understand the proceedings and assist in the preparation of his defense," the court is required to fix a time for a hearing on the issue of competence and to appoint two or three experts to examine the defendant and testify at the hearing. Ind. Code 35-36-3-1.

b. Insanity plea

If a defendant enters a plea of insanity, the trial court is required by statute to appoint two or three experts "to examine the defendant and to testify at trial." Ind. Code 35-36-2-2. The court-appointed experts testify as the court's witnesses after both parties have presented their evidence, and both parties may cross-examine the court's witnesses and present rebuttal evidence. Ind. Code 35-36-2-2.

Crawford v. State, 770 N.E.2d 775 (Ind. 2002) (not only is it error to call court-appointed witnesses out of order, it may be a violation of the judicial cannons). See also Alexander v. State, 819 N.E.2d 533 (Ind. Ct. App. 2004).

c. Sexually violent predator

If a person is not a sexually violent predator under subsection (b), the prosecuting attorney may request the court to conduct a hearing to determine whether the person (including a child adjudicated to be a delinquent child) is a sexually violent predator under subsection (a). If the court grants the motion, the court shall appoint two (2) board certified psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After conducting the hearing and considering the testimony of the two psychologists or psychiatrists, the court shall determine whether the person is a sexually violent predator under subsection (a). A hearing under this subsection may be combined with the person's sentencing hearing. Ind. Code 35-38-1-7.5(e).

Marlett v. State, 878 N.E.2d 860 (Ind. Ct. App. 2008) (the prosecutor has discretion to ask for an SVP hearing; trial court must appoint two psychologists or psychiatrists to testify at the hearing; written reports will not suffice). But see Westbrook v. State, 770 N.E.2d 868 (Ind. Ct. App. 2002) (analyzing prior statute).

d. Appointment of an expert

Appointment of an expert is not the same as calling a witness to testify. Miller, 12 *Indiana Evidence* 1013 § 614.102 (4th ed). Where a court has appointed an expert for an indigent defendant, the expert is appointed to advise or testify for the defense and not to be called as the court's witness. Miller, 12 *Indiana Evidence* 1017 § 614.105 (4th ed.). The Indiana Rules of Evidence do not contain any procedures for the trial court to appoint an expert witness. Cf. Federal Rule 706.

C. JUDGE'S AUTHORITY TO ASK QUESTIONS OF WITNESSES: RULE 614(b)

The court may question a witness, regardless of who calls the witness. Indiana Rule of Evidence 614(b). However, the judge must be careful not to influence the jury with the judge's own

contentions. Miller, 12 *Indiana Evidence* 1017 § 614.201 (4th ed.); McVey v. State, 531 N.E.2d 458, 461 (Ind. 1988). It violates due process to combine the role of judge and advocate. In re Commitment of Roberts, 723 N.E.2d 474 (Ind. Ct. App. 2000).

1. Jury trial

The trial judge has discretion to question a witness in order to clarify testimony for the finder of fact. McCord v. State, 622 N.E.2d 504, 511 (Ind. 1993).

Ross v. Black & Decker, Inc., 977 F.2d 1178, 1187 (7th. Cir. 1992) ("A trial judge may not advocate on behalf of a [party], nor may he betray even a hint of favoritism toward either side. This scrupulous impartiality is not inconsistent with asking a question of a witness in an effort to make the testimony crystal clear for the jury.") (Federal Rule 614(b)).

2. Court trial

The trial court has greater leeway to ask questions of a witness in a court trial than in a jury trial but may not assume an adversarial role. State v. Covell, 580 N.E.2d 704, 707 (Ind. Ct. App. 1991).

In re Commitment of Roberts, 723 N.E.2d 474 (Ind. Ct. App. 2000) (trial court's calling and question of witnesses who was provided by social worker who filed a commitment petition in the absence of the social worker's attorney did not violate due process rights of the mental patient and did not place court in adversary position).

Myers v. State, 718 N.E.2d 783 (Ind. Ct. App. 1999) (post-conviction court did not abuse discretion asking petitioner difficult questions).

3. Improper questioning

Although a judge can aid the jury by asking questions of a witness, the judge exceeds the fact-finding role when the judge asks questions calculated to impeach or discredit a witness. Stellwag v. State, 854 N.E.2d 64 (Ind. Ct. App. 2006). The judge may question a witness if done in a manner that will not improperly influence the jury. Appraising the weight and value of testimony is the province of jury, and the trial judge should refrain from imposing opinions on jury. Abernathy v. State, 524 N.E.2d 12 (Ind. 1988).

Abernathy v. State, 524 N.E.2d 12 (Ind. 1988) (trial court's questioning of defendant's wife and victim's mother about prior inconsistent statement and whether she went to church and his questioning of victim's sister about details and asking whether she was sure was improper).

Decker v. State, 515 N.E.2d 1129 (Ind. Ct. App. 1987) (questioning witness at length about prior statements and advising him that if he told a different story than when he entered guilty, he was presumptively guilty of perjury conveyed to the jury the judge's opinion that the witness lacked credibility and was fundamental error).

The trial court abuses its discretion when its questions are "too partisan or extensive." 1 *McCormick on Evidence* §8, 42 (7th ed. 2013). The number of questions asked by the trial court is not dispositive; the nature of the questions and the identity of the witness are the most

important considerations. 1 *McCormick on Evidence* §8, 42 (7th ed. 2013). Leading questions by the court may amount to an impermissible comment on the evidence. 1 *McCormick on Evidence* 29 §8 (7th ed.).

D. OBJECTIONS: RULE 614(c)

A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present. Indiana Rule of Evidence 614(c). Rule 614(c) modifies the normal rule that an objection must be specifically stated at the time the question is asked. Miller, 12 *Indiana Evidence* 1028-29 § 614.301 (3d ed.).

> Owens v. State, 750 N.E.2d 403 (Ind. Ct. App. 2001) (trial court overstepped its bounds as neutral and passive arbiter when it questioned witnesses and ordered further discovery after both State and defense had rested; failure to object at trial made trial counsel's actions ineffective and failure to raise these issues on direct appeal made appellate counsel's actions ineffective).

This approach is consistent with previous common law. See, e.g., Abernathy v. State, 524 N.E.2d 12 (Ind. 1988). However, under common law, there may not even be a duty to object. The fundamental error doctrine is applicable to review of claims of improper judicial intervention in criminal trials. Anderson v. State, 653 N.E.2d 1048 (Ind. Ct. App. 1995) (*citing* Kennedy v. State, 280 N.E.2d 611 (Ind. 1972)). "An attorney would be reluctant to object to the judge's questioning as it then would appear to the jury that the defense and the court were in direct conflict with doing further damage to defendant's case." Long v. State, 448 N.E.2d 1103, 1104 (Ind. Ct. App. 1982) (*citing* Kennedy, *supra*).

E. QUESTIONS BY THE JURY: RULE 614(d)

1. Jury instructed on procedure for submitting questions

"The court shall instruct the jury before opening statements ...that jurors may seek to ask questions of the witnesses by submission of questions in writing." Ind. Jury Rule 20(a)(7).

a. When court decides to allow juror questions:

1) Counsel should be promptly informed
2) At the beginning of trial, jury should be instructed that they may be allowed to submit questions and the manner in which they may do so (See Ashba v. State, 816 N.E.2d 862 (Ind. Ct. App. 2004))
3) Court should explain to jurors that questions may be rephrased to comply with rules of evidence
4) Questions should be submitted in writing
5) Content should not be disclosed to other jurors
6) Court and attorneys should review questions outside presence of jury
7) Counsel should be able to object
8) Court may modify
9) Even where juror questions are allowed, the judge should propound the question to the witness

b. Substance of instruction

"During the trial you may have questions you want to ask a witness. Please do not address any questions directly to a witness, the lawyers, or your fellow jurors since there are rules as to what questions may be asked, and the answers that witnesses are allowed to give. Instead, if you have questions, please raise your hand after the attorneys have asked all of their questions, and before the witness has left the witness stand. You must put your questions in writing. I will review them with the attorneys, and I will determine whether your questions are permitted by law. If a question is permitted, I will ask it of the witness. If it is not permitted, you may not speculate why it was not asked, nor what the answer may have been." Indiana Pattern Jury Instruction, Criminal 1.2200 (2021).

c. Reminding jury, they can submit questions

Indiana has long recognized jurors' right to submit questions. Ind. Evid. R. 614(d) is in neither the federal nor uniform rules of evidence but was specifically added by the Indiana Supreme Court. Lawson v. State, 664 N.E.2d. 773 (Ind. Ct. App. 1996).

