

## 2022 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

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This survey covers developments in all aspects of Indiana's evidence law between October 1, 2021 and September 30, 2022. Consistent with long-standing practice,<sup>1</sup> the format of this survey tracks developments in the same order as the Indiana Rules of Evidence and then covers additional developments of common-law and statutory practices not squarely covered by the Indiana Rules of Evidence.

For the period of 2014 through 2019, Indiana averaged just over 1,147 jury trials each year.<sup>2</sup> Since 2020, that average has plummeted to just under 756 trials per year.<sup>3</sup> Inevitably, fewer trials mean fewer evidentiary disputes and fewer appellate decisions addressing evidentiary procedure. Nevertheless, the survey period still produced many important insights into Indiana practice.

### I. GENERAL PROVISIONS: RULES 101 THROUGH 106

#### *A. Rule 102: Purpose of the Indiana Rules of Evidence*

In construing the Indiana Rules of Evidence, courts must guide their analyses with the aim of effectuating the purpose of the rules as stated in Rule 102: "These

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1. See, e.g., Edward F. Harney, Jr. & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887 (1996).

2. Average calculated from data assembled by the Indiana Supreme Court. IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, VOL. I: JUDICIAL YEAR IN REVIEW 81 (2014) (1,169 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2014-judicial-v1-review.pdf> [<https://perma.cc/ZM25-6GG8>]; IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, VOL. I: JUDICIAL YEAR IN REVIEW 81 (2015) (1,160 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2015-judicial-v1-review.pdf> [<https://perma.cc/CYL7-TJZB>]; IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, VOL. I: JUDICIAL YEAR IN REVIEW 122 (2016) (1,041 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2016-judicial-v1-review.pdf> [<https://perma.cc/XQ5X-G5R6>]; IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, JUDICIAL YEAR IN REVIEW 140 (2017) (1,133 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2017-judicial-review.pdf> [<https://perma.cc/865X-J4R9>]; IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, JUDICIAL YEAR IN REVIEW 141 (2018) (1,239 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2018-judicial-review.pdf> [<https://perma.cc/CC93-VMLU>]; IND. SUP. CT., JUDICIAL SERVICE REPORT, JUDICIAL YEAR IN REVIEW 110 (2019) (1,142 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2019-judicial-review.pdf> [<https://perma.cc/3CZG-YH9N>].

3. Average calculated from data assembled by the Indiana Supreme Court. IND. SUP. CT., INDIANA JUDICIAL SERVICE REPORT, JUDICIAL YEAR IN REVIEW 110 (2020) (545 trials), available at <https://www.in.gov/courts/iocs/files/rpts-ijs-2020-judicial-review.pdf> [<https://perma.cc/856E-AWED>]; Indiana Trial Court Statistics by County, available at <https://publicaccess.courts.in.gov/ICOR/> [<https://perma.cc/RHZ3-JT77>] (833 trials in 2021; 889 trials in 2022, based on "provisional data" for 2022).

rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>4</sup> “Upon that foundation, [courts] begin with the premise that all relevant evidence is admissible subject to delineated categories of excluded evidence.”<sup>5</sup>

*B. Rule 103: Preserving Evidentiary Rulings for Appeal*

Rule 103(a) requires a party seeking to preserve evidentiary errors for appellate review to either timely object to evidence that is subsequently admitted or, when evidence is excluded, provide a sufficient offer of proof so as to inform the appellate tribunal of what would have occurred had the evidence been admitted.<sup>6</sup> In *Warren v. State*, the Indiana Court of Appeals deemed appellate review of certain testimony waived because the criminal defendant failed to object to the testimony until after the witness testified, instead of immediately following the question triggering the objectionable testimony.<sup>7</sup> *Turner v. State*, also from the Indiana Court of Appeals, exemplified the other means by which evidentiary challenges may be forfeited by failures at the trial-court level.<sup>8</sup> There, forced to rely on a witness’s deposition testimony due to her unavailability for trial, the defendant’s challenge on appeal proved unfruitful because he neither made an offer of proof regarding the absent witness’s testimony nor did he argue that the witness’s “testimony was going to be any different from her deposition testimony.”<sup>9</sup>

