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IN THE NEWS: Flummoxed by Facebook, Admits Justice Breyer  
New Federal Rule on Experts Takes Effect Dec. 1

1. Preservation of Evidence Objections; Demonstrative Evidence; Discovery and Exclusion of Evidence; Arguing Damages; Remittitur; ***TRW Vehicle Safety Systems, Inc. v. Moore*** - 2010 WL 4119664 (Ind. S. Ct. 10/13/10) (Dickson)
2. Jury Verdict Reversed Because Jury Was Not Allowed to View Digital Evidence During Deliberations; Admissibility of Enlargements; ***Arlton v. Schraut*** - 2010 WL 4472126 (Ind. Ct. App. 11/2/10) (Mathias)
3. Exercising Juror Strikes; Rebuttal Evidence; ***Hatter v. Pierce Manufacturing, Inc.*** - 934 N.E.2d 1160 (Ind. Ct. App. 9/7/10) (Robb)
4. Always File Your 56(F) Motion; ***Booher v. Sheeram, LLC*** - 2010 WL 4600160 (Ind. Ct. App. 11/15/10) (Baker)
5. Untimely Ruling on Motion to Correct Error; Notice of Appeal; Sua Sponte Finding of Error; ***Bergstrom v. State of Indiana*** - 933 N.E.2d 555 (Ind. Ct. App. 9/9/10) (Mathias)
6. Judgment May Be Enforced After More than Twenty Years; ***In the Matter of the Unsupervised Estate of Wilson v. Steward*** - 2010 WL 4600252 (Ind. Ct. App. 11/15/10) (Crone)
7. Excited Utterance Exception to Hearsay Rule; ***Boatner v. State*** - 934 N.E.2d 184 (Ind. Ct. App. 9/22/10) (Mathias)
8. Questions About Testing Methods Used by Expert Must be Substantial to Justify Exclusion; ***Kennedy v. State*** - 934 N.E.2d 779 (Ind. Ct. App. 10/6/10) (Barnes)
9. Psychologist Not Qualified to Give Expert Opinion on Causation of a Brain Injury; ***Bennett v. Richmond*** - 932 N.E.2d (Ind. Ct. App. 8/13/10) (Najam)
10. Attorney's Statements at Hearing Are Binding on Client as to All Defendants; ***Heyser v. Noble Roman's, Inc.*** - 933 N.E.2d 16 (Ind. Ct. App. 8/19/10) (Sharpnack)
11. Attorney Has No Duty to Represent Client Beyond Scope of Contract; ***Flatow v. Ingalls*** - 932 N.E.2d 726 (Ind. Ct. App. 8/16/10) (Robb)
12. Ex-Husband Is Not Unjustly Enriched if Attorney Settles Claim Without Consulting Ex-Wife; Loss of Consortium; Legal Malpractice; ***Manns v. Richie*** - 2010 WL 4600293 (Ind. Ct. App. 11/15/10) (Baker)
13. Sellers of a Home Can Be Liable for Misrepresentations in Sales Disclosure Form; ***Hizer v. Holt*** - 2010 WL 4228446 (Ind. Ct. App. 10/27/10) (Mathias)
14. Passenger's Duty to Lookout and Warn; ***Burton v. Bridwell*** - 2010 WL 4546109 (Ind. Ct. App. 11/12/10) (Baker)
15. New Amendments to Indiana Rules

ADVOCACY TIP OF THE MONTH: Read Good Prose.

**NOTE:** *The contents of this handout consist primarily of blog entries from IndianaLawUpdate.com prepared primarily by Brad Catlin and words taken directly from appellate court opinions with citations generally omitted. Anyone intending to rely upon the opinion should consult the published decision.*

## IN THE NEWS:

### **I'm a Bit Flummoxed by Facebook, Admits Justice Breyer**

By Martha Neil, ABA Journal.com, November 16, 2010

Judges on the nation's top court are handicapped by a lack of knowledge about the Internet when deciding related cases, a U.S. Supreme Court justice admits.

Speaking at Vanderbilt University Law School, Justice Stephen G. Breyer said he had recently watched a movie about the origins of the Facebook social networking site and found it perplexing, reports the Associated Press.

"If I'm applying the First Amendment, I have to apply it to a world where there's an Internet, and there's Facebook, and there are movies like ... *The Social Network*, which I couldn't even understand," said Breyer, who is 72.

Breyer said the film illustrates his argument that modern conditions—like the development of the social-networking site—should inform justices when interpreting a Constitution written in the 18<sup>th</sup> century.

### **New Federal Rule on Experts Takes Effect Dec. 1**

By Robert Ambrogi

Bullseye: November 2010

A major revision to Rule 26 of the Federal Rules of Civil Procedure takes effect Dec. 1, bringing about a significant change in the long-standing procedure governing expert witness reports.

No longer will Rule 26 require full discovery of draft expert reports and broad disclosure of any communications between an expert and trial counsel, as has been the case ever since the rule's revision in 1993.

Instead, those communications will now come under the protection of the work-product doctrine. The new rule will prohibit discovery of draft expert reports and limit discovery of attorney-expert communications. Still allowed will be full discovery of the expert's opinions and of the facts or data used to support them.

#### **1. Preservation of Evidence Objections; Demonstrative Evidence; Discovery and Exclusion of Evidence; Arguing Damages; Remittitur: *TRW Vehicle Safety Systems, Inc. v. Moore* - 2010 WL 4119664 (Ind. S. Ct. 10/13/10) (Dickson)**

Daniel Moore died when, despite wearing his seatbelt, he was ejected through the sunroof of his Ford Explorer vehicle during a rollover that followed a tire failure as he was driving. He was survived by his wife and one minor son and his wife, as personal

representative of his estate, brought a wrongful death action against Ford, TRW, and Goodyear. Goodyear settled prior to trial, but remained in the case as a nonparty. After a fourteen-day trial, the jury found the total damages to be \$25,000,000 and allocated fault as follows: Daniel Moore, 33%; Ford, 31%; Goodyear, 31%; and TRW, 5%. Both Ford and TRW appealed and the plaintiff cross-appealed. The Court of Appeals reversed the verdicts, finding that the evidence was insufficient to support a plaintiff's verdict. The Indiana Supreme Court then granted transfer and in its opinion addressed a number of issues.