The trial court is not required to ask the jury if it has questions about a witness before each witness is excused, but rather to instruct the jury in a manner which leaves no doubt as to when to submit a question for a witness. Howard v. State, 818 N.E.2d 469 (Ind. Ct. App. 2004). "The trial court may use a variety of methods to obtain jury questions so long as the jurors know when they will be given an opportunity to ask questions." Id. at 479 (*citing* Ashba v. State, 816 N.E.2d 862 (Ind. Ct. App. 2004)).

Howard v. State, 818 N.E.2d 469 (Ind. Ct. App. 2004) (instructing jurors that they can write down their questions and submit them to the court unambiguously informed the jurors how to submit a question; thus, trial court's failure to ask jurors if they had questions before excusing witnesses was not error).

Ashba v. State, 816 N.E.2d 862 (Ind. Ct. App. 2004) (trial court's preliminary instruction that the jurors would be given an opportunity to ask questions before each witness was excused followed by the trial court's failure to do so was error; but, because there was no simultaneous objection when each witness was excused, the issue was waived).

2. Procedure when juror submits question

"A juror may be permitted to propound questions to a witness by submitting them in writing to the judge. The judge will decide whether to submit the questions to the witness for answer. The parties may object to the questions at the time proposed 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." Indiana Rule of Evidence 614(d).

a. Questions must be written

Rule 614(d) permits the jury to ask questions of the witness by submitting them to the judge in writing. This is the only manner of questioning specified.

b. Review of questions

The judge should review the questions with counsel for both parties and give counsel an opportunity to object out of the hearing of the jury. Tyson v. State, 386 N.E.2d 1185, 1192 (Ind. 1979).

When determining whether a juror question should be asked, the trial court should consider whether the question allows the jury to better understand the evidence, discover the truth and is admissible under the rules of evidence. Trotter v. State, 733 N.E.2d 527 (Ind. Ct. App. 2000). Questions propounded by jurors pursuant to Jury Rule 20 are entitled to no less scrutiny under the Rules of Evidence than those propounded by the parties. Burks v. State, 838 N.E.2d 510 (Ind. Ct. App. 2005).

Vinson v. State, 735 N.E.2d 828 (Ind. Ct. App. 2000) (allowing a juror to question State's witness regarding whether she could see any other persons in a getaway car was proper although it reopened the State's case), *disapproved on other grounds by* Long v. State, 743 N.E.2d 253 (Ind. 2001).

Trotter v. State, 733 N.E.2d 527 (Ind. Ct. App. 2000) (allowing a juror's question beyond the scope of the State's direct regarding an inconsistency between two pieces of evidence was proper because the question sought clarification of the evidence).

Dowdy v. State, 672 N.E.2d 948 (Ind. Ct. App. 1996) (trial court properly refused to ask juror's question regarding whether the defendant had been previously charged with the charges he now faces and if not why his photo and fingerprints were on file with the police).

PRACTICE POINTER: Be aware that answers to jury questions can open the door to otherwise inadmissible evidence if there is no objection to the question. Crafton v. State, 821 N.E.2d 907 (Ind. Ct. App. 2005) (defendant's answer to jury question opened the door to otherwise inadmissible 404(b) evidence; defendant failed to object to jury question).

c. Judge asking foundational questions

The trial court's discretion to determine the appropriateness of a juror question includes the discretion to question a witness about his or her ability to answer. Trotter v. State, 733 N.E.2d 527 (Ind. Ct. App. 2000). Thus, the trial court may ask foundational questions of the witness before reading the juror's questions as long as the foundational questions were asked in an impartial manner and did not influence the jury improperly with the judge's own contentions. Id.

XV. SEPARATION OF WITNESSES - RULE 615

A. OFFICIAL TEXT:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

B. SEPARATION OF WITNESSES

A litigant has the right to demand separation. The Court has no discretion to the entry of a separation order, except as to the witnesses exempted under Evidence Rule 615. Corley v. State, 663 N.E.2d 175, 176-77 n.2 (Ind. Ct. App. 1996).

1. Mandatory at request of party

Separation of witnesses is mandatory at the request of a party. Hernandez v. State, 716 N.E.2d 948, 950 (Ind. 1999); Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995). The court may enter a separation order on its own motion. Rule 615.

A trial court's failure to enter a separation order upon request may be harmless error in the absence of a showing of prejudice. Miller, 12 *Indiana Evidence* 1034-35 § 615.101 (4th ed.); Wm. L. Comer Fam. Equity Pure Trust v. Commissioner, 958 F.2d 136, 140-41 (6th Cir. 1992).

2. Timing of request

a. Indiana Rule of Evidence 615

Indiana Rule of Evidence 615 is silent on the timing of the request for separation. "Ideally, a motion for separation of witnesses will be made before any witness testifies. However, a motion sometime after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended."

Anderson v. State, 743 N.E.2d 1273 (Ind. Ct. App. 2001) (harmless error to deny defendant's motion for separation of witnesses made after the first witness had only begun to testify about general background information).

b. Common law -- prior to any testimony

Before the adoption of Evidence Rule 615, separation motion was required to be requested and ruled upon before any witnesses testified.

Kuchel v. State, 501 N.E.2d 1045 (Ind. 1986) (reversible error in granting State's motion for separation order, over defendant's objection, after State had rested its case-in-chief).

PRACTICE POINTER: Make motion to separate witnesses prior to jury selection. Otherwise, witnesses may develop their own agenda by listening to voir dire and/or opening statements.

3. Scope of separation

Indiana Rule 615 forbids separated witnesses to: (1) listen to the testimony of other witnesses, and (2) to discuss any testimony with other witnesses.

PRACTICE POINTER: When moving for separation of witnesses, also ask the trial court to admonish the witnesses not to discuss their testimony with other witnesses.

a. Consultation between witnesses and counsel

A separation order does not prohibit counsel from consulting with witnesses. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001). Although it is appropriate for attorneys to discuss factual matters with their witnesses, Jiosa declined to address whether counsel may describe testimony of other witnesses in the face of the separation order. See also Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989); Patch v. State, 13 N.E.3d 913 (Ind. Ct. App. 2014).

Perry v. Leeke, 488 U.S. 272, 109 S. Ct. 594 (1989) (under the Sixth Amendment, a trial judge may not prohibit consultation between a criminal defendant and his attorney during an overnight recess but may prohibit such consultation during a brief recess taken during defendant's testimony).

b. Stages of the trial

Court has discretion to permit witnesses to remain in courtroom during opening statement. Kuchel v. State, 501 N.E.2d 1045 (Ind. 1986).