Rule 103(b) was amended in 2013 to more closely align with Rule 103(b) of the Federal Rules of Evidence.<sup>10</sup> The primary thrust of the change was to allow “the use of a continuing objection at trial.”<sup>11</sup> The mere existence of a continuing objection does not, however, ensure the preservation of appellate review. As shown in *Hostetler v. State*, it is possible for a party to properly register a continuing objection and subsequently waive the objection during trial.<sup>12</sup> There, after successfully registering a continuing objection, the criminal defendant waived further application of the continuing objection when his counsel stated that he did not object to subsequent evidence that would otherwise have been subject to the objection.<sup>13</sup> Once a party has registered “a sufficiently specific

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4. IND. R. EVID. 102; *Hayko v. State*, 196 N.E.3d 259, 262 (Ind. Ct. App. 2022), *vacated*, 201 N.E.3d 603 (Ind. 2023).

5. *Hayko*, 196 N.E.3d at 262.

6. IND. R. EVID. 103(a).

7. 182 N.E.3d 925, 934 (Ind. Ct. App. 2022).

8. 183 N.E.3d 346, 362 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 853 (Ind. 2022).

9. *Id.*

10. See *Hostetler v. State*, 184 N.E.3d 1240, 1245 (Ind. Ct. App.), *trans. denied*, 190 N.E.3d 925 (Ind. 2022).

11. *Id.*

12. *Id.* at 1244-47.

13. *Id.*

objection to a particular class of evidence and the trial court grants a continuing objection, the proper procedure is . . . to remain silent during the subsequent admission of that class of evidence.”<sup>14</sup>

The 2013 amendment to Rule 103(b) did not perfectly align Indiana Rule 103(b) with its federal counterpart. The survey period served as an unfortunate reminder that the difference is significant in at least one regard. Federal Rule 103(b) provides: “Once the court rules definitively on the record—*either before or at trial*—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”<sup>15</sup> Indiana Evidence Rule 103(b) reads: “Once the court rules definitively on the record *at trial* a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”<sup>16</sup> By excluding “either before,” Indiana Rule 103(b) specifically does not allow pretrial rulings—i.e., motions in limine—to preserve errors for appellate review.<sup>17</sup> That distinction yet again proved to be a procedural trap foreclosing appellate review in *Woodward v. State*.<sup>18</sup>

A second opinion, *Angulo v. State*, also saw appellate review defeated by the failure to raise at trial an issue addressed in a motion in limine.<sup>19</sup> Importantly, while application of Federal Rule 103(b) may have preserved review in *Woodward*, it likely would not have done so in *Angulo*. Both rules require the court to rule “definitively” to relieve the obligation of subsequent objections.<sup>20</sup> In *Angulo*, the trial court explained “that it would be willing to reconsider its ruling based on the evidence admitted at trial.”<sup>21</sup> By advising counsel of its willingness to revisit the matter at trial, the trial court likely did not “definitively” rule on the motion sufficient to preserve review under even the federal rule.<sup>22</sup>

As long as Indiana Evidence Rule 103(b) differs in this regard from Rule 103(b) of the Federal Rules of Evidence,<sup>23</sup> it will remain “a trap for unwary

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14. *Id.* at 1246 (quoting *Hayworth v. State*, 904 N.E.2d 684, 686 (Ind. Ct. App. 2009)).

15. FED. R. EVID. 103(b) (emphasis added).

16. IND. R. EVID. 103(b) (emphasis added).

17. *See, e.g., Angulo v. State*, 191 N.E.3d 958, 968-69 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 825 (Ind. 2022).

18. 187 N.E.3d 311, 317 (Ind. Ct. App. 2022), *reh’g denied*, 2022 Ind. App. LEXIS 215 (Ind. Ct. App. June 22, 2022).

19. *Angulo*, 191 N.E.3d at 968-69.

20. FED. R. EVID. 103(b); IND. R. EVID. 103(b).

21. *Angulo*, 191 N.E.3d at 969.

22. *See, e.g., Jenkins v. Keating*, 147 F.3d 577, 581 (7th Cir. 1998); *United States v. Stark*, 499 F.3d 72, 78 n.3 (1st Cir. 2007); *United States v. Hinton*, 535 F. App’x 528, 530 (7th Cir. 2013), *cert. denied*, 574 U.S. 1176 (2015); *cf. United States v. Redlightning*, 624 F.3d 1090, 1113 (9th Cir. 2010); *but cf. Pittman v. Cnty. of Madison*, 970 F.3d 823, 829 (7th Cir. 2020) (“passing boilerplate reference to the fact that a ruling on a motion in limine is ‘subject to change’” in order on motions in limine deemed insufficient to render rulings conditional).