### **Expert testimony**

The TRW claim on appeal is that the trial court erroneously failed to exclude the entirety of the testimony of the Plaintiff's seatbelt expert, Steven Meyer, because it failed to meet the requirements of Indiana Evidence Rule 702. It is only those rulings on admissibility made during trial, not those made on motions in limine that may be raised on appeal. And trial objections to admissibility, if not made contemporaneously with the admission of the challenged evidence, do not preserve for appellate review any resulting claim of error in the ruling on such untimely objections. Before trial, TRW filed a Motion in Limine seeking to limit or exclude Meyer's testimony. The trial court denied the motion to exclude his testimony in its entirety.

During Meyer's testimony at trial, TRW requested the exclusion of evidence regarding two tests or experiments that Meyer had apparently conducted and about which his testimony was anticipated. After considerable argument of counsel regarding Evidence Rule 702 and case law interpreting it, the trial court recessed for further research. Upon returning, the trial court announced that "with respect to the testimony of Mr. Meyer and the Motion in Limine," Meyer would be permitted to testify but that the two tests "are excluded."

*At the conclusion of all the evidence* in the case, TRW orally moved to strike Meyer's testimony regarding "alternate designs," "[the] alleged defect of the seatbelt assembly," and "claim defect." As to the latter, TRW asked that the jury "be instructed to disregard it." After hearing argument of counsel, the trial court denied these motions. We decline to give separate appellate consideration to the denial of these motions because they were not made at the time of the witness's testimony and because these post-trial motions did not seek to strike the entirety of Meyer's testimony.

TRW claims on appeal that the trial court erred in failing to exclude the entirety of Meyer's testimony, but we do not find such issue to have been raised by any contemporaneous motion or request during trial.

### **Demonstrative Evidence**

Ford also adopts TRW's appellate assertion that the trial court erroneously excluded two items of evidence relating to whether a "spool-out" occurred in the seatbelt retractor during this Ford Explorer rollover ejection. One item was TRW's expert's video of rollover crash testing of a Lincoln Navigator vehicle allegedly with a similar seatbelt assembly using a test dummy that was the same size and weight as the plaintiff's decedent. TRW stresses that it offered this video only as demonstrative evidence. TRW's second claim challenges the trial court's exclusion of photographs and related testimony regarding hundreds of similar seatbelt assemblies.

The rollover video was proffered during the testimony of TRW design engineer Jeffery Pearson, who testified that the video would illustrate and clarify his testimony and serve as a useful demonstrative aid. Demonstrative evidence is ordinarily admissible if it is "sufficiently explanatory or illustrative of relevant testimony to be of potential help to the

trier of fact," but it is "subject to the balancing of probative value against the danger of unfair prejudice."

The trial judge excluded the video, observing that the video "doesn't meet [the standard of substantial similarity] particularly," noting issues of the distances the depicted vehicle traveled while airborne and the location of the dummies used. TRW argues that because the video was offered merely as demonstrative evidence, not reconstructive evidence, the trial court misapplied the "substantial similarity" standard.

We agree that the considerations regarding admissibility of demonstrative evidence are less rigorous than those used for evidence that attempts to reenact or reconstruct an event. Nevertheless, we entrust considerable latitude to trial judges in making such determinations, which as here may have been informed and interwoven in the context of lengthy, complicated, and vigorously contested trial and pre-trial proceedings. In addition to evaluating whether the video was sufficiently explanatory or illustrative to help the jury, deciding whether to permit its use as demonstrative evidence also appropriately entailed consideration of relevancy and the balance of its probative value against the danger of unfair prejudice. In the context of this litigation, TRW and Ford have not persuaded us that the trial court abused its discretion in excluding the video.

#### **Exclusion of evidence for failure of timely disclosure**

As to Pearson's proposed testimonial and photographic evidence comparing numerous seatbelts he had observed with the one involved in this case, the plaintiff's trial objection raised various grounds but primarily alleged the failure of the proffered evidence to comply with pre-trial discovery and disclosure requirements that had been imposed by the trial court.

The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings and will be granted deference in assessing what constitutes substantial compliance with discovery orders. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overruled.

#### **Damages**

With respect to damages, the Supreme Court considered whether the plaintiff bore the burden of presenting evidence of the present value of the lost wages or of the projected personal maintenance expenses of the decedent. The Court held that a plaintiff does not bear such a burden. Presentation of such evidence was an option for the defendants, not a requirement of the plaintiff.

Here, of the damages itemized in the plaintiff's closing statement, the amount sought for the decedent's son was problematic. In requesting damages "to replace this young man's father for him," the plaintiff's counsel invited the jury to calculate an award at a fixed rate for the duration of the decedent's life expectancy of 37.1 years. Under the Wrongful Death Act and the jury instructions, however, the plaintiff was entitled to damages sustained by the decedent's son for the loss of love, care, affection, parental training, and guidance *only during the son's dependency*, not for the projected remainder of the decedent's life.

While it may be presumed that the decedent's dependent child would have remained in such dependent status until age eighteen, to project any later period of dependency would require speculation unsupported by the evidence in this case.

### **Remittitur**

To remedy the error in the jury's total damage determination without necessarily requiring a full representation of evidence on damages, we elect to grant a new trial subject to remittitur, wherein the plaintiff may instead accept a determination of total damages, before allocation of comparative fault, in the sum of \$15,974,583, which represents a \$9,025,417 reduction in the jury's finding of \$25,000,000 in total damages.

### **Reallocation of fault**

From the evidence, it can be reasonably inferred that the rollover event was precipitated by the failure of a Goodyear tire, but there is no evidence establishing whether it resulted from a tire defect attributable to Goodyear or from normal wear and tear, underinflation, a slow leak, a road hazard or puncture, or any other cause. There is insufficient evidence on which a product liability verdict against Goodyear could have been returned if it were a named party, and thus there is insufficient evidence to support the allocation of fault to it as a nonparty.

With our decision to vacate the 5% fault assigned to TRW and the 31% assigned to Goodyear, the jury's remaining fault allocations account for only 64% of the total fault contributing to cause the plaintiff's damages, leaving 36% not allocated. The appropriate appellate remedy is not dictated by existing statutory provisions or case law precedent.

We conclude that the interests of justice require a new trial to allocate fault, and we remand for a new trial on the issues of comparative fault and its allocation between Ford and the plaintiff's decedent.