However, a party may be entitled to separation of witnesses during an interval between trials after a mistrial is declared. Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989).

c. Other proceedings

Request for separation of witnesses at a bail hearing was properly denied. Phillips v. State, 550 N.E.2d 1290, 1296 (Ind. 1990).

d. After completion of testimony

The trial court has discretion to allow earlier witnesses to remain in the courtroom following their testimony as long as the witnesses are not recalled. Solomon v. State, 439 N.E.2d 570, 576-77 (Ind. 1982). However, these witnesses, even if permitted to remain in the courtroom, should continue to be prohibited from consulting with other witnesses. Miller 12, Indiana Practice 1043 § 615.103 (4th ed).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (there is no presumption of prejudice where witness who violated separation order after their testimony by making statements to media were not present during testimony of any other witness and defendant was unable to identify how specific future witnesses were affected by statements to the media).

e. Rebuttal witnesses

As soon as a party knows they may call a rebuttal witness, that party should prevent the witness from gaining any further knowledge other testimony. Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002).

Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002) (as soon as the defense became aware that defendant's fiancé, who was not listed as a witness, might be called to the stand, he should have ensured that she complied with the separation of witness order; instead, the witness remained in the courtroom, spoke with the defendant and reviewed a State witness's deposition; excluding her testimony was not an abuse of discretion). See also McDonald v. State, 511 N.E.2d 1066 (Ind. 1987).

Lane v. State, 539 N.E.2d 488 (Ind. Ct. App. 1989) (where defendant failed to show misconduct by the State, trial court did not abuse discretion in failing to exclude testimony of rebuttal witness because of her presence in the courtroom; witness did not testify in State's case-in-chief and was not listed as a prospective witness).

PRACTICE POINTER: There is an argument that the purpose of keeping witnesses separate does not apply to rebuttal witnesses. U.S. v. Bramlet, 820 F.2d 851 (7th Cir. 1987) (rationale for excluding adverse witness who violates separation order is premised on concern that once having heard testimony of others, witness may inappropriately tailor his/her testimony to prior evidence; by contrast, the very function of rebuttal witness is challenging the prior testimony of opposing witnesses, thereby enhancing fact finder's ultimate determination of an objective "truth"). Thus, the separation order is not violated by rebuttal witnesses who were not expected to testify. U.S. v. Hargrove, 929 F.2d 316, 320-21 (7th Cir. 1987). However, the federal rule of evidence only addresses a witness's ability to hear testimony of other witnesses and not that discuss testimony with other witnesses as does the Indiana Rule.

4. Purpose of rule

"The purpose of a separation of witnesses order is to prevent the testimony of one witness from influencing that of another." Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995); Alexander v. State, 600 N.E.2d 549, 553 (Ind. Ct. App. 1992). The rule is not intended to offer a mechanism by which one party may defeat the other party's separation of witness's order. Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000).

"Sequestration of witnesses under Rule 615 serves two related purposes. The first purpose is to prevent a witness from tailoring his testimony in light of the testimony of other witnesses. [The] second purpose of Rule 615 is to permit the discovery of false testimony and other credibility problems." Wright & Gold, 29 *Fed. Prac. & Proc.* 53-54 § 6242 (West 1997) (footnotes omitted).

C. PERSONS EXEMPT FROM SEPARATION ORDER

Whether a witness fits in an exemption from exclusion under Rule 615 is within the trial court's discretion, but if the witness is included in an exemption, the court has no discretion to exclude her. Fourthman v. State, 658 N.E.2d 88 (Ind. Ct. App. 1995).

1. A party who is a natural person

Rule 615(1) does not permit the exclusion of a party who is a natural person. The rule is consistent with prior common law. See State v. Kinder, 259 Ind. 327, 286 N.E.2d 826, 927 (1972).

a. Parents of juvenile

A child's parents cannot be excluded from the hearing on a petition alleging delinquency. L.B. v. State, 675 N.E.2d 1104 (Ind. Ct. App. 1996); Ind. Code 31-37-10-7.

K.S. v. State, 849 N.E.2d 538 (Ind. 2006) (juvenile's mother, who was also the mother of the victim, was not subject to separation of witness's order; Ind. Code 31-37-10-7 designates a child's parent as a party to the proceeding and grants the parent "all rights of parties provided under the Indiana Rules of Trial Procedure").

C.T.S. v. State, 781 N.E.2d 1193 (Ind. Ct. App. 2003) (where the juvenile's mother was present during each hearing, the trial court did not err in excluding the juvenile's stepfather due to witness separation order).

b. The Defendant: Constitutional right to be present and Portuondo v. Agard

A criminal defendant has a constitutional right to be present in the courtroom during any testimony. U.S. Constitution, Amendment 6; Indiana Constitution, Article 1, Section 13.

However, in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119 (2000), the U.S. Supreme Court approved a prosecutor's argument that a criminal defendant's testimony was less credible because the defendant had been in the courtroom and heard the testimony of all of the other witnesses before taking the stand himself.

c. Dealing with Portuondo v. Agard argument in cases where defendant is likely to testify

(1) File motions *in limine* asking the trial court

(a) to bar the prosecutor from arguing that the defendant's credibility is lessened because he has the chance to hear the other witnesses testify first, *citing* the Indiana Constitution, Article 1, Section 13 which guarantees the defendant the right to confront his accusers face to face,

(b) to permit the defense an opportunity to respond to any such argument by the prosecutor, even if made for the first time in rebuttal argument,

(c) for a ruling that any prior consistent statements by the defendant will become admissible if the prosecutor argues that the defendant's testimony is a recent fabrication.

(2) During voir dire

Educate the jury about the historical, constitutional, and commonsense reasons why the defendant is permitted to hear all of the testimony against him before deciding whether to testify.

(3) Before Separation of Witnesses motion

Before making a routine motion for separation of witnesses, weigh the value of separation of witnesses to the defense against the likely impact of the prosecutor's argument that the defendant was uniquely able to tailor his testimony.

(4) State's assisting witness/representative

Where the State has designated an assisting witness or representative, remind the jury that the assisting witness has had the opportunity to listen to the testimony of every other witness before testifying, and that the State has the option of calling that witness in rebuttal, after the defense has rested.

(5) Jury instructions on defendant's credibility

Indiana common law held that it was error to give a jury instruction on the credibility of a particular witness, because doing so invades the jury's function. Bieghler v. State, 690 N.E.2d 188 (Ind. 1997); Turner v. State, 280 N.E.2d 621 (Ind. 1972).

2. Officer or employee of party that is not a natural person designated as its representative

This rule permits designation of only one person as a representative of the State in a criminal case. Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000); Joyner v. State, 736 N.E.2d 232 (Ind. 2000).

a. Police officer

The prosecutor may designate a law enforcement officer to remain at counsel table under Rule 615(2), even though he may be called to testify. Fourthman v. State, 658 N.E.2d 88, 91 (Ind. Ct. App. 1995); Long v. State, 743 N.E.2d 253 (Ind. 2001).

Heeter v. State, 661 N.E.2d 612 (Ind. Ct. App. 1996) (non-designated officer properly allowed to testify, but better practice would have been for State to designate officer as its representative prior to the presentation of evidence).

Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004) (trial court did not violate its separation of witness's order by permitting State to call detective, who remained in

courtroom as State's representative to return to witness stand twice to testify after hearing testimony of other witnesses).

Although the State can only designate one officer as a representative under Rule 615(2), it may, in some situations, be permitted to exclude from the separation order a second officer under Rule 615(3). Joyner v. State, 736 N.E.2d 232 (Ind. 2000) (harmless error to allow two officers as representatives); but see Kirby v. State, 774 N.E.2d 523 (Ind. Ct. App. 2002) (second officer was properly exempted from separation order as an "essential witness").

b. Other designated representatives

Hayden v. State, 830 N.E.2d 923 (Ind. Ct. App. 2005) (superintendent of juvenile facility where sexual misconduct offense occurred could be considered as the State's representative and sit at prosecution's table).

Fourthman v. State, 658 N.E.2d 88, 91 (Ind. Ct. App. 1995) (DNR officer who investigated case was proper State's representative).

