

## EVIDENTIARY MATTERS

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### WAIVER OF CONFIDENTIAL PRIVILEGES

In general, plaintiffs in a will contest are entitled to the same information as the defendants, privileged or not. If an attorney witnesses a will, it is the testator herself that waives any attorney client privilege by having asked the attorney to serve as a witness. Sometime an executor will attempt to redact certain information. In looking at the standard used by the courts, you can review the following cases:

Pence v. Waugh, 34 N.E. 860 (Ind. 1893).

Kern v. Kern, 55 N.E. 1004, 1006 (Ind. 1900).

Briggs v. Clinton County Bank, 452 N.E.2d 989 (Ind.App. 1983).

Estate of Voelker, 396 N.E.2d 389, 399 (Ind.App. 1979).

Schutz v. Leary, 106 N.E.2d 705, 707 (Ind.App. 1952).

Haverstick v. Banet, 370 N.E.2d 341 (Ind. 1977).

A word of warning to any defendant that wishes to raise a privilege to prevent the disclosure of information. In criminal cases the exercise of a privilege is not disclosed to the jury. In civil cases, however, the rules are entirely different.

If the defendants do not permit the drafting attorney or physician or anyone else to testify because of a privilege, or do not produce documents during discovery because of a privilege, the law permits plaintiffs to argue that the smoking gun was hidden. Harris v. C.I.R., 461 F.2d 554 (5<sup>th</sup> Cir. 1972); Marcus v. Marcus, 394 A.2d 727 (Conn. 1978); Fried v. Bradley, 52 So.2d 247 (La. 1950); In re McFadden, 108 A.2d 247 (Pa.Sup.Ct. 1954); Bayou Drilling v. Baillio, 312 S.W.2d 705 (Tex.App. 1958). See also Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976); Ingram v. Indianapolis, 759 N.E.2d 1144, 1149 (Ind.App. 2001); Moore v. Liggins, 685 N.E.2d 57, 65 (Ind.App. 1997). Of course the negative inferences do not permit the defendants to obtain summary judgment in such a case.

The defendants' refusal to waive a privilege permits the Jury to rule in favor of the plaintiff so long as he or she introduces a scintilla of other evidence to support a verdict. Gash v. Kohm, 476 N.E.2d 910, 915 (Ind.App. 1985); Aubrey v. State, 310 N.E.2d 556 (Ind. 1974); Loomis v. Ameritech, 764 N.E.2d 658, 662 (Ind.App. 2002). "In Indiana, the exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it." Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000), citing Porter v. Irvin's Interstate, 691 N.E.2d 1363, 1364-65 (Ind.App. 1998), Great Am. Tea Co. v. Van Buren, 33 N.E.2d 580, 581

(Ind. 1941). Morris v. Buchanan, 44 N.E. 2d 166 (Ind. 1942) (“Many of the facts about which there is uncertainty were peculiarly within the knowledge of the appellant and such a situation may give rise to an inference that if these had been fully disclosed they would have been unfavorable. While this rule will not be carried to the extent of relieving a party of the burden of proving his case, it may be considered as a circumstance in drawing reasonable inferences from the facts established”), citing Van Buren, 33 N.E.2d at 581. See Westervelt v. National Mfg., 69 N.E. 169 (Ind.App. 1903).

### **STATEMENTS MADE BY THE DECEDENT**

In the recent case of Lasater v. House, 841 N.E.2d 553 (Ind. 2006), the Indiana Supreme Court held that in a will contest, statements of a testator when he or she signed the will are not admissible as evidence of undue influence, but can be admitted on the issue of testamentary capacity. The Supreme Court made a decision on outdated law that could have been an interesting case of first impression.

Suppose the testator tells the drafting lawyer: “I either sign this new will giving my nurse everything or she’ll make me go to a nursing home.” Hard to imagine why the court would allow such testimony under the auspices of soundness of mind but not on the issue of undue influence.