### **Lessons:**

1. Objecting to expert testimony before trial in a motion in limine and during trial but after the testimony has come in will not preserve the objection; it must be lodged at trial at the time the testimony is offered.
2. The trial court has wide discretion in excluding demonstrative evidence.
3. The trial court has wide discretion in excluding evidence which has not been disclosed timely during discovery.
4. A plaintiff does not need to present evidence of the present value of future damages, such as lost wages; the presentation of such evidence is an option for a defendant.
5. A decedent's child is not entitled to damages for the loss of love, care, affection, parental training, and guidance beyond the child's projected dependency.
6. At least in some situations, the appellate courts will not judicially reallocate fault where the evidence is inadequate to support the jury's allocation of fault to a party.
7. Appellate courts may order a remittitur, giving plaintiff the option of a new trial on damages or accepting a reduced amount.

## **2. Jury Verdict Reversed Because Jury Was Not Allowed to View Digital Evidence During Deliberations; Admissibility of Enlargements; *Arlton v. Schraut* – 2010 WL 4472126 (Ind. Ct. App. 11/2/10) (Mathias)**

The plaintiff Paul Arlton was diagnosed with an eye condition that, if left untreated, can cause significant loss of vision and, ultimately, blindness. Laser surgery was successfully used to treat the condition in 1987 and 1989 and left a scar but his central

vision remained intact. The plaintiff had no further problems until 2002, when he was referred to the defendant Dr. Gary Schraut and had a third laser surgery. During this surgery, something happened (exactly what is in dispute), which caused the plaintiff to have a wedge-shaped blind spot in the center of his vision. The plaintiff's expert concluded that this spot was caused by Dr. Schraut having placed a new laser burn within the area of the plaintiff's pre-existing scar which violated the standard of care.

At trial, the plaintiff's medical records, which contained angiograms (photos of the back of the eye using a dye in the bloodstream) from before and after the surgery, were admitted by stipulation. For each of the angiograms, nine digital images were recorded. Each juror was provided with a color copy of all of the angiogram photos in an exhibit binder. The nine images from each angiogram were printed on a single sheet of 8½" x 11" paper. Also admitted, without objection, were three CD-ROM discs containing these same images of the angiograms in digital form. During the testimony from various witnesses, both parties showed the jury enlarged images of the angiograms using a projector and a screen.

The plaintiff also offered into evidence six enlargements of the digital images from the discs that he had personally printed. The plaintiff testified that the printouts were simply enlargements of the digital photos on the previously-admitted CD-ROM discs and that he did not modify the photos in any way other than "zooming" in on specific portions. The defendants objected to the admission of these images, and the trial court sustained the objection.

During the third day of the trial, plaintiff's counsel asked the trial court how the jury would be able to access the digital evidence during deliberations and offered to provide the jury with a laptop computer if needed. The trial court declined the offer and also refused to give an instruction informing the jury that it could request the bailiff to conduct it into court for examination of the digital evidence. The jury found for the defendants and the plaintiff appealed.

On appeal, the Court first held that the trial court abused its discretion when it excluded the enlargements because Evid. R. 1003 generally allows for the admission of duplicates and Evid. R. 1001's definition of "duplicate" includes enlargements. Because there was no genuine question as to the authenticity of the enlargements, "the trial court's decision to exclude the enlargements was clearly against the logic and effect of the facts and circumstances before the court and therefore an abuse of discretion."

The Court next addressed the jury's access to the digital evidence during deliberations. The Court found no Indiana case directly on point and looked to the Sixth Circuit's decision in *United States v. Rose*, 522 F.3d 710 (6th Cir. 2008), for guidance. Based on the reasoning discussed in that case, the Court held that the jury should have been allowed to view the files on the CD-ROM during deliberations.

We recognize that giving the jury access to a computer could raise unintended issues, such as who needs to provide the computer or whether the jury could misuse the computer to access extraneous information. We do not presume to set forth one all-encompassing rule regarding providing the jury access to digital evidence. The solutions could be as simple as what was done in *Rose*, i.e., transforming the evidence into a medium that is accessible without a computer. Or the court or parties could provide the

jury with a "clean" computer, *i.e.*, one that contains no other information and which has no ability to access the Internet.

Ideally, these issues should be dealt with well before deliberations begin, even before trial, so that the trial court does not have to scramble just before deliberations trying to find a way to let the jury access admitted digital evidence. But whatever solution is agreed upon or decided upon is better than admitting digital evidence, and then giving the jurors no means of accessing it. Digital evidence should not be "relegated to muteness."

In a footnote, the Court then described the responsibilities of counsel and the court in more detail:

Indiana's talented trial attorneys and trial judges can work together to solve this issue through anticipatory motions in limine during discovery, or as discovery closes, and well before trial. As they do so, it is important not to interpret our discussion and opinion as a requirement that courts and their counties immediately purchase expensive technology to make digital evidence accessible to jurors. As stated above, transformation of digital evidence by the parties, their attorneys, or digital experts into a DVD format playable on a simple television with attached DVD player may well be all that is required in most instances. It will always be the responsibility of the parties' attorneys to ensure that the digital evidence at issue "works" on the court's equipment available to the jury or to provide appropriate equipment for the jury's use, subject to review by the court and objection by opposing counsel. As courts and counties upgrade their technology, in many instances, the technology being replaced can be repurposed to the limited jury room uses discussed here.

The Court then held that the trial court erred in not granting the requested jury instruction and that all of these issues constituted reversible error.

**Lessons:**

1. Enlargements are admissible duplicates pursuant to Rules 1001 and 1003 of the Indiana Rules of Evidence.
2. "Digital evidence should not be relegated to muteness" during jury deliberations.
3. It is the responsibility of the party admitting digital evidence to ensure that the jury has the ability to review that evidence during deliberations in a manner that is approved by the Court.

Note: The court's 20-page opinion was issued 36 days after oral argument.

**3. Exercising Juror Strikes; Rebuttal Evidence; *Hatter v. Pierce Manufacturing, Inc.* – 934 N.E.2d 1160 (Ind. Ct. App. 9/7/10) (Robb)**

In this case, the plaintiffs sued the defendant for product liability theories of defective design and failure to warn. The case proceeded to an eight-day jury trial. During voir dire by plaintiffs' counsel, three prospective jurors stated they would have difficulty

following an instruction requiring liability to be determined by a preponderance of the evidence rather than ninety-nine to one hundred percent certainty. A fourth prospective juror checked a box on his jury questionnaire stating he could not be a fair juror in a civil case, and during voir dire indicated a potential hardship due to his need to transport his father to the hospital for surgery. Plaintiffs moved to strike these jurors for cause and the trial court denied those challenges. Plaintiffs (who had 3 peremptory challenges) used those challenges on two of these prospective jurors and a fifth prospective juror whom the plaintiffs did not challenge for cause but deemed objectionable for other reasons. Plaintiffs appealed after an adverse judgment and challenged the trial court's refusal to strike the four prospective jurors for cause.