3. Persons essential to presenting the party's case

A majority of the Indiana Supreme Court has held that if an essential witness would also qualify for an exemption under Rule 615(2), any other witness to be exempted from a witness separation order also must be essential. Osborne v. State, 754 N.E.2d 916, 926-27 (Ind. 2001). However, permitting a party to retain more than one "essential" witness in the courtroom to assist during trial under Rule 615(3) would be questionable. Long v. State, 743 N.E.2d 253, 256-57 (Ind. 2001) (disapproving of Vinson v. State, 735 N.E.2d 828 (Ind. Ct. App. 2000)).

a. A second police officer

In some cases, and with an appropriate showing, a party may designate a second witness as 'essential' under Rule 615(3). Long v. State, 743 N.E.2d 253 (Ind. 2001). A party seeking to exempt a witness from exclusion under Rule 615(3) must convince the trial court that the witness has such specialized expertise or intimate knowledge of the facts of the case that the party's attorney would not effectively function without the presence and aid of the witness. Id. at 256.

Long v. State, 743 N.E.2d 253 (Ind. 2001) (not an abuse of discretion to allow both a testifying FBI agent under Rule 615(3) and a state trooper under Rule 615(2) to remain in the courtroom where the trial and investigation involved 45 non-police witnesses, over 500 witness interviews, 66 exhibits and 30 searches over several years).

Kirby v. State, 774 N.E.2d 523 (Ind. Ct. App. 2002) (trial court acted within its discretion in allowing the State to keep two officers in the courtroom because the officers had interviewed more than 220 witnesses and had personally interviewed different witnesses; the second officer was permitted to remain in courtroom under essential witness exemption).

Osborne v. State, 754 N.E.2d 916 (Ind. 2001) (trial court abused its discretion in allowing two officers to be exempted from the witness separation order where the prosecution did not involve complicated facts or an extensive investigation; neither officer's presence was essential to presenting the State's case).

Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000) (trial court erred in allowing two police officers to remain in courtroom without designating the second officer's presence as an essential witness).

Practice Pointer: Though two officers were permitted to remain in court in Long v. State and Kirby v. State, one as an officer of the State and one as an essential person (an FBI agent and a sheriff's department detective, respectively), Long v. State views such a situation with disfavor. "An exclusion under clause (3) would thus be inappropriate in cases where a person excluded under clauses (1) or (2) can provide the expertise and knowledge adequate to assist counsel. Likewise, permitting a party to retain more than one witness in the courtroom under clause (3) to assist during trial would be especially questionable." 743 N.E.2d 253, 256.

b. An expert witness

Expert witnesses are often permitted to remain in the courtroom during the testimony of other witnesses because:

(1) their presence may be essential to assist counsel in understanding the testimony of opposing experts,

(2) they are believed to be less likely to alter their testimony in response to that of opposing witnesses,

(3) under Rule 703, expert witnesses may be permitted to use the testimony of other witnesses at trial as a basis for their opinions. See Rule 703; Graham, *Handbook on Federal Rules of Evidence* § 615.02, at 615-5 (3rd Ed. 1991).

R.R. Donnelley & Sons Co. v. North Texas Steel Co., Inc., 752 N.E.2d 112 (Ind. Ct. App. 2001) (trial court abused its discretion by refusing to exempt expert witnesses from the separation order where use of experts was essential given complexities of case; it would be necessary for experts either to be present or be provided with daily transcripts in order to rebut testimony of opposing experts).

c. Victim

Hernandez v. State, 716 N.E.2d 948 (Ind. 1999) (trial court did not abuse its discretion in allowing the attempted murder victim to sit at prosecution table and remain in courtroom as an "essential witness"; victim, who was a prison guard, had personal knowledge of incident and facts leading up to incident and was able to assist in cross-examination of inmates who testified that defendant acted in self-defense) (Boehm & Dickson, JJ., dissenting).

d. Parent of a juvenile criminal defendant

Children being tried for a crime as an adult do not have an automatic right to have a parent with them during the trial. Where the parent is subject to a witness separation order, the child defendant can identify the parent's presence as "essential" to presentation of the child's defense pursuant to Evidence Rule 615(c) to allow the parent to remain in the courtroom despite a witness-separation order. To prove that the parent is "essential," the child can offer any number of reasons, such as the child's special needs, that the child is struggling with communicating with counsel, or that the child needs parental guidance when making life-altering decisions, like whether to pursue a line of questioning, take the stand, or accept a plea agreement

Harris v. State, 165 N.E.3d 91 (Ind. 2021) (juvenile failed to show mother's presence was essential where he stated that his parent would like to remain in the courtroom "as much as possible" because of his age and the seriousness of the offense; because defendant did not raise issue of a due process right to parental presence before the trial court, the argument that due process provided a right to parental presence was waived).

PRACTICE POINTER: If concerned about credibility issues and alteration of testimony of exempted witness, request that witness testify first. Rule 611(a) gives the trial court the discretion to control order of witnesses. But see Gregory v. State, 540 N.E.2d 585 (Ind. 1989) (no abuse of discretion to refuse to require officer to testify first).

D. REMEDIES FOR VIOLATIONS

The remedy for violation of a separation order is within the trial court's discretion. Clark v. State, 480 N.E.2d 555, 558 (Ind. 1985). The trial court must exercise its discretion consistently with both parties.

Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993) (trial court erred in making inconsistent rulings in favor of the State based on violations witness separation order, thereby preventing defendant from impeaching the State witness while allowing the State to bolster its case).

1. Exclusion of witness

A trial court has authority to exclude the testimony of a witness who has violated a witness separation order. Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997); Murphy v. State, 475 N.E.2d 42, 50-51 (Ind. Ct. App. 1985). However, "even when confronted with a clear violation of a separation order, the trial court may choose to allow the violating witness to testify." Roser v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998); Jordan v. State, 656 N.E.2d 816, 818 (Ind. 1995).

a. When party is without fault

It is presumed an abuse of discretion to exclude testimony of a witness due to a violation of the separation of witness's order if the party seeking to call the witness is without fault in the violation. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001) (*citing* Thomas v. State, 420

N.E.2d 1216 (Ind. 1981)); Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002). This common law presumption was not changed by the adoption of the Rules of Evidence and does not eliminate the effective tools for enforcement of separation orders. Jiosa, 755 N.E.2d at 608.

Joyner v. State, 736 N.E.2d 232 (Ind. 2000) (where it was impossible for the State to anticipate need for rebuttal witness, allowing the State to call the witness who had sat through most of trial was within the trial court's discretion). See also Roser v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998).

Anderson v. State, 774 N.E.2d 906 (Ind. Ct. App. 2002) (witness sitting through a portion of voir dire after a separation order was issued did not require exclusion of witness where there was no evidence of collusion by the State).

Wireman v. State, 432 N.E.2d 1343 (Ind. 1982) (no abuse of discretion in allowing State's witness to testify even though prosecution violated order by interviewing two witnesses simultaneously prior to calling them; no evidence they were told what to say).

b. Defendant's constitutional right to present witnesses

Disqualification of the witness is a drastic sanction that has severe impact on the constitutional right to present witnesses on the defendant's behalf. Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995). Because a defendant has a constitutional right to present evidence in his favor, exclusion of a defense witness for violation of a witness separation order is not always appropriate. Id. "[W]here the excluded witness is the sole witness to corroborate the defendant's defense[,] courts have generally concluded that disqualification is an abuse of discretion." Id.; Toth v. State, 375 N.E.2d 256, 258 (Ind. Ct. App. 1978).

Jiosa v. State, 755 N.E.2d 605 (Ind. 2001) (where witness inadvertently learned of another witness's testimony, the violation of the order was not the fault of the witness or the defense attorney; thus, it was an abuse of discretion to exclude the defense witness's testimony).

Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995) (where no evidence of collusion with defense attorney, it was an abuse of discretion to exclude witness due to violation of separation order; harmless error).

Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997) (prejudice shown and reversible error where excluded witness was the only person who could corroborate the defendant's testimony).

Toth v. State, 176 Ind.App. 283, 375 N.E.2d 256 (1978) (reversible error in restricting testimony of critical defense witness, an alleged accomplice, to matters not raised in State's case-in-chief because of violation where defendant did not know person was present in courtroom taking notes and discussing notes with defense witness during recess).

Joyner v. State, 736 N.E.2d 232 (Ind. 2000) (exclusion of defense witness as sanction for separation order violation did not deny defendant his right to present a defense

where defendant was allowed to call another witness who had violated the order to testify as to the same facts of the excluded witness's testimony).

Rowan v. State, 431 N.E.2d 805 (Ind. 1982) (no error in refusing to allow defense witness to testify because of separation order violation where witness was law clerk and investigator for defense and was present in courtroom while State's witness testified).

Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002) (trial court did not abuse discretion in excluding defense witness's testimony that she knew that defendant's sister rather than the defendant had shot at victim's car; although the testimony was important to defendant's case and separation order was not violated because fiancée had never been listed as witness, as soon as the defendant knew he might want to call her, he should have ensured that she gained no further knowledge of testimony).

2. Inform jury about violation of Order

Where a witness violates a separation order and the party is not at fault, the witness should be allowed to testify, but the conduct of the witness may go to the jury upon the question of his credibility. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001). In fact, it can be error to deny the other party the right to cross on the separation violation. Smith v. State, 169 Ind. App. 71, 345 N.E.2d 851, 855 (1976).

Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989) (no reversible error where defense counsel had opportunity to subject witness to full-blown cross-examination designed to reveal to jury alleged violation of separation order).

3. Contempt citations

The trial courts may issue contempt citations to witnesses who violate separation orders. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001); Baysigner v. State, 436 N.E.2d 96, 100 (Ind. Ct. App. 1982).

4. Mistrial

Ray v. State, 838 N.E.2d 480 (Ind. Ct. App. 2005) (no error in denying mistrial based on prosecutor's violation of witness separation order; the court did not find grave peril because the jury was provided information concerning the conversations between the doctor and the prosecutor and subject of the conversation was a relatively minor part of the evidence presented). See also Clark v. State, 480 N.E.2d 555 (Ind. 1985).

5. Prejudice presumed from violation

A presumption of prejudice arises from a separation order violation but can be overcome if the party supporting the erroneous decision can show no prejudice. Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000).

Osborne v. State, 754 N.E.2d 916 (Ind. 2001) (three justices believed that the trial court should not have allowed officers to remain in courtroom after granting separation of witnesses order pursuant to Rule 615 and that burden of showing harmless error falls on State).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (presumption of prejudice does not apply where the witnesses who violated separation order after their testimony by making statements to the media were not present during testimony of any other witness and there were no identifiable effects on specific future witnesses).

Error in excluding witness is not prejudicial where testimony would have been cumulative. Smiley v. State, 649 N.E.2d 697, 701 (Ind. Ct. App. 1995).

E. SEE IPDC *CRIMINAL TRIAL LAW MANUAL*

See the Indiana Public Defender Council *Criminal Trial Law Manual*, Chapter 7, for more detail about separation of witnesses.

XVI. BIAS - RULE 616

A. OFFICIAL TEXT:

Evidence that a witness has a bias, prejudice, or interest for or against any party may be used to attack the credibility of the witness.

B. RELATED CONSIDERATIONS

Rule 616 makes it clear that a witness may be impeached with evidence of bias, prejudice, or interest. This preserves long-standing common law. Miller, 12 *Indiana Evidence* 1051-53 § 616.101 (4th ed.). Evidence of bias is not collateral in nature, nor is it limited to scope of direct examination. Shanholt v. State, 448 N.E.2d 308, 316 (Ind. Ct. App. 1983).

NOTE: The Federal Rules of Evidence have no Rule 616, but bias, interest or prejudice evidence is admissible to impeach a witness just as it was before the adoption of the Federal Rules. U.S. v. Abel, 469 U.S. 45, 51, 105 S. Ct. 465, 468 (1984); Miller, 12 *Indiana Evidence* 1051 § 616.101. n.2 (4th ed.).

1. Sixth Amendment

"A defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of state witnesses in order to test their believability." Thornton v. State, 712 N.E.2d 960 (Ind. 1990); Davis v. Alaska, 415 U.S. 308, 315-318, 94 S. Ct. 1105 (1974).

a. Limitations

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits" on cross-examination about the bias of prosecution witnesses, "based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431 (1986).

b. Harmless beyond a reasonable doubt

In determining whether a violation of the right to cross-examine is harmless beyond a reasonable doubt, the court should consider the importance of witness' testimony in prosecution's case, whether testimony was cumulative, presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and the overall strength of the prosecution's case. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431 (1986); see also Koenig v. State, 933 N.E.2d 1271 (Ind. 2010).

2. Due process

A "trial court's exercise of discretion in regulating the scope of cross-examination must be consistent with due process." McIntyre v. State, 460 N.E.2d 162, 166 (Ind. Ct. App. 1984).

3. Rule of Evidence 401

Under Rule 401, to be admissible, relevant evidence must make a fact more probable than not. Pre-evidence rule law embodied this concept by holding that there must be a nexus between the alleged bias and the prior act. Hossman v. State, 467 N.E.2d 416 (Ind. 1984). If the line of questioning would not give rise to a reasonable degree of probability of bias and prejudice, then it is not error to exclude the questioning. Id.

Hossman v. State, 467 N.E.2d 416 (Ind. 1984) (there was too remote of a nexus between witness's bias and excluded evidence of witness's drug user/supplier relationship with her boyfriend who turned State's evidence against the defendant and fear that the boyfriend would reveal her role in ex-husband's alleged murder if she did not corroborate his testimony against defendant; witness's testimony could not set boyfriend free to continue to sell her drugs because of additional time on other charges and court found it "unlikely" that boyfriend would incriminate himself by implicating her in murder and little evidence that ex-husband's death was a murder).

Gaston v. State, 451 N.E.2d 360 (Ind. Ct. App. 1983) (error in admitting testimony of alibi witness's prior arrest by investigating officer, as it was irrelevant to show bias against state; the State showed no nexus between arrest and the State's conclusion that the witness was biased against the State; thus, testimony improperly impeached witness and tended to prejudice jury against the defendant).

4. Rule of Evidence 403

Evidence admissible under Rule 616 may still be excluded under Rule 403 if its probative value is substantially outweighed by other considerations, such as the danger of unfair prejudice, Ingram v. State, 715 N.E.2d 405, 407 (Ind. 1999), or confusion of the issues. See Rule 403.

Once the "witness's bias has been demonstrated sufficiently that the jury is unlikely to think that the witness is testifying from a sense of citizenship rather than interest or bias, the court has discretion to move the trial forward." Miller, 12 *Indiana Evidence* 1052-53 § 616.101 (4th ed.); Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006).

Andrews v. State, 588 N.E.2d 1298 (Ind. Ct. App. 1992) (no error in limiting further cross-examination of informant-witness after informant's criminal history, relationship with the police, present unemployment, and status as drug dealer were admitted into evidence).

Wood v. State, 804 N.E.2d 1182 (Ind. Ct. App. 2004) (trial court properly excluded evidence of victim's alleged bias, i.e., her hostility at defendant's relative who may have helped obtain a conviction against her husband, where probative value of excluded testimony was substantially outweighed by danger of unfair prejudice; it was unclear

whether the witness knew of the familial relationship and how the family member contributed to her husband's conviction).