23. In order to avoid such results in the future, the Indiana State Bar Association’s Litigation Section has tendered a proposal to the Indiana Supreme Court Committee on Rules of Practice and Procedure to amend Indiana Evidence Rule 103(b) to conform with federal practice.

counselors.”<sup>24</sup>

### C. Rule 106: Doctrine of Completeness

The doctrine of completeness is embodied by Indiana Evidence Rule 106.<sup>25</sup> The doctrine serves “to avoid misleading impressions caused by taking a statement out of its proper context or otherwise conveying a distorted picture by the introduction of only selective parts of the document.”<sup>26</sup> “The rule may be invoked to admit omitted portions of a statement in order to (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact; or (4) insure a fair and impartial understanding of the admitted portion.”<sup>27</sup> Rule 106 does not, however, create an absolute right to introduce omitted portions of statements or documents. “A court need not admit the remainder of the statement, or portions thereof, that are neither explanatory of nor relevant to the portions already introduced.”<sup>28</sup> As shown by two opinions during the survey period, a party who cannot demonstrate that the jury was left with “a misleading impression” or “distorted picture of the circumstances” in the absence of the omitted portions of a statement or document is not entitled to relief under Rule 106.<sup>29</sup>

## II. JUDICIAL NOTICE: RULE 201

Rule 201, permitting judicial notice, serves as the procedural mechanism by which courts can utilize common knowledge and “not pretend to be more ignorant than the rest of mankind.”<sup>30</sup> During the survey period, a key takeaway is the increasing comfort with which the Indiana Court of Appeals will look to court documents available in the Odyssey case management system.<sup>31</sup> That is consistent with Rule 201’s allowance for taking judicial notice of “records of a court of this state.”<sup>32</sup> In one instance, the Indiana Court of Appeals was able to solve a hole in the appellate record by using judicial notice to recognize a

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24. *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (en banc).

25. *ArcBest Corp. v. Wendel*, 192 N.E.3d 915, 927 (Ind. Ct. App. 2022).

26. *Id.*

27. *Id.* (quoting *Lieberenz v. State*, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999)).

28. *Id.*

29. *Id.* at 927-28; *see also* *Lowder v. Warden*, No. 3:20-cv-868, 2021 U.S. Dist. LEXIS 239429, at \*39-41 (N.D. Ind. Dec. 15, 2021), *appeal dismissed*, 2022 U.S. App. LEXIS 19606 (7th Cir. Feb. 25, 2022).

30. *Page v. State*, 139 N.E. 143, 144 (Ind. 1923) (quoting *State v. Louisville & N. R. Co.*, 96 N.E. 340 (Ind. 1911)).

31. *See, e.g., Taylor v. St. Vincent Salem Hosp., Inc.*, 180 N.E.3d 278, 284-85 (Ind. Ct. App. 2021); *Walker v. Herman & Kittle Props. Inc.*, 178 N.E.3d 1266, 1269 n.1 (Ind. Ct. App. 2021) (“The sparsity of the record before us prompted our review of the trial court record for Cause No. 4999 in the Odyssey case management system.”), *trans. denied*, 186 N.E.3d 578 (Ind. 2022); *Priest v. State*, 181 N.E.3d 1046, 1047 n.3 (Ind. Ct. App. 2022).

32. IND. R. EVID. 201(a)(2)(C) & (b)(5); *see, e.g., Priest*, 181 N.E.3d at 1047 n.3.

document filed with the trial court but omitted from “the voluminous appellate record.”<sup>33</sup> Practitioners are, however, well advised not to trust in the court to fix omissions in the appellate record, “[s]ince it is the duty of the appellant to make a proper record,” not the court.<sup>34</sup>

Utilizing the mechanism of judicial notice, the survey period saw courts take notice of: “its own records in the same case;”<sup>35</sup> documents from a related guardianship matter referenced in filings before the trial court but not made part of the record prior to appeal;<sup>36</sup> executive orders;<sup>37</sup> and prior related appellate decisions detailing the procedural history of the case.<sup>38</sup>