Pierce raises the threshold issue of whether Hatter's claim that the trial court erred by denying two for-cause challenges was properly preserved, citing the exhaustion rule of *Merritt v. Evansville-Vanderburgh Sch. Corp.*, 765 N.E.2d 1232 (Ind.2002). There our supreme court held "a claim of error arising from denial of a challenge for cause is waived unless the appellant used any remaining peremptory challenges to remove the challenged juror or jurors." To preserve review of any error, the appellant bears the burden of "demonstrating that at the time she challenged the jurors for cause, she had exhausted her peremptory challenges." "Eventual use of all peremptory challenges is therefore not enough to satisfy the exhaustion requirement."

Hatter's decision to forego using his final peremptory on Holt or Pennington was a failure to comply with the exhaustion rule as to one of those jurors. In other words, even though Hatter did not have enough peremptory strikes to remove both Holt and Pennington, he could have prevented the seating of one or the other. Therefore, Hatter can prevail on his claim of error in the trial court's denial of his for-cause challenges only by showing **both** were erroneously denied.

Turning to the facts before us, we conclude that even if the trial court erred by denying Hatter's challenge to juror Pennington, it did not abuse its discretion by seating Holt on the jury.

Because Hatter failed to fully comply with the exhaustion rule as required to preserve independent claims of error in the seating of either Holt or Pennington, his only available claim is that the trial court erred by seating both. This claim fails because regardless of any error in seating Pennington, the trial court did not abuse its discretion by seating Holt.

Rebuttal evidence is that which tends to explain, contradict, or disprove an adversary's evidence. "The scope of rebuttal is a matter left to the discretion of the trial court." In reviewing a trial court's decision to exclude rebuttal evidence on relevance grounds, our supreme court has stated that "denying the opportunity to present evidence on peripheral matters in rebuttal is not error." Under Indiana Rule of Evidence 403, even relevant evidence may be excluded if its probative value is substantially outweighed by, among other factors, undue delay.

Hatter admits the excluded testimony was relevant only to provide further impeachment of a defense expert Hatter already cross-examined. Thus, the trial court acted within its discretion to exclude the testimony as marginally relevant and leading to undue delay, factors the trial court referenced in its ruling.

The Court "encourage[d] trial judges to employ the procedure the trial court apparently utilized here, by making the entire panel available first for for-cause challenges and then for peremptory strikes."

**Lessons:**

1. To preserve a "for cause" challenge, you must first exhaust all peremptory challenges.
2. The trial judge may exclude rebuttal evidence on peripheral or marginally relevant matters and "undue delay" is an appropriate consideration.
3. Impeachment may be deemed to be marginally relevant.
4. When in doubt, submit evidence in your case in chief.

**4. Always File Your 56(F) Motion; *Booher v. Sheeram, LLC* – 2010 WL 4600160 (Ind. Ct. App. 11/15/10) (Baker)**

This case involved a slip and fall claim against a hotel. After the case was filed, the defendant filed a motion for summary judgment. The plaintiff filed two Rule 56(F) motions, which the trial court granted. Plaintiff then contacted defense counsel to seek agreement to a third extension of time. Defense counsel agreed -- but the plaintiff never actually filed a third 56(F) motion. When the attorney eventually filed the response with a supporting affidavit documents, the defendant moved to strike the submission. The trial court granted both the motion to strike and the motion for summary judgment.

On appeal, the plaintiff tried arguing that the trial court erred by granting the motion to strike, the Court disagreed:

Although we encourage collegiality among members of the legal profession and endeavor to promote cooperation and conflict resolution outside the walls of the courthouse, in certain circumstances parties must still seek formal relief directly from the trial court. Our Supreme Court has held that this is an example of such a circumstance. Consequently, while we do not find fault with the Booher's attorney's decision to rely on the word of opposing counsel, unfortunately that reliance was not enough — he should still have filed a motion for extension of time with the trial court.

The Court then concluded that the trial court did not err by granting the motion for summary judgment.

**Lesson:** Always file a motion if you seek a continuance pursuant to Rule 56(F). No exceptions.

**5. Untimely Ruling on Motion to Correct Error; Notice of Appeal; Sua Sponte Finding of Error; *Bergstrom v. State of Indiana* – 933 N.E.2d 555 (Ind. Ct. App. 9/9/10) (Mathias)**

Robert Bergstrom was issued a citation for speeding, which resulted in a bench trial. After trial, the court found that Bergstrom did indeed commit a speeding infraction, fined him, and imposed court costs. Bergstrom then filed a motion to correct error, which the trial court heard on November 5, 2009, but the trial court did not issue an order denying

Bergstrom's motion to correct error until February 5, 2010, which was ninety-two days after the hearing. The appellant filed his notice of appeal on March 4, 2010.

Although neither party raised the issue of the timeliness of the appeal, the Court did so *sua sponte*. It noted the time limitation for ruling on a motion to correct error found in Trial Rule 53.3(A). The emphasis in the following was the Court's:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, ***or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard*** or forty-five (45) days after it was filed, if no hearing is required, ***the pending Motion to Correct Error shall be deemed denied***. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

Because the timely filing of a notice of appeal is a jurisdictional prerequisite, the appellant's case was dismissed. The Court's application of Trial Rule 53.3(A) is straightforward and, therefore, the result is not a surprise. However, the Court clearly wanted to send a message to the members of the bar by electing to have this decision published.

**Lessons:**

1. Motions to correct error are deemed denied if there is not a timely ruling.
2. The Court of Appeals will dismiss an appeal *sua sponte* if they find a jurisdictional defect.

**6. Judgment May Be Enforced After More than Twenty Years; *In the Matter of the Unsupervised Estate of Wilson v. Steward* – 2010 WL 4600252 (Ind. Ct. App. 11/15/10) (Crone)**

A father and mother were divorced in 1971. At the time of the divorce, they had a son and daughter, so the father was ordered to pay child support. In July 1989, the father was held in contempt and ordered to pay a certain amount in child support arrearages. The father died in May 2009 and the mother filed a claim against his estate in September 2009, seeking the money owed pursuant to the July 1989 order. The trial court entered an order awarding the amount of the judgment to the mother and the father appealed.