C. TYPES OF BIAS OR INTEREST

The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Rowe v. State, 704 N.E.2d 1104, 1108 (Ind. Ct. App. 1999); Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105 (1974).

1. Avoiding penal consequences

[C]ross-examination to show that a witness is testifying under threat of criminal prosecution or under promise of leniency is proper to show possible bias, prejudice, or motive in testifying and is relevant to a determination of the credibility of the witness and reliability of his testimony." McIntyre v. State, 460 N.E.2d 162, 166 (Ind. Ct. App. 1984) (*citing* 81 Am. Jur. 2d Witnesses § 560 (1976)). A trial judge may not preclude cross-examination as to pending criminal charges against a prosecution witness. Id.

a. Expressed plea agreements or understanding with prosecutor

It is within a prosecutor's authority to make promises and offers of immunity, leniency, money, and other benefits to State's witnesses to induce cooperation. Schmanski v. State, 466 N.E.2d 14 (Ind. 1984). "However, these practices place a burden upon the prosecution because they tend to impair the credibility of witnesses or to show interest, bias, or motives as a witness." Sigler v. State, 700 N.E.2d 809 (Ind. Ct. App. 1998); Schmanski v. State, 466 N.E.2d 14, 15 (Ind. 1984). Expressed plea agreements or understandings between the State and its witnesses must be fully disclosed, even where those agreements are not reduced to writing. Wright v. State, 690 N.E.2d 1098, 1113 (Ind. 1997).

State v. Hollin, 970 N.E.2d 147 (Ind. 2012) (trial court did not commit clear error in granting defendant's petition for post-conviction relief on the basis that defendant's trial counsel was ineffective for failing to impeach defendant's accomplice about his plea agreements with the State).

b. Hopes of leniency

(1) Pending charges

Even where there is no evidence of a deal between the State and a witness, the extent of a possible benefit is relevant to the jury's determination of weight and credibility of the witness' testimony. Standifer v. State, 718 N.E.2d 1107 (Ind. 1999). The defendant has a constitutional right to confront a witness and explore his bias, and refusal to permit him to identify pending charges or to inquire into the witness's perceptions of a possible arrangement with the State that may violate that right. Smith v. State, 721 N.E.2d 213 (Ind. 1999).

Smith v. State, 721 N.E.2d 213 (Ind. 1999) (trial court committed reversible error by prohibiting defendant from crossing State's witness on pending charges,

despite prosecutor's assurance there was no deal between the State and the witness for his testimony).

Ferguson v. State, 670 N.E.2d 371 (Ind. Ct. App. 1996) (evidence of "any understanding" as to consideration witness receives for testifying must be disclosed to jury; in this case, it strained credulity that the witness would so freely incriminate herself under oath without an understanding that she would not face criminal charges; defendant should have been permitted to subpoena prosecutor as witness concerning any understanding).

But see Sigler v. State, 700 N.E.2d 809 (Ind. Ct. App. 1998) ("An express agreement exists where there is a confirmed promise of lenience in exchange for that witness' testimony. On the other hand, preliminary discussions need not be disclosed nor is disclosure required where in fact the witness hopes for leniency but the State neither confirms nor denies that hope to the witness.").

Tolliver v. State, 922 N.E.2d 1272, 1286 (Ind. Ct. App. 2010) ("deals" and "pending charges" about which defense counsel wished to cross-examine witnesses were totally unsupported by any evidence).

Wilson v. State, 39 N.E.3d 705 (Ind. Ct. App. 2015) (witness's inconsistencies as to number of times he was arrested was not relevant evidence of bias, prejudice or interest against defendant).

(2) Witness serving executed sentence, probation, parole, or CI

Where the State's witness is on probation, the defendant should be permitted to cross-examine the witness about his status as a probationer. Rowe v. State, 704 N.E.2d 1104, 1108 (Ind. Ct. App. 1999) (post-conviction relief from pre-Indiana Rules conviction), Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105 (1974).

Standifer v. State, 718 N.E.2d 1107 (Ind. 1999) (trial court committed harmless error by refusing to permit defendant to cross-examine one of State's witnesses about witness' status as informant and his resulting bias in favor of State and another State's witness about being on parole, despite fact that amount of time remaining on sentence he had served for possession of drugs was arguably motivating factor in his cooperation with State).

Janner v. State, 521 N.E.2d 709 (Ind. Ct. App. 1988) (trial court erred in denying defendant opportunity to cross-examine witness about being a paid informer).

But see Splunge v. State, 641 N.E.2d 628 (Ind. 1994) (trial court did not err in prohibiting cross-examination of accomplice on the possibility of a sentence modification; accomplice had specifically testified she received no promises from State in exchange for her testimony, State was in no position at date to extend promise of lesser sentence, and remote possibility that accomplice would receive modification or clemency was highly speculative and did not reflect any arrangement made by State to procure her testimony).

Collins v. State, 835 N.E.2d 1010 (Ind. Ct. App. 2005) (where there was no indication whatsoever that a deal of leniency was offered to State's witness nor

that he had any expectation that such a deal would arise from his testimony, trial court did not abuse its discretion in refusing to allow the defendant to cross State's witness on status as probationer).

c. Potential penalties

Where the witness has reduced the length of potential sentences through an agreement with the prosecution, the defendant is entitled to inquire into the potential penalties the witness faced, at least if the witness's testimony is being given as part of the plea bargain or the witness was charged as part of the crime on trial. Miller, 12 *Indiana Evidence* 1059-60 § 616.102 (4th ed.); Smith v. State, 721 N.E.2d 213, 219-20 (Ind. 1999); Jarrett v. State, 498 N.E.2d 967, 968 (Ind. 1986). A defendant's interest in getting before a jury any and all inducements a witness receives in exchange for testifying is of utmost importance and outweighs any perceived harm to the State in letting the jury know the potential penalties avoided by the witness. Bell v. State, 655 N.E.2d 129 (Ind. Ct. App. 1999); see also Watson v. State, 507 N.E.2d 571 (Ind. 1987).

Bell v. State, 655 N.E.2d 129 (Ind. Ct. App. 1999) (trial court erred in prohibiting defendant from crossing on the full extent of the penalties avoided by informant in exchange for his testimony against defendant even though informant's plea agreement did not require him to testify against defendant).

Sigler v. State, 733 N.E.2d 509 (Ind. Ct. App. 2000) (trial court erred by limiting extent to which defendant could cross-examine his accomplices about their plea agreements with the State; there is no sufficient alternative (including referring to sentence as percentage of possible sentence) to allowing criminal defendant to question felon-witness regarding specific number of years of imprisonment he or she has avoided by agreement with State). See also McCain v. State, 948 N.E.2d 1202 (Ind. Ct. App. 2011); Bullock v. State, 903 N.E.2d 156 (Ind. Ct. App. 2009); and Jones v. State, 749 N.E.2d 575 (Ind. Ct. App. 2001). A trial court is not required to instruct a jury to weigh with extra caution the testimony of a witness testifying in exchange for lenience. Miller, 12 *Indiana Evidence* 1054-55 § 616.102 (4th ed.); McCollum v. State, 582 N.E.2d 804, 813 (Ind. 1991).

d. Avoiding detection or prosecution of specific bad acts not reduced to crimes

Although under pre-Rule of Evidence common law and under Indiana Rule of Evidence 608, a witness may not be impeached by specific bad acts which have not been reduced to conviction, state-imposed evidentiary rules must yield to weightier Sixth and Fourteenth Amendment rights of the defendant. See Hendricks v. State, 554 N.E.2d 1140 (Ind. Ct. App. 1990). Thus, when a specific bad act that has not been reduced to a conviction not only impeaches the witness's character for honesty, but also illustrates a bias or prejudice, that specific bad act should be admissible under Indiana Rule of Evidence 616 and the Sixth Amendment.