The Indiana Tax Court, however, provided an example of when a court may decline a request to take judicial notice:

In previous litigation, Southlake challenged the Mall’s 2011-2014 assessments, beginning at the Indiana Board, then at this Court, and finally at the Indiana Supreme Court. In this case, the Assessor has requested that the Court take judicial notice of an excerpt from an appraisal of the Mall contained in the certified administrative record of that previous case claiming it would lend support to Kenney’s classification of the Mall in this case. The Court declines to do so because generally a trial court may not take judicial notice of its own records in another case previously before it, even on a related subject with related parties.<sup>39</sup>

What sets that opinion apart from those in which courts looked to records of a court of this state is that the litigant sought for the court take judicial notice of a *fact* contained within the record of the prior proceedings. Under Rule 201(a)(2)(C), a court may take notice of “the existence of” such records, not the facts contained therein.<sup>40</sup>

### III. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

#### *A. Rules 401 & 402: What Is and Is Not Relevant*

Rule 402 establishes that evidence which is relevant “is admissible subject

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33. Kenworthy v. Lyons Ins. & Real Estate, Inc., 185 N.E.3d 405, 409 n.1 (Ind. Ct. App. 2022).

34. Poxon v. Gen. Motors Acceptance Corp., 407 N.E.2d 1181, 1183 (Ind. Ct. App. 1980); accord Buchanan v. State, 332 N.E.2d 213, 217 (Ind. 1975).

35. Akin v. Simons, 180 N.E.3d 366, 376 (Ind. Ct. App. 2021).

36. *In re* Guardianship of A.E.R., 184 N.E.3d 629, 633 n.1 (Ind. Ct. App. 2022).

37. Trs. of Ind. Univ. v. Spiegel, 186 N.E.3d 1151, 1156 n.1 (Ind. Ct. App.), *trans. denied*, 195 N.E.3d 857 (Ind. 2022).

38. *In re* Moeder, 196 N.E.3d 691, 694 n.1 (Ind. Ct. App. 2022).

39. Southlake Ind., LLC v. Lake Cnty. Assessor, 181 N.E.3d 484, 494 n.9 (Ind. Tax Ct. 2021) (citations omitted).

40. *In re* D.P., 72 N.E.3d 976, 982-83 (Ind. Ct. App. 2017).

to delineated categories of excluded evidence”<sup>41</sup> and evidence which is irrelevant is inadmissible.<sup>42</sup> Before a court may apply any of the delineated categories to exclude otherwise relevant evidence, it must first assess whether the evidence passes the test for relevance.<sup>43</sup> Under Indiana Evidence Rule 401, “[e]vidence is relevant if it (a) has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>44</sup> That test ““provides a liberal standard for relevancy.””<sup>45</sup>

Several decisions from the Indiana Court of Appeals illustrated the liberal breadth of relevance, finding: evidence of the price of a drug was relevant to establishing an element of a charge for maintaining a common nuisance;<sup>46</sup> evidence from text messages that victim of drug overdose may have acquired drugs from another source was relevant in prosecution for violation of Indiana’s drug-induced homicide statute;<sup>47</sup> evidence that plaintiff who was killed in a motor-vehicle accident had been “fleeing from police and was driving unsafely in the minutes prior to the collision tends to make it more probable that he drove his motorcycle in an unsafe manner to allude police” shortly after cessation of the pursuit;<sup>48</sup> and, where governing statute did not prohibit admission of economic-impact evidence, the mere fact that the statute did not specifically authorize admission of such report was not a basis to exclude such evidence as irrelevant.<sup>49</sup>

Many other decisions from Indiana courts proved that the scope of relevance is not without limitations, finding: in the absence of evidence that a criminal defendant violated his parole so that he could confront the alleged victim or otherwise violated his parole by confronting the alleged victim, the defendant’s parole status was not relevant to his self-defense claim;<sup>50</sup> evidence that a witness other than the criminal defendant “might have been involved in an [unrelated] incident that might—or might not have—resembled” the incident charged did not meet the threshold for relevance;<sup>51</sup> a witness’s testimony that she had told police that another woman had identified to her a different person as responsible for the murder was not relevant because “there [was] no evidence that the detective or any other officer received her information about the unknown woman” and the

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41. *Hayko v. State*, 196 N.E.3d 259, 262 (Ind. Ct. App. 2022), *vacated*, 201 N.E.3d 603 (Ind. 2023).