On appeal, the father argued that the mother's claim was barred by the 10-year statute of limitations on enforcing child support obligations and the 20-year statute of limitations on enforcing a judgment. The Court held that the 10-year statute did not apply because the child support obligation had already been reduced to judgment. It then followed a prior case that held the twenty-year statute is merely a rule of evidence that creates a rebuttable presumption.

According to Indiana Code Section 34-11-2-12, "Every judgment and decree of any court of record of the United States, of Indiana, or of any other state shall be considered satisfied after the expiration of twenty (20) years." Despite being listed in a chapter entitled, "Specific Statutes of Limitation," this section seems unlike a standard statute of limitations.... Indiana Code Section 34-11-2-12 does not contain the same language as the other sections within the same chapter. Ind. Code §§ 34-11-2-1, -2 (employment actions "must be brought within" two years).... The *Rex Metal Craft* court concluded that the

twenty-year statute is merely a rule of evidence that creates a rebuttable presumption. In other words, a judgment that is less than twenty years old constitutes prima facie proof of a valid and subsisting claim, whereas a judgment that is over twenty years old stands discredited, with the lapse of time constituting prima facie proof of payment. Thus, the party seeking to avail itself of the presumption of satisfaction of a judgment after twenty years have passed must plead payment.

It is clear from Mother's testimony that she asserted nonpayment. Moreover, the record is devoid of any evidence that Father's estate pleaded payment. Thus, the evidence was sufficient to overcome the presumption of satisfaction of the judgment. As such, Mother's claim against the estate is not barred by Indiana Code Section 34-11-2-12.

**Lesson:** A judgment may be enforced after more than 20 years by proof of nonpayment notwithstanding a statute that says "every judgment shall be considered satisfied after 20 years."

#### **7. Excited Utterance Exception to Hearsay Rule; *Boatner v. State* – 934 N.E.2d 184 (Ind. Ct. App. 9/22/10) (Mathias)**

Donte Boatner was convicted of domestic battery for injuring his girlfriend. At trial, the girlfriend did not testify, so his conviction was based largely upon the testimony of the officer who interviewed the girlfriend after the incident. The officer testified that the woman was disoriented, crying, without shoes, and almost ran to him in her attempt to find help and told the officer that the defendant had "pushed her down and hit her on her face."

On appeal, the defendant argued that the trial court had erred in admitting this testimony as an excited utterance because "[t]he emergency had passed," and she therefore "had time and opportunity to reflect and deliberate regarding her statements to the deputy." The Court agreed that a statement's remoteness in time from a startling event was a factor that should be considered when determining whether a particular statement was an excited utterance. However, the Court held that the proponent of a statement did not need to demonstrate that the statement was proximate in time to the startling event in order for it to be admissible as an excited utterance.

[H]ere, although the exact time of the battery could not be established, Deputy Earles testified that A.J. was disoriented, crying, without shoes, and almost ran to him in her attempt to find help. She told Deputy Earles that Boatner had pushed her down and hit her even before he could ask her any questions. Under these facts and circumstances, the trial court could conclude that A.J.'s statement to Deputy Earles was made while she was under the stress of excitement cause by Boatner's battery.

**Lessons:**

1. A statement can be found to be an excited utterance, even if no evidence is admitted showing that the utterance is proximate in time to the startling event.
2. The burden of demonstrating that an allegedly excited utterance is remote in time from an event is on the party seeking to exclude that testimony, if the appearance and presentation of the declarant would otherwise support the admissibility of that statement.

**8. Questions About the Testing Methods Used by Expert Must be Substantial to Justify Exclusion; *Kennedy v. State* – 934 N.E.2d 779 (Ind. Ct. App. 10/6/10) (Barnes)**

Charles Kennedy was charged with conspiracy to commit robbery. When investigating the case, the State began conducting DNA testing on an item of evidence used in the robbery. Indiana State Police ("ISP") lab DNA analyst Nicole Keeling first analyzed a swab from the asphalt to determine what DNA alleles were present at each of fifteen different loci used in making DNA identifications. She then compared those loci and their alleles to a sample of the victim's DNA, identified that the victim was the source of the major DNA profile found on the item to a reasonable degree of scientific certainty, but also indicated that there were extra alleles found on the item, not consistent with the victim's DNA profile, that led her to believe there was a minor contributor of a different DNA profile on the item. The State then compared Kennedy's DNA to that on the item and Keeling concluded that Kennedy "cannot be excluded as a possible contributor of the additional alleles" found on the item.

Kennedy moved to exclude Keeling's conclusions regarding the DNA evidence because the manner in which Keeling had conducted her analysis did not comport with accepted scientific principles. The trial court denied that motion and the evidence was admitted at trial over Kennedy's objections. At trial, Kennedy presented as a witness Ranajit Chakraborty, a nationally-recognized DNA analysis expert who expressed strong disagreement with the manner in which Keeling conducted parts of her testing. At the conclusion of the trial, the jury found that Kennedy was guilty and he appealed.

On appeal, the court first dealt with an argument about the admission of this evidence on procedural grounds for alleged violation of discovery rules. After concluding that Kennedy was not prejudiced by the alleged late disclosure, the Court turned to whether the trial court erred in concluding that Keeling's test results were sufficiently scientifically reliable to be admissible.

Although he was arguing that the evidence should be excluded, Kennedy conceded that Keeling was qualified as an expert in the field of DNA forensic analysis and that the lab at which the testing was performed is properly accredited and has adopted scientifically acceptable methods for DNA testing. The Court then noted that Keeling utilized a testing method that had passed general muster in Indiana for scientific reliability and admissibility in evidence at trial. Therefore, the Court's analysis focused on whether there were substantial irregularities in the testing process used by Keeling.

After describing, in detail, the nature of the dispute about the testing process used by Keeling, the Court concluded that the trial court did not err in admitting the evidence.

Kennedy is challenging the very highly technical details of how Keeling conducted her testing. We believe this is the very reason the rules of evidence provide for expert witness testimony. The details of how DNA testing is conducted are beyond the ready grasp of laypersons, or judges and lawyers for that matter. Furthermore, DNA testing is not always a black-and-white science. Keeling, whom Kennedy recognizes as a qualified expert in this field, testified that DNA analysts almost always have to exercise some degree of discretion in testing. Chakraborty also agreed that trained and qualified DNA analysts can have reasonable disagreements regarding proper

test results. We believe this clearly is a case where the dispute between Keeling and Chakraborty regarding the precise details of her testing methods goes to the weight of her results, not their admissibility. Kennedy was permitted to and in fact did present to the jury a detailed critique of Keeling's methods. The trial court did not abuse its discretion in admitting the results into evidence.