Hendricks v. State, 554 N.E.2d 1140 (Ind. Ct. App. 1990) (trial court erred by foreclosing defendant's two attempts to explore wife's own involvement in abuse of her children as a motive to testify falsely, although defendant was able to establish that wife was nearly exclusive caretaker of children and failed to discover son's injuries for almost a full day; harmless error).

Janner v. State, 521 N.E.2d 709 (Ind. Ct. App. 1988) (trial court erred in denying defendant the opportunity to cross the witness on the circumstances surrounding the State's dismissal of his burglary charge despite the fact he was willing to plead to the charge; the dismissed burglary was of defendant's home after she allegedly drove him to a drug deal which was the basis of her charge and arguably was in retaliation for defendant's refusing to give witness ride on another occasion; the fact that the burglary had not been reduced to a conviction did not make it inadmissible).

Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006) (in theft prosecution, evidence of co-defendant's prior thefts that were dismissed pursuant to plea agreement would show bias for the State rather than simply bad character; however, trial court did not abuse its discretion in excluding the evidence of the specific acts because defendant had already placed into evidence the witness's possible bias, i.e., his desire to curry favor with the State, through the witness's plea agreement).

PRACTICE POINTER: The concurrence in Beaty, *supra,* suggested that there should be another exception to Indiana Rule of Evidence 608(b)'s limitation on admission of specific acts of misconduct for the situation where the State has offered a deal to a witness that results in avoidance of prosecution. In that situation, the defendant should be able to explore the prior acts of misconduct in the dismissed charges. Argue that in your client's case, the Sixth Amendment demands the introduction of such evidence.

2. Financial motive and/or involvement in lawsuit

"If a witness in a criminal trial has a financial motive for testifying in a certain fashion, the jury should hear about those matters as they are relevant evidence of credibility." Domangue v. State, 654 N.E.2d 1 (Ind. Ct. App. 1995); Hammer v. State, 553 N.E.2d 201, 203 (Ind. Ct. App. 1990).

Domangue v. State, 654 N.E.2d 1 (Ind. Ct. App. 1995) (evidence of injured witness's civil case against tavern arising from same facts as criminal case was admissible).

McCarthy v. State, 749 N.E.2d 528 (Ind. 2001) (harmless error to prohibit defendant schoolteacher to cross-examine alleged child molesting victim's mother about the Notice of Tort Claim she had filed against the school).

Kleinrichert v. State, 530 N.E.2d 321 (Ind. Ct. App. 1988) (reversible error to deny defendant opportunity to cross detective with lawsuit filed by defendant against detective and which was still pending at time of trial), *disapproved on grounds that harmless error analysis applies to Sixth Amendment violation by* McCarthy v. State, 749 N.E.2d 528 (Ind. 2001).

Tucker v. State, 728 N.E.2d 261 (Ind. Ct. App. 2000) (trial court did not err in precluding the defendant from questioning State's witness about whether or not he had reported income he earned as confidential informant to appropriate taxing authorities; witness's alleged failure to pay income taxes was, at best, only peripherally related to the defendant's case), *disapproved on grounds that harmless error analysis applies to Sixth Amendment violation by* McCarthy v. State, 749 N.E.2d 528 (Ind. 2001).

McKinley v. State, 465 N.E.2d 742 (Ind. Ct. App. 1984) (evidence regarding officer's beating of defendant during arrest was admissible under 4 theories: (1) *res gestae*; (2) insight into motives/intentions of parties; (3) buttressing defendant's self-defense testimony; (4) motive for bias and prejudice of the officer (who faced a civil suit and departmental discipline if beating proven); evidence regarding officer's behavior at the station should have been admitted to impeach the officer's credibility).

Although the pendency of a civil suit is admissible to show bias and prejudice, the amount of damages does not bear upon such prejudice since prayer for damages is frequently exaggerated. Koo v. State, 640 N.E.2d 95, 102 (Ind. Ct. App. 1994). Where the fact of the pending lawsuit is before jury, additional knowledge of the amount of money sought is unlikely to affect the jury's verdict. Id.

Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994) (where evidence that victim had sued defendant civilly and was seeking damages had been admitted into evidence, trial court did not err by refusing to allow testimony of victim's discussions with her attorney regarding settlement negotiations related to civil lawsuit and alleged settlement negotiation concerning rape charge).

Seketa v. State, 817 N.E.2d 690 (Ind. Ct. App. 2004) (trial court correctly limited cross-examination of the victim regarding a civil tort claim he had filed in relation to jailhouse beating in this case; defendant brought out that the tort claim had been filed and little more existed that the jury could learn about this civil lawsuit).

3. Other proceedings between witness and a party

a. Pending proceedings

Mitchell v. State, 730 N.E.2d 197, n. 4 (Ind. Ct. App. 2000) (evidence that the complaining witness was party to CHINS proceeding trying to get her kids returned to her may have been offered for purposes identified in IRE 616).

b. Prior prosecution of witness by State

It is doubtful that a prior conviction of a witness will ever be admissible to show prejudice of the witness against the State without more evidence of hostility to the State due to the conviction. Jones v. State, 467 N.E.2d 1179 (Ind. 1984).

Gaston v. State, 451 N.E.2d 360 (Ind. Ct. App. 1983) (error in admitting testimony of alibi witness' prior arrest by investigating officer as it was irrelevant to show bias against State; the State showed no nexus between arrest and the state's conclusion that the witness was biased against the State; thus, testimony improperly impeached witness and tended to prejudice jury against defendant).

c. Prior prosecution of witness's family member

Williams v. State, 492 N.E.2d 28 (Ind. 1986) (trial court properly allowed the State to cross-examine defendant's alibi witness regarding her bias against the State due to her brother's murder conviction).

4. Hostility towards party

Where the witness has previously made hostile statements about the defendant, the statements may be admissible to impeach the witness's credibility by showing his bias or prejudice against the defendant. Dyson v. State, 692 N.E.2d 1374 (Ind. Ct. App. 1998).

5. Religious beliefs as evidence of bias or prejudice

While evidence of a witness's religious beliefs or opinions, or lack thereof, is not admissible to impeach a witness's character for truthfulness, it may be admissible for the purpose of showing bias or interest. Sevits v. State, 651 N.E.2d 278, 283 (Ind. Ct. App. 1995); Rule 610.

6. Attempts to influence witness's testimony

a. Threats by or fear of Defendant or defense witnesses

A witness may be impeached by evidence of bribery or threats or attempts to influence a witness made by or against the witness, because it reflects on the credibility of the witness. Miller, 12 *Indiana Evidence* 1067-69 § 616.106 (4th ed.); Ingram v. State, 508 N.E.2d 805 (Ind. 1987). Such evidence can be excluded under Rule 403 if the risk of unfair prejudice or jury confusion substantially outweighs the incremental probative value of the evidence.

Fox v. State, 497 N.E.2d 221 (Ind. 1986) (no error in State eliciting testimony that witness made prior inconsistent statement because his family had been threatened).

Morgan v. State, 419 N.E.2d 964 (Ind. 1981) (fact that defendant's accomplice had beaten prosecution witness in retaliation for witness' testimony in case was relevant to accomplice's credibility).

But there must be a good faith basis to cross-examine about threats. Where there is no evidence of a threat made against the witness, the State cannot speculate one. Benson v. State, 762 N.E.2d 748 (Ind. 2002) (State committed misconduct by speculating that the witness's testimony was a product of threats simply because he was incarcerated).

b. Threats by State

It is a denial of due process to refuse to permit the defendant to cross-examine a witness about her reluctance to testify where the witness has refused to testify until being threatened with contempt. McIntyre v. State, 460 N.E.2d 162 (Ind. Ct. App. 1984).

c. Fear

Even fear, alone and without a threat, may be admissible.