42. IND. R. EVID. 402.

43. IND. R. EVID. 401.

44. *Id.*; *see also Mastellone v. YMCA of Greater Indianapolis*, 191 N.E.3d 861, 868 (Ind. Ct. App. 2022) (Molter, J.).

45. *Turner v. State*, 183 N.E.3d 346, 353 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 853 (Ind. 2022).

46. *Warren v. State*, 182 N.E.3d 925, 933 (Ind. Ct. App. 2022).

47. *Yeary v. State*, 186 N.E.3d 662, 682-83 (Ind. Ct. App. 2022).

48. *Ind. State Police v. Est. of Damore*, 194 N.E.3d 1147, 1158-60 (Ind. Ct. App. 2022).

49. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 197 N.E.3d 316, 329 (Ind. Ct. App. 2022).

50. *Turner*, 183 N.E.3d at 353-57.

51. *Angulo v. State*, 191 N.E.3d 958, 969 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 825 (Ind. 2022).

witness “was unsure if she had called the correct number, and the detective did not recall receiving a call from her during the relevant period of time;”<sup>52</sup> appraisal report used to undermine opposing appraisal report was irrelevant once the opposing appraisal was excluded;<sup>53</sup> and evidence of criminal defendant’s mental-health history and suicidality going back five years was not relevant where defendant was already “permitted to offer evidence regarding his mental state on the day of the incident and the weeks immediately preceding it.”<sup>54</sup>

*B. Rule 403: Excluding Relevant Evidence for Prejudice,  
Confusion, or Other Reasons*

It is often said that “Evidence Rule 403 provides that the court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>55</sup> That often-stated short-hand iteration of the rule cuts off the list of potential dangers that may substantially outweigh the probative value. In full, Rule 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”<sup>56</sup>

*Woodward v. State* put to test one of the less frequently addressed dangers, “undue delay.”<sup>57</sup> The criminal defendant argued on appeal that he had suffered undue delay in violation of Rule 403 because he received a copy of the lab report identifying methamphetamine just five days prior to trial.<sup>58</sup> The Indiana Court of Appeals easily dispensed with the argument:

[Defendant]’s argument misapprehends Rule 403. The laboratory report did not cause any delay whatsoever in [his] trial. The relevant question under Rule 403 is whether the *admission* of the report at trial would cause undue delay. [Defendant] argues that the submission of the report to him, prior to the trial, was a result of undue delay, not a cause thereof. As such, his arguments on this issue are inapposite. The trial court did not abuse its discretion by admitting the report.<sup>59</sup>

When “unfair prejudice” is the asserted basis for invoking Rule 403, it is not enough to simply assert that there was prejudice; the party must identify and establish the prejudice in order to trigger balancing of it against the probative

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52. *Mathews v. State*, 186 N.E.3d 1172, 1180 (Ind. Ct. App.), *trans. denied*, 193 N.E.3d 376 (Ind. 2022).

53. *Southlake Ind., LLC v. Lake Cnty. Assessor*, 181 N.E.3d 484, 494 n.10 (Ind. Tax Ct. 2021).

54. *Albert v. State*, 193 N.E.3d 1040, 1045-46 (Ind. Ct. App.), *trans. denied*, 199 N.E.3d 785 (Ind. 2022).

55. *Turner*, 183 N.E.3d at 353.

56. IND. R. EVID. 403.

57. 187 N.E.3d 311, 316-18 (Ind. Ct. App. 2022).