Prior to a few years ago the Indiana Deadmans’ Statute prevented any party from taking the witness stand and testifying as to anything that occurred during the lifetime of the decedent, except on the issue of soundness of mind. The legislature amended the Deadmans’ Statute so that it no longer applies in will contests or trust contests. In the discussion section of the Lasater opinion the court cited to the case law of Allman, Loeser, Crane, Emry, Ditton, Westfall, Todd, and Hayes, all of which were rendered meaningless after the legislative change. These cases speak about whether a witness is competent (which goes to whether or not he or she can testify at all because of the Deadmans Statute), not whether certain testimony is admissible, which is an entirely different question.

The attorneys in the case and the court missed the correct evidentiary rule in the first place, which can be common when objections and responses are made quickly during a trial. In Lasater the plaintiff wanted the witness to testify about what the testator said. Because an executor is a party defendant to a will contest, everything the decedent said or did during his or her lifetime is admissible as non-hearsay under Evidence Rule 801(d)(2). Rule 803(3) never comes into play.

The executor is a necessary defendant to any will contest. Moll v. Goedeke, 25 N.E.2d 258 (Ind.App. 1940); I. C. 29-1-7-17 (“The executor and all other persons beneficially interested in the will shall be made defendants to the

action.”). The executor is charged in his fiduciary capacity to defend the probated will. *Hamilton v. Huntington*, 58 N.E.2d 349 (Ind. 1944). This makes the plaintiff and the estate party opponents.

Pursuant to Evidence Rule 801(d)(2), “A statement is not hearsay if: The statement is offered against a party and is (A) the party’s own statement, in either an individual or representative capacity; ...” This rule applies not only to statements, but also to opinions. *Beresford v. Starkey*, 563 N.E.2d 116, 124 (Ind.App. 1990). The plaintiffs do not have to show that the decedent had personal knowledge of any facts. *Miller, Courtroom Handbook on Evidence*, page 270 (2005 ed.), citing *Blackburn v. UPS*, 179 F.3d 81, 96 (3d Cir. 1999). Thus, when the plaintiff’s attorney asks a witness (including the plaintiff) what the decedent said, his or her statements are not hearsay. *Hebel v. Conrail*, 475 N.E.2d 652, 660-61, (Ind. 1985) (“They were admissible as the admissions of a decedent against his personal representative.”), and footnote 2 (which applies the rule to “a party, or a party’s predecessor in interest”).

As another example, in *Uebelhack Equipment v. Garrett*, 408 N.E.2d 136 (Ind.App. 1980), an owner brought an action against a general contractor for damages. “Part of the evidence introduced to show the nature and terms of the contract were statements made by Edwin Uebelhack to Paul Zimmer. ... The only unusual factor is that Edwin Uebelhack is since deceased from the time of the making of the statements. ... the declarations of a deceased person, especially when they are corroborated by conditions and circumstances, are sufficient to establish the existence, terms and conditions of an express oral contract.” *Id.* at 138-39. *First Bank & Trust v. Tellson*, 118 N.E.2d 496, 501 (Ind.App. 1954); *Weir v. Lake*, 41 N.E.2d 828, 831 (Ind.App. 1942) (“Such statements may be sufficient to prove the issue in question and to support a decision, and particularly is this true where the declarations or statements are supported by other evidence”).

### PROPER QUESTIONS

Indiana Evidence Rule 401: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Authentic document or thing  
Competent witness  
Hearsay with exception  
Personal knowledge  
Proper opinion  
Not otherwise objectionable

Once evidence is offered that you dispute or need to challenge, the door is opened to raise questions concerning the following:

Bias (interest, prejudice, motives, etc.)  
Character evidence  
Impeachment

### **OBJECTIONS**

Accrediting or bolstering witness before impeachment  
Addressing juror by name  
Ambiguous question  
Argumentative  
Asked and answered  
Assumes fact not in evidence  
Authentication or identification problem  
Best evidence rule  
Broad  
Business record exception not established  
Character not admissible or attacked  
Child witness not competent  
Closing argument  
Collateral matter  
Competency not established  
Completeness rule  
Complex, compound or multiple question  
Compromise offers or settlement not admissible  
Calls for conclusion  
Coaching  
Confusing question  
Convictions of crime not admissible  
Corroborative evidence not proper  
Cross examination goes beyond scope of direct  
Cumulative  
Deadman's statute  
Deceptive question  
Defaming character  
Discretion of the court for any reason  
Document speaks for itself  
Exhibit or witness not on pretrial list  
Expert testimony not proper  
Extrinsic evidence not admissible  
First hand knowledge not shown  
Foundation lacking  
    No factual predicate for witness statement  
    Lay witness answering expert question  
    Beyond demonstrated expertise of the expert