The Court's decision in this case further helps define the bar that counsel must reach in order to exclude the testing results of a qualified expert using an approved testing process. Any irregularities in the testing procedure used must be substantial and the opponent of that evidence must be able to clearly demonstrate this to the Court. The failure to do so will mean that the evidence will still get to the jury.

**Lesson:** A litigant who is challenging the conclusions of a qualified, scientific expert who used approved testing procedures must demonstrate that there were substantial irregularities with the testing procedure used which make the results unreliable.

#### **9. Psychologist Not Qualified to Give Expert Opinion on Causation of a Brain Injury; *Bennett v. Richmond* – 932 N.E.2d (Ind. Ct. App. 8/13/10) (Najam)**

In this case, a man was rear-ended while driving a van. As a result of that collision, Richmond sustained injuries to his neck and back, so he brought suit against the other driver. Pursuant to a referral by his attorney, the plaintiff underwent a neuropsychological evaluation with a psychologist "to determine the presence and possible degree of disability associated with a closed head injury sustained in an automobile accident." The psychologist concluded, inter alia, that "the accident produced the brain injury." The defendant moved to strike the psychologist's testimony because he was not competent to testify regarding medical diagnosis. The trial court denied this motion after a hearing and allowed the psychologist to testify on these issues at trial over objection. The defendant appealed.

On appeal, the Court noted that the medical cause of a brain injury "is generally exclusively within the purview of medical doctors." While the Court refused to hold that a psychologist is per se unqualified to give such testimony, it held that this particular psychologist had not demonstrated that he is qualified to opine on causation in this case. Dr. McCabe testified only that, in his professional continuing education courses, he has "touched on subjects that relate to evaluation of traumatic brain injuries" and that he has received referrals from two Elkhart neurologists. We hold that the trial court abused its discretion when it permitted Dr. McCabe to testify that Richmond sustained a brain injury as a result of the accident with Bennett.

While, generally speaking, Dr. McCabe demonstrated that he would have been qualified to opine that Richmond's test results indicate that he has sustained a brain injury from an unknown cause, absent qualifications in determining the etiology of brain injuries, Dr. McCabe's testimony went too far in identifying the May 2004 accident as the cause of Richmond's alleged brain injury.

At trial, Dr. McCabe presented a video explaining how even a minor whiplash injury can result in brain damage. But Dr. McCabe did not testify regarding the mechanics of the

vehicular accident in this case to demonstrate how the impact might have resulted in Richmond's brain damage. For instance, Dr. McCabe did not describe the speed or force of the impact of the collision between the vehicles.

Instead, Dr. McCabe offered a simple inferential analysis of the cause of Richmond's alleged brain injury based upon Richmond's lack of any history of memory loss, cognitive dysfunction, headaches, or other symptoms prior to the May 2004 accident. Dr. McCabe testified that "[g]iven the absence of any of the symptoms of this condition prior to the accident, either in his report, the medical record, or the observations of his wife, it seems evident that the accident produced the brain injury." His opinion was not based on clinical medical evidence of the alleged injury. Under the circumstances, his opinion is "nothing more than 'subjective belief' and 'unsupported speculation' which is not the proper subject of expert testimony under Daubert[.]"

**Lessons:**

1. An expert must have qualifications in determining the etiology of an injury in order to provide an opinion on the causation of that injury.
2. In the absence of clinical evidence of physical injury, an expert must base an opinion on the causation of a brain injury on more than an inferential analysis of the plaintiff's mental condition before and after the accident.

**10. Attorney's Statements at Hearing Are Binding on Client as to All Defendants; *Heyser v. Noble Roman's, Inc.* – 933 N.E.2d 16 (Ind. Ct. App. 8/19/10) (Sharpnack)**

Plaintiffs filed suit, asserting fraud and other claims. Two of the defendants moved to dismiss under Rule 12(b)(6) and that motion was granted. At a hearing on that motion, plaintiffs' counsel stated:

So I would submit to the Court that we have certainly alleged sufficient facts to fall within that case to hold the banks liable or at least pass a motion to dismiss on a claim that [the Banks] conspired and acted in concert with Noble Roman's under these alleged facts. We've cited some other cases on constructive fraud and basically under those kind of cases the claim that you were making a representation about future promises and opinions and not facts was not upheld. ***We haven't pleaded constructive fraud*** so I would submit to the Court that we state the cause of action for fraud, ***Gable v. Curtis***, supports that.

The remaining defendant then moved for partial summary judgment, asserting that the plaintiffs were alleging actual fraud, not constructive fraud. The plaintiffs responded, asserting that their complaint and subsequent amendments alleged both actual and constructive fraud. The Court granted the defendant's motion because the plaintiffs' counsel, at a hearing on the other defendants' motion to dismiss, had told the court that the plaintiffs had not pleaded constructive fraud. The plaintiffs then appealed.

On appeal, the plaintiffs argued that their attorney's statement did not constitute a binding admission. The Court disagreed.

[T]he Franchisees' then counsel admitted that the Franchisees were only pleading actual fraud against Noble Roman's, who was the only defendant that allegedly made fraudulent statements. That admission was binding upon

the Franchisees throughout the lawsuit. Under these circumstances, Noble Roman's was entitled to judgment as a matter of law on the Franchisees' subsequent attempt to plead constructive fraud, and the trial court did not err by granting partial summary judgment to Noble Roman's on that claim.

**Lesson:** Any unambiguous statement that an attorney makes during the course of litigation may be binding on that attorney's clients as to all parties to that litigation.

**11. Attorney Has No Duty to Represent Client Beyond Scope of Contract; *Flatow v. Ingalls* – 932 N.E.2d 726 (Ind. Ct. App. 8/16/10) (Robb)**

Ingalls filed a four-count lawsuit against his former employer, alleging, inter alia, defamation. After one claim was dismissed, Ingalls hired Flatow to represent him as to the defamation claim only. Flatow proceeded to move for partial summary judgment on the defamation claim. The former employer filed a brief in opposition and a cross-motion for summary judgment on all three remaining counts of Ingalls's complaint, including the defamation count. Ingalls did not file a reply to the response to the motion for partial summary judgment, nor did he file a response to the cross-motion for summary judgment. The trial court granted judgment to the former employer. Ingalls then sued Flatow for legal malpractice. Flatow's motion for summary judgment was denied and she was granted permission to pursue an interlocutory appeal.