58. *Id.*

59. *Id.* at 318.

value.<sup>60</sup> As caselaw recognizes, “relevant evidence is inherently prejudicial” to the opposing party and “[c]ourts ‘err on the side of admissibility,’” making “[t]he bar for unfair prejudice, rather than mere prejudice, . . . high.”<sup>61</sup> “Unfair prejudice . . . looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis.”<sup>62</sup>

Multiple opinions from Indiana appellate courts reminded that the burden of invoking Rule 403 on appeal is high.<sup>63</sup> In *Hall v. State*, the Indiana Supreme Court rejected a Rule 403 challenge to the “testimony from the shooter in [defendant’s] murder-for-hire scheme,” finding the evidence was not unfairly prejudicial and that use of a deposition in lieu of live testimony was also not sufficiently prejudicial to warrant exclusion.<sup>64</sup> The Indiana Court of Appeals, in *Indiana State Police v. Estate of Damore*, found evidence that the decedent had been fleeing from police and driving unsafely in the minutes before striking an unrelated police officer’s vehicle was not unduly prejudicial and the probative value “was relatively high” particularly in light of the applicable defense of contributory negligence.<sup>65</sup> The court of appeals also declined to find Rule 403 sufficient to exclude evidence of a terminated diversion agreement in large part because the trial court had “admonished the jury not to speculate as to the reasons why the Diversion Agreement had been terminated.”<sup>66</sup>

Finally, in prosecution of charges for burglary, domestic battery, and invasion of privacy, the Indiana Court of Appeals ruled that a subsequent incident of domestic violence against the victim was highly relevant to disprove the criminal defendant’s claim of self-defense and to illustrate his motive.<sup>67</sup> In balancing the prejudice, the court found it important that “[t]he jury was not told that [the defendant] had been charged with any crimes related to the [subsequent] incident,” the testimony on the subsequent incident was brief in the context of the three-day trial, and “the court provided a limiting instruction and advised the jury that the [subsequent-incident] evidence was admitted ‘solely on the issue of the relationship of the parties’ and that it ‘should not be considered on the ultimate issue of guilt or innocence of the Defendant.’”<sup>68</sup>

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60. *Mastellone v. YMCA of Greater Indianapolis*, 191 N.E.3d 861, 868-69 (Ind. Ct. App. 2022) (Molter, J.).

61. *Barton v. State*, 192 N.E.3d 970, 979 (Ind. Ct. App.) (quoting *Schntitzmeyer v. State*, 168 N.E.3d 1041, 1045 (Ind. Ct. App. 2021)), *trans. denied*, 197 N.E.3d 827 (Ind. 2022).

62. *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021) (quoting *Camm v. State*, 908 N.E.2d 215, 224 (Ind. 2009)).

63. *See, e.g., id.* (“Trial courts are given wide latitude in weighing probative value against the danger of unfair prejudice, and we review that determination for abuse of discretion.”).

64. *Id.* at 1194.

65. 194 N.E.3d 1147, 1160 (Ind. Ct. App. 2022).

66. *Barton*, 192 N.E.3d at 980.

67. *Davis v. State*, 186 N.E.3d 1203, 1212 (Ind. Ct. App.), *trans. denied*, 194 N.E.3d 600 (Ind. 2022).

68. *Id.* (citation omitted).



*C. Rule 404: Character Evidence, Crimes, Wrongs or Other Acts*

Like Rule 403, Rule 404 provides for circumstances in which certain otherwise relevant evidence may be excluded. Under Rule 404(a)(1), “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>69</sup> Rule 404(b)(1) provides a similar prohibition on use of “[e]vidence of a crime, wrong, or other act . . . .”<sup>70</sup> The rule’s purpose is “to prevent the jury from making the ‘forbidden inference’ that prior wrongful conduct suggests present guilt.”<sup>71</sup> “[A]lthough Rule 404(b) cases typically involve the issue of whether *prior* bad acts of the defendant are admissible, the wording of Rule 404(b) does not suggest that it only applies to prior bad acts and not subsequent ones.”<sup>72</sup> Nevertheless, the evidence must be from a separate act; where it can be said to be “part of one continuous action,” it is not subject to exclusion under Rule 404(b).<sup>73</sup>

Even if evidence would be excludable under either subdivision of the rule, it may still be admissible if offered for a purpose other than proving a “person acted in accordance with the character or trait.”<sup>74</sup> Rule 404(a)(2) and Rule 404(b)(2) provide alternative permissible grounds for use of otherwise impermissible evidence, as well as procedural requirements to do so.<sup>75</sup> Notably, Rule 404(b)(2) contains an “illustrative but not exhaustive” list of alternative uses.<sup>76</sup>

The standard for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its unfair prejudicial effect pursuant to Indiana Evidence Rule 403.<sup>77</sup>

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69. IND. R. EVID. 404(a)(1).