Hearsay  
Witness not present for photograph, recording or telephone call  
Equipment functioned properly  
Chain of custody  
Habit, routine and practice not proper  
Harassment  
Hearsay  
Hearsay exception does not apply  
Declarant available  
Declarant not available  
Hypothetical question not proper  
Identification lacking  
Illegally obtained evidence  
Immaterial or not relevant  
Impeachment not proper  
Incompetent witness  
Inflammatory  
Insurance issue not proper  
Interpreter not qualified  
Irrelevant or immaterial  
Jencks Act violation (FRCP 26.2)  
Job offer argument  
Judge cannot be a witness  
Judicial notice not proper  
Judicial questioning not proper  
Juror cannot be witness  
Leading  
Liability insurance improper  
Limited admissibility  
Mischaracterization or misquoting of witness prior testimony  
Misleading question  
Missing evidence  
Missing witness  
Misstates the facts or law  
Mistrial  
Motion to strike (where objection not made)  
Multiple or compound question  
Must accept witness answer  
Narrative not proper  
Non-responsive answer  
Not relevant to issues raised in the pleadings  
Not relevant to impeachment purpose  
Not reasonably calculated to lead to admissible evidence (deposition only)  
Notes being used without foundation  
Offer of proof required  
Opening statement  
Argumentative

- Discusses law
- Mentions improper facts
- Opinion of witness not proper
- Original document rule
- Parol evidence rule
- Payment of medical bills
- Personal knowledge lacking
- Personal opinion of attorney
- Photograph not proper
  - Inflammatory
  - Misleading
  - Re-creation or dramatization going beyond illustration
  - Reveals evidence not admissible
- Plea bargaining not admissible
- Poverty or wealth of a party
- Prejudicial
- Presumptions
- Pretrial conference order eliminated issue
- Prior inconsistent statement not admissible
  - Witness called only for this purpose
  - Statement not inconsistent with prior testimony
  - Witness is permitted opportunity to explain inconsistent statement
  - Statement concerns a collateral matter not within issues at trial
- Privacy concerns
- Privileges
  - Accountant client
  - Attorney client
  - Crime victim counselors
  - Doctor patient
  - Executive
  - Fifth Amendment
  - Government
  - Husband wife
  - Immunity
  - Informer
  - Journalist
  - Medical provider patient
  - Priest penitent
  - Social workers
  - Trade secrets
- Rape shield Statute
- Reading from document not in evidence
- Redaction not proper
- Redirect examination beyond the scope of cross
- Refreshing recollection not proper
  - Witness testifying to contents of document, not refreshed memory
  - Intent to have Jury speculate about contents of inadmissible exhibit

Witness not shown to need the document  
Not relevant or material  
Religious matters  
Remarriage matters  
Remedial matters or repairs  
Repetitious question  
Self serving recollection  
“Send a message” argument  
Settlement offers or compromise efforts  
Side bar should have been requested  
Speculation  
Statute of frauds  
Stipulation applies  
Subsequent remedial measures  
Summary not admissible  
    Originals not voluminous  
    Source materials not admissible nor made available  
    Summary not accurate  
Surprise (e.g., concealed during discovery)  
Attorney testifying  
Unfair question  
Unintelligible question  
Vague  
Vouching for witness not permitted  
Waste of time  
Witness or exhibit not on pretrial list

### *RESPONSES TO OBJECTIONS*

Objection does not apply because ...  
Objection goes to weight and sufficiency, not competency  
Rephrase the question  
Connect it up later  
Other side opened the door  
Agree to limiting instruction  
If objection sustained, offer of proof

## THE DEADMANS' STATUTE

By statute the Indiana Deadmans' Statute no longer applies in a will contest or trust contest. In the event the statute comes into play in estate litigation, whether in the context of a claim or otherwise, here is a suggested list of ways to get around it:

1. The statutes barring testimony are strictly construed and the wording of each section must apply. Summerlot v. Summerlot, 408 N.E.2d 820 (Ind.App. 1980). If a single description in the statute is missing, the Deadman's Statute does not apply.