On appeal, the Court looked to Indiana Professional Conduct Rule 1.2(c) to inform it of the scope of the duty that Flatow owed to Ingalls and narrowly construed the duty. The contract provided that Flatow would "draft a motion for summary judgment and a reply brief in the above matter" and that the "representation in this matter includes inception of the matter through the end of trial." The contract also said: "As we have discussed, this Contract does not encompass, nor does it engage [the Flatow Defendants] in any manner not described above."

The Court held as follows:

[W]e view the contract provision stating the Flatow Defendants will represent Ingalls from "inception of the matter through the end of trial" in light of the more specific provisions and conclude the "matter" is Ingalls's summary judgment motion, and that although the Flatow Defendants may be alongside Ingalls through the entire proceedings, they will be active only on this one limited matter.

Because the representation was so limited, Flatow had no duty to respond to the former employer's motion for summary judgment, even though it addressed the defamation claim.

Judge Kirsch disagreed with this conclusion, finding that the Flatows' agreement to represent Ingalls in "the matter through the end of trial" was an express agreement to represent Ingalls on his defamation claim and to take all steps required by the applicable standard of care regarding the summary judgment proceedings and, thereafter, through to the end of trial. However, he concurred in the judgment because Ingalls failed to point to any legal argument that should have been made or evidence that should have been

designated in reply in support of his own motion or in response to his former employer's motion that would have resulted in a more favorable outcome.

**Lessons:**

1. Courts will construe the legal duty that an attorney owes to her client narrowly when there is limiting language in the contract for legal services.
2. Courts will look to the Disciplinary Rules for guidance in determining the scope of a lawyer's duty.

**12. Ex-Husband Is Not Unjustly Enriched if Attorney Settles Claim Without Consulting Ex-Wife; Loss of Consortium; Legal Malpractice; *Manns v. Richie* – 2010 WL 4600293 (Ind. Ct. App. 11/15/10) (Baker)**

A man was injured in a workplace accident and he and his wife filed a claim arising out of those personal injuries. Her claim was based on loss of consortium. A few months after the case was filed, the wife sought a divorce and their marriage was dissolved the next year. About 12 years after the personal injury claim was filed, it was settled. In that settlement, no monies were attributed to the wife's loss of consortium. The next year, the wife sued both her husband and the attorney who prosecuted the personal injury claim. Both defendants moved for summary judgment. The trial court granted the husband's motion, but denied the lawyer's motion. The wife appealed.

On appeal, the court held that the husband had neither actual nor apparent authority to settle the wife's claim on her behalf.

Here, at the time Richie and Kopack settled the NIPSCO litigation, Richie and Manns had been divorced for approximately nine years. Under these circumstances, Richie had neither actual nor apparent authority to settle on his ex-wife's behalf. Consequently, Richie could not possibly have settled Manns's claims. He was entitled to recover only his own damages from NIPSCO; therefore, the \$750,000 that he received were solely compensating for his damages, not Manns's. In other words, Manns has conferred no benefit upon Richie because he was compensated only for his own claims. As a matter of law, therefore, Manns has failed to establish that Richie was unjustly enriched, and the trial court properly entered summary judgment on his behalf.

We note that as Manns's attorney, Kopack may have been authorized to settle on her behalf, and allegedly did so without her consent. Therefore, to the extent that she can establish damages, the party from whom she should seek redress is Kopack, not Richie.

**Lessons:**

1. An ex-husband does not have apparent authority to settle a lawsuit on behalf of his ex-wife.
2. It is not unjust for an ex-husband to settle his personal injury claims without obtaining any money for the loss of consortium claims of his ex-wife.
3. An attorney may not settle a loss of consortium claim without the consent of the client asserting the claim.

### 13. Sellers of a Home Can Be Liable for Misrepresentations in Sales Disclosure Form; *Hizer v. Holt* – 2010 WL 4228446 (Ind. Ct. App. 10/27/10) (Mathias)

At issue in this case was whether I.C. chapter 32-21-5 abrogates the common law rule of caveat emptor with regard to representations made in a statutorily required Sales Disclosure Form. The Court held that it did.

The Hizers bought a home from the Holts that the Holts had built. In the agreement, the Hizers reserved the right to conduct an inspection of the property. Prior to closing, the Hizers obtained an inspection of the septic system, the outside portion of the well, and a VA appraisal. However, they did not conduct an independent inspection of the home itself. In the Sales Disclosure Form required by I.C. § 32-21-5-7, the Holts stated that the plumbing and well were not defective, that there were no hazardous conditions on the property, including no mold, and that there were no moisture and/or water problems in the basement.

After the closing, the Hizers discovered several undisclosed problems with the home and filed a complaint against the Holts. The trial court granted summary judgment to the Holts and the Hizers appealed.

The Holts argued that the Hizers had no right to rely on representations by the Holts because the Hizers had a reasonable opportunity to inspect the property, and an inspection would have revealed the alleged defects. The Court disagreed, noting that no previous decision had addressed the impact of I.C. chapter 32-21-5 on the caveat emptor doctrine.

We cannot conceive of any reason that the General Assembly would require sellers to complete the Sales Disclosure Form if sellers cannot be held liable for fraudulently misrepresenting the condition of the property on the form. Importantly, sellers "must complete and sign a disclosure form and submit the form to the prospective buyer before an offer for the sale of the residential real estate is accepted." We believe that the General Assembly intended for a prospective buyer to rely on the seller's disclosure of known defects on the property when making his or her offer to purchase the property.

Furthermore, section 32-21-5-11 provides that sellers are not liable for errors, inaccuracies or omissions on the Sales Disclosure Form under certain, limited circumstances, including a lack of actual knowledge of the defect. By implication, therefore, the General Assembly contemplated that sellers can be held liable for errors, inaccuracies, or omissions on the Sales Disclosure Form if the seller has actual knowledge of the defect. For all of these reasons, we conclude that Indiana Code chapter 32-21-5 abrogates any interpretation of the common law that might allow sellers to make written misrepresentations with impunity regarding the items that must be disclosed to the buyer on the Sales Disclosure Form pursuant to section 32-21-5-7(1).

**Lesson:** A seller of a home can be liable for any misrepresentations in the Sales Disclosure Form required by I.C. § 32-21-5-7.