70. IND. R. EVID. 404(b)(1).

71. *Davis v. State*, 186 N.E.3d 1203, 1210 (Ind. Ct. App.) (quoting *Halliburton v. State*, 1 N.E.3d 670, 681 (Ind. 2013)), *trans. denied*, 194 N.E.3d 600 (Ind. 2022); *see also* *Attkisson v. State*, 190 N.E.3d 447, 451 (Ind. Ct. App.) (“The rule was designed to assure that the State, relying on evidence of uncharged misconduct, may not punish a person for his character.”), *trans. denied*, 195 N.E.3d 858 (Ind. 2022).

72. *Davis*, 186 N.E.3d at 1211 (citing *Southern v. State*, 878 N.E.2d 315, 322 (Ind. Ct. App. 2007)).

73. *Ind. State Police v. Est. of Damore*, 194 N.E.3d 1147, 1160 n.5 (Ind. Ct. App. 2022); *see, e.g.,* *Baumholser v. State*, 186 N.E.3d 684, 693-95 (Ind. Ct. App.) (finding evidence of five instances of child molestation was not subject to exclusion under Rule 404(b) because each act was committed on the same victim and was direct evidence of the charged crimes), *trans. denied*, 190 N.E.3d 922 (Ind. 2022).

74. IND. R. EVID. 404(a)(1), (b)(1); *see also* *Baumholser*, 186 N.E.3d at 693.

75. IND. R. EVID. 404(a)(2), (b)(2).

76. *Davis*, 186 N.E.3d at 1210 (citing *Hicks v. State*, 690 N.E.2d 215, 219 (Ind. 1997)).

77. *Attkisson v. State*, 190 N.E.3d 447, 451-52 (Ind. Ct. App.) (citing *Bishop v. State*, 40

In *Davis v. State*, the Indiana Court of Appeals found evidence of subsequent domestic violence perpetrated by the criminal defendant against the same alleged victim was permissible to show intent so as to rebut a self-defense claim and to show motive by demonstrating a hostile relationship between the defendant and victim.<sup>78</sup> *Attkisson v. State* also allowed the use of a subsequent bad act—a subsequent attempted bank robbery—to be admitted for the purpose of identifying the criminal defendant as the perpetrator of a separate robbery, three weeks earlier.<sup>79</sup> Such identification evidence often must undergo the signature-crime test, which “focuses on the similarity and uniqueness between the charged and uncharged conduct rather than the time frame between the different criminal episodes.”<sup>80</sup> The panel in *Attkisson*, however, did not deem it necessary to go through the test because “the challenged evidence [was] so specifically and significantly related to the charged crime in time, place, and circumstance as to be logically relevant to one of the particular excepted purposes.”<sup>81</sup> Specifically, in both instances, the defendant “was wearing a disguise” comprised of a “hat, large sunglasses, [] was clutching a large” bag, and wore makeup to cover his tattoos.<sup>82</sup>

Rule 404(b) was successfully invoked in *Corbett v. State*.<sup>83</sup> There, evidence of other attempted home invasions was admitted at trial.<sup>84</sup> The defendant argued that the evidence did not fall under Rule 404(b)(2)’s exception for motive because the prosecution failed to present evidence connecting the defendant to the other attempted home invasions.<sup>85</sup> The Indiana Court of Appeals agreed.<sup>86</sup> Although evidence of prior attempted home invasions may have been relevant to demonstrate motive as to why the defendant would have “attacked a family he seemingly [had] no connection to,” absent evidence connecting him to those prior bad acts, it should not have been admitted under Rule 404(b)(2).<sup>87</sup>

#### *D. Rule 412: Victims’ Sexual History*

Rule 412 embodies Indiana’s rape-shield protections.<sup>88</sup> In the prosecutions of sex crimes, the rule generally prohibits “evidence of a victim’s or witness’ past sexual conduct” except in limited specified circumstances.<sup>89</sup> On review of a

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N.E.3d 935, 951 (Ind. Ct. App. 2015)), *trans. denied*, 195 N.E.3d 858 (Ind. 2022).

78. 186 N.E.3d at 1211-12.

79. 190 N.E.3d at 451-52.

80. *Id.* at 452 (citing *Bishop*, 40 N.E.3d at 952-53).