2. The Deadman's Statute does not apply to issues of soundness of mind, sanity, or the decedent's health. Bechert v. Lehe, 316 N.E.2d 394 (Ind.App. 1974); Beaver v. Emry, 149 N.E. 730 (Ind.App. 1925); Supreme Lodge v. Andrews, 67 N.E. 1009 (Ind.App. 1903).

3. It should not apply if the decedent, if alive, could not have refuted the testimony. Johnson v. Estate of Rayburn, 587 N.E.2d 182 (Ind.App. 1992).

4. Establish a prima facie case with other evidence and then call your barred witness.

a. The trial court does not abuse discretion in calling a barred witness to testify once a prima facie case is established. 34-45-2-10; Wilhoite v. Beck, 230 N.E.2d 616 (Ind.App. 1967); Alexander's Estate v. Alexander, 212 N.E.2d 911 (Ind.App. 1966); Heavin v. Sutherlin, 64 N.E.2d 43 (Ind.App. 1945); Rodebaugh v. Rodebaugh, 154 N.E. 699 (Ind.App. 1927); Yost v. Dunk, 106 N.E. 644 (Ind.App. 1914); Dearing v. Coulson, 96 N.E. 9 (Ind.App. 1911);

b. You can also call the witness. Schlemmer v. Schendorf, 49 N.E. 968 (Ind.App. 1898); Milam v. Milam, 60 Ind. 58 (1877) (noting that at common law all parties were not competent as witnesses until making out a prima facie case).

5. Use a witness that will not gain or lose by direct legal operation of the judgment. Fisher v. Estate of Haley, 695 N.E.2d 1022 (Ind.App. 1998).

6. Use a document signed by the decedent.

7. Seek a waiver.

a. File a motion for summary judgment and include the barred testimony in an affidavit. If the other side does not move to strike or object, your client is forever competent. Crawford v. Wells, 344 N.E.2d 869 (Ind.App. 1976).

b. Call your client to the stand. If the other side permits a single question barred by the statute then all other testimony is proper. The Deadman's Statute is one of witness competency, not an issue where you can pick and choose among questions and answers. Paullus v. Yarnelle, 633 N.E.2d 304 (Ind.App. 1994); Satterthwaite v. Satterthwaite's Estate, 420 N.E.2d 287 (Ind.App. 1981); Dime Savings v. Jones, 151 N.E. 701 (Ind.App. 1926).

c. If the other side asks your client a barred question, either as their own witness or by going beyond the scope of your direct. See Estate of Neu, 588 N.E.2d 567 (Ind.App. 1992); Estate of Palamara, 513 N.E.2d 1223 (Ind.App. 1994).

d. If the other side uses your client's deposition or admission at any stage of the proceeding (e.g., in summary judgment or at trial). Taylor v. Taylor, 632 N.E.2d 808 (Ind.App. 1994); Kalwitz v. Estates of Kalwitz, 759 N.E.2d 228, fn.3 (Ind.App. 2001) (stating that the use admissions of any sort waive the Deadman's Statute; quarry whether this includes testimony of plaintiff's admissions against interest).

8. Serve a request for admission on the other side. Even if your client cannot testify the other side may have to admit the fact you wish to prove.

9. Prove your case in a different way; e.g., if direct evidence is barred, try circumstantial: If you want a bill paid, your first choice is to have the service provider testify. But if the service provider is not competent, have any witness testify that the decedent received the service and ask the executor if there was an invoice in the decedent's records. If the invoice does or does not exist, ask the executor if he or she has any record of the decedent paying it. This should get you past the prima facie case requirement.