Peck v. State, 563 N.E.2d 554 (Ind. 1990) (evidence that witness had stated on prior occasions that she feared defendant's brother was probative of her fear of brother at time of trial, which bore on her credibility as alibi witness).

7. Relationship with a party

Evidence of a witness's personal relationship with a party is admissible as indicative of bias. Shanholt v. State, 448 N.E.2d 308, 316 (Ind. Ct. App. 1983). See Rule 501 (husband-wife privilege).

a. Bias for the party

Price v. State, 765 N.E.2d 1245 (Ind. 2002) (evidence that after State witness's testimony, witness asked murder defendant whether he was "doing all right" to which the defendant nodded affirmatively and both then laughed, was relevant to show witness's bias toward defendant).

b. Bias against the party

Zawacki v. State, 753 N.E.2d 100 (Ind. Ct. App. 2001) (evidence that victim requested permission from defendant and his wife to engage in a sexual relationship with defendant's daughter and wrote defendant's daughter letters which demonstrated his sexual feelings for her was admissible in sexual misconduct trial as impeachment showing victim's bias, prejudice, or ulterior motive).

Dyson v. State, 692 N.E.2d 1374 (Ind. Ct. App. 1998) (statements by seventeen-year-old victim/son expressing hostility toward defendant/father were not offered to prove the truth of the matter but rather to show bias and prejudice against father and were admissible in battery prosecution; exclusion of such was harmless error).

Embry v. State, 923 N.E.2d 1 (Ind. Ct. App. 2010) (where the defense impeaches a State witness by exposing her bias against defendant, the State may not offer evidence of prior misconduct committed by defendant against the witness solely to explain the witness's disposition.)

8. Professional disciplinary history

An expert witness's professional licensure status and the reasons for professional discipline may be admissible to impeach that expert's credibility. But the evidence's admissibility is subject to statutory restrictions and specific rules of evidence.

Tunstall v. Manning, 124 N.E.3d 1193 (Ind. 2019) (in personal injury case, trial court committed harmless error by excluding evidence that Plaintiff's expert-doctor's medical license had been on probation; but it properly excluded the reasons for his past professional discipline, i.e., misdemeanor convictions and use of "fraud or material deception" to retrieve his license. This evidence is inadmissible under Ind. Evidence Rules 608(b) and 609).

XVII. UNRECORDED STATEMENTS DURING CUSTODIAL INTERROGATION - RULE 617

A. OFFICIAL TEXT:

(a) In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following:

(1) The statement was part of a routine processing or "booking" of the person; or

(2) Before or during a Custodial Interrogation, the person agreed to respond to questions only if his or her Statements were not Electronically Recorded, provided that such agreement and its surrounding colloquy is Electronically Recorded or documented in writing; or.

(3) The law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating; or

(4) The statement was made during a custodial interrogation that both occurred in, and was conducted by officers of, a jurisdiction outside Indiana; or

(5) The law enforcement officers conducting or observing the Custodial Interrogation reasonably believed that the crime for which the person was being investigated was not a felony under Indiana law; or

(6) The statement was spontaneous and not made in response to a question; or

(7) Substantial exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation, or prevent its preservation and availability at trial.

(b) For purposes of this rule, "Electronic Recording" means an audio-video recording that includes at least not only the visible images of the person being interviewed but also the voices of said person and the interrogating officers; "Custodial Interrogation" means an interview conducted by law enforcement during which a reasonable person would consider himself or herself to be in custody; "Place of Detention" means a jail, law enforcement agency station house, or any other stationary or mobile building owned or operated by a law enforcement agency at which persons are detained in connection with criminal investigations.

(c) The Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation.

(d) This Rule is in addition to, and does not diminish, any other requirement of law regarding the admissibility of a person's statements.

B. Requirement of available recording of custodial statement, generally

With limited exceptions, Evidence Rule 617 prohibits the admission at a criminal felony trial of any evidence of a statement made by an accused as part of a custodial interrogation in a place of detention that was not recorded visually and audibly. Miller, 12 *Indiana Evidence* 1077 § 617.101 (4th ed.). The recording requirement applies to custodial interrogation, meaning any interview conducted in a "place of detention" by law enforcement personnel, during which a reasonable person would consider himself or herself to be in custody. Ind. Evid. R. 617(a), (b).

C. Requirement of recording of custodial statement – place of detention

Rule 617 does not impose an affirmative duty on law enforcement officers to transport a person to a place of detention before conducting a custodial interrogation.

> Steele v. State, 975 N.E.2d 430 (Ind. Ct. App. 2012) (defendant's policy arguments for imposing such a duty should be directed to the Evidence Rules Review Committee, which may recommend to the Indiana Supreme Court that the rule be amended accordingly).
>
> Fansler v. State, 100 N.E.3d 250 (Ind. 2017) (motel room used for sting operation and custodial interrogation was not a "place of detention" requiring electronic recording).

D. Authentication of the recording

Indiana courts have required recordings offered into evidence in criminal cases to be authentic and correct, to contain testimony elicited freely and voluntarily, to have been preceded by all necessary warnings and waivers, to be free of matters otherwise not admissible in evidence, and to be of such clarity as to be intelligible and enlightening to the factfinder. Lamar v. State, 258 Ind. 504, 282 N.E.2d 795, 799-800 (1972); Miller, 12 *Indiana Evidence* 1083-84 § 617.301 (4th ed.).

A recording can be authenticated by any of the methods set forth in Ind. Evid. R. 901 but seems most likely to be authenticated by a person who has personal knowledge of the interrogation and who has reviewed the recording. It remains to be seen whether Indiana's presumption of regularity in the handling of exhibits or Indiana's presumption that public officials discharge their duties with due care will assist in making the required showing. Id. It also remains to be seen whether Evidence Rule 902(11), which allows the use of affidavits to lay the foundation for the hearsay exception for records of regularly conducted activity, will be available to the proponent of the evidence of a statement made during custodial interrogation at a place of detention. Id.

E. Impeachment

Rule 617 applies regardless of the reason for which evidence of the statement is offered into evidence. Miller, 12 *Indiana Evidence* 1079 § 617.101 (4th ed.). However, statements made during a "Custodial Interrogation in a Place of Detention" which do not comply with Rule 617 may still be used against the defendant for purposes of impeachment.

> Cutler v. State, 983 N.E.2d 217 (Ind. Ct. App. 2013) (State may impeach a testifying defendant by using a prior custodial statement that was recorded but was not "available at trial" as required by Indiana Evidence Rule 617(a)).

F. Juvenile Cases

Ind. Code 31-30.5-1-2 (effective July 1, 2015), provides that "[a] statement made during the custodial interrogation of a juvenile that is conducted at a place of detention is not admissible against the juvenile in a juvenile proceeding unless the interrogation complies with the requirements of Indiana Evidence Rule 617."

A custodial interrogation conducted at a school or other place where a juvenile is detained is admissible against the juvenile in a felony criminal prosecution or in a juvenile proceeding only if:

(1) the interrogation complies with Indiana Evidence Rule 617; or

(2) the interrogation:

(A) is recorded by using audio equipment; and

(B) complies with every requirement of Indiana Evidence Rule 617, except for the requirement that an electronic recording be an audio-visual recording.

Ind. Code 31-30.5-1-3(b).

Johnson v. State, 117 N.E.3d 581 (Ind. Ct. App. 2018) (defendant's conversation with probation officer was not an interrogation, where there was no questioning by officer, defendant requested to speak with him, changed topic of conversation from his probation violations to victim's murder, and defendant volunteered information even after probation officer advised defendant of his prerogative not to talk about the investigation; thus, his statements during conversation were not inadmissible under Evid. R. 617).