#### 14. Passenger's Duty to Lookout and Warn; *Burton v. Bridwell* – 2010 WL 4546109 (Ind. Ct. App. 11/12/10) (Baker)

A husband was driving an automobile with his wife as a passenger. The two were stopped at a four-way stop when a vehicle being driven by the defendant was about one-half block away. After the husband began to pull out from the stop, he realized that the defendant was not going to stop. The wife then said, "she's not going to stop," and the accident happened immediately thereafter. The wife sued the defendant and the case went to trial, where the wife tendered proposed jury instructions, including Pattern Jury Instruction 6.01, which informed the jury that it "must decide this case according to the Indiana law of comparative fault." The jury attributed 50% of the fault to the wife and 50% to the defendant.

On appeal, the wife argued that the jury erred by attributing any fault to her. The Court looked to *Spratt v. Alsup*, 468 N.E.2d 1059, 1063-64 (Ind. Ct. App. 1984), in which the duties of an automobile passenger were discussed as follows:

An occupant of a vehicle is generally not required to be constantly on the lookout for unexpected danger. However, she has some duty to maintain a proper lookout, which is to say, a passenger remains under a duty to exercise reasonable care. An occupant may properly assume that the driver will exercise proper care and caution. Generally she need not keep a lookout for approaching vehicles and must only act as a reasonable person would in the same or similar circumstances. Nevertheless, if a passenger using reasonable care should have seen an approaching vehicle enabling her to warn the driver who could have prevented the collision, it would have been her duty to do so.

In the *Burton case*, the Court held that, while the wife did have some duty to maintain a proper lookout, the defendant had not demonstrated that she breached that duty in this case.

[T]he evidence failed to demonstrate that Tracie, as a passenger in the vehicle, had the opportunity to see Bridwell's vehicle, appreciate that it was not going to stop, and warn her husband in time for him to act and avoid the collision. Absent such evidence, the apportionment of fault cannot stand.

**Lesson:** Comparative fault may be allocated to a passenger who should have seen an approaching vehicle and could have warned the driver in time to avoid the collision.

#### 15. New Amendments to Indiana Rules

On September 21, the Indiana Supreme Court posted a number of amendments to various Indiana rules, most of which will become effective on January 1, 2011. The changes are not huge but you will want to pay careful attention when you're seeking a stay pending appeal, suing on an account, preparing jury instructions, calculating a deadline from the date of a ruling, and in variety of other situations.

### **Highlights of the new amendments include:**

- Jury Rule 4 requires that the jury summons include information on “court policies regarding the use of electronic communication devices (i.e. cell phones, PDAs, smart phones, etc.).”
- Jury Rule 26 specifies that final instructions “shall include at least ... (1) the applicable burdens of proof; (2) the credibility of witnesses; and (3) the manner of weighing the testimony received.”
- Trial Rule 9.2 now requires attaching to the complaint an Affidavit of Debt, in a prescribed form, when suing on an account.
- Trial Rule 23(f) mandates that when there are residual funds after a class action claims process has been exhausted, at least 25 % of the residual funds shall be disbursed to the Indiana Bar Foundation to support the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the remaining residual funds to the Indiana Bar Foundation or any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the interests of members of the certified class.
- Trial Rule 51 specifies:
  - In the absence of permission from the court for a greater number, a party is limited to 10 requested final instructions and this limit applies to requested pattern instructions.
  - A party may also request the court to reread any preliminary instructions which will not count against the 10 instruction limit. Upon request, the court is required to reread the preliminary instruction.
  - The new “plain English” Indiana Model Jury Instructions (Civil) may be requested by number designation, without copying the instruction in writing.
- Trial Rules 53.1, 53.3, 59 and 62 specify that the dates noted in the Chronological Case Summary (CCS) shall be controlling in calculating deadlines for the Lazy Judge Rule, motions to correct error and motions to execute on a judgment. Trial Rule 78 requires that the CCS entry be made “promptly” and that the date noted in the CCS “should be the date the notation is made, regardless of the date the judicial event occurred.”
- Trial Rule 62(D) now clearly authorizes the trial court to stay execution of a judgment, not only upon the giving of an adequate appeal bond or irrevocable letter of credit, but also upon the giving of any “other form of security approved by the court.”

### **Lessons:**

1. It is now clear that under Trial Rule 62(d) a trial court may stay execution of a judgment upon the giving of *any kind* of security it deems appropriate; the security is not limited to appeal bonds and letters of credit.
2. The amended rules also make clear that the trigger date for calculating deadlines will run from the date noted in the CCS which may be later than the date of the judicial event reflected in the CCS.

**ADVOCACY TIP OF THE MONTH: Read good prose.**

Excerpt from *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan A. Garner, p. 61-62

As you read, so will you write. Lawyers tend to be bad writers because their profession condemns them to a diet of bad reading material. The very highest they go up the literary ladder, so to speak, is judicial opinions—which are widely read not, heaven knows, because they are well written (nor even because they are well reasoned) but because they are authoritative. Judge Frank Easterbrook of the Seventh Circuit puts the point bluntly: “The best way to become a good legal writer is to spend more time reading good prose. And legal prose ain’t that! So read *good* prose. And then when you come back and start writing legal documents, see if you can write your document like a good article in *The Atlantic*, addressing a generalist audience. That’s how you do it: get your nose out of the lawbooks and go read some more.”

Sir Walter Scott made a related point many years ago: “A lawyer without history or literature is a mechanic, a mere working mason. If he possess some knowledge of these, he may call himself an architect.”

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## IndianaLawUpdate – the Blog

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Ron has also served as President of the Indianapolis American Inn of Court, as Chair of the Continuing Legal Education Board of the International Association of Defense Counsel, and as Co-chair of the Training the Advocate Committee, Litigation Section, American Bar Association. He formerly was a JAG and Captain in the U.S. Marine Corps and served as the elected Prosecuting Attorney in Monroe County, Indiana.

Ron co-authored *The Twelve Secrets of Persuasive Argument* (2009 ABA), *The Winning Argument* (2001 ABA), *Classical Rhetoric and the Modern Trial Lawyer*, Litigation (Winter 2010); and *Ethos and the Art of Argument*, Litigation (Fall 1999). Ron also wrote *Learning the Craft*, Litigation (Spring 1998) and was the editor and a contributing author of *Law and Amateur Sports* (Ind. Univ. Press 1982).