81. *Id.*

82. *Id.*

83. 179 N.E.3d 475, 489-90 (Ind. Ct. App. 2021), *trans. denied*, 182 N.E.3d 839 (Ind. 2022).

84. *Id.* at 489.

85. *Id.*

86. *Id.*

87. *Id.* at 490.

88. *Williams v. State*, 681 N.E.2d 195, 200-02 (Ind. 1997).

89. *Id.* at 200.

habeas petition, the United States District Court for the Southern District of Indiana determined that none of the specified exceptions to Indiana Evidence Rule 412 would have permitted a criminal defendant charged with rape to admit evidence that DNA from three other males was found in the victim's underwear because "[t]he only issue at trial was consent."<sup>90</sup> The defendant testified that the victim "was at his home during the rape and that he engaged in sexual activity with her before she left."<sup>91</sup> Because consent was the only issue, the evidence of the victim's "prior sexual activity would not have proved that another person committed the rape."<sup>92</sup>

#### IV. PRIVILEGES: RULES 501 & 502

Rule 501(a) establishes that "no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing" "[e]xcept as provided by constitution, statute, any rules promulgated by the Indiana Supreme Court, or common law."<sup>93</sup> Two privileges received notable attention during the survey period.

The first is the peer-review privilege, "established through the Indiana Peer Review Act ('IPRA')."<sup>94</sup> Under the IPRA, "[a]ll proceedings of a peer review committee are confidential," and "communications to a peer review committee shall be privileged communications."<sup>95</sup> Subject to certain exceptions,<sup>96</sup> communications, the record of, and determinations of the panel shall not be revealed "outside of the peer review committee."<sup>97</sup>

In *Bonzani v. Goshen Health System*, the United States District Court for the Northern District of Indiana was asked to apply Indiana's peer-review privilege.<sup>98</sup> The case concerned a suit by a doctor formerly employed by Goshen Hospital who was presented with the choice to either voluntarily resign or be involuntarily terminated due in part to determinations by a peer review committee.<sup>99</sup> The court observed:

The IPRA's peer review privilege is not absolute. For instance, the IPRA's peer review privilege does not protect information that is "otherwise discoverable or admissible from original sources" from

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90. *Johnson v. Sevier*, No. 1:20-cv-02290, 2021 U.S. Dist. LEXIS 203970, at \*15 (S.D. Ind. Oct. 22, 2021).

91. *Id.*

92. *Id.*

93. IND. R. EVID. 501(a).

94. *Bonzani v. Goshen Health Sys.*, No. 3:19-CV-586, 2022 U.S. Dist. LEXIS 117614, at \*5 (N.D. Ind. July 5, 2022) (citing IND. CODE § 34-30-15-1(a), (b) (2022)).

95. IND. CODE § 34-30-15-1(a), (b).

96. *Id.* § 34-30-15-1(d) to (f).

97. *Id.* § 34-30-15-1(c).

98. 2022 U.S. Dist. LEXIS 117614, at \*5-9.

99. *Id.* at \*2-3.

disclosure during discovery just because it was part of peer review proceedings. The IPRA also authorizes access to peer review information for health care providers subjected to peer review proceedings. Specifically, the IPRA states that “[a] professional health care provider under investigation shall be permitted at any time to see any records accumulated by a peer review committee pertaining to the provider’s personal practice.”<sup>100</sup>

The debate between the parties turned on the meaning of “under investigation” and “at any time.”<sup>101</sup> The hospital argued that the doctor could only access peer-review materials while “under investigation.”<sup>102</sup> “In other words, [the hospital] contend[ed] that [the doctor was] not entitled to his peer review records now, after the investigation has concluded, even though he was entitled to those same records during the pendency of the investigation.”<sup>103</sup> The court rejected application of the privilege, finding that “under investigation” merely limited the accessibility to the particular doctor being investigated; it did not pose a temporal constraint.<sup>104</sup>

The other privilege meaningfully addressed was the work-product privilege. In *Minges v. State*, the Indiana Supreme Court was asked to revisit its 1985 decision in *State ex rel. Keaton v. Circuit Court of Rush County*, which had held that a trial court could not compel “production of verbatim copies of police reports” in criminal proceedings.<sup>105</sup> Finding that *Keaton* conflicts with Indiana’s liberal discovery procedures and is no longer consonant with modern technology and procedures, the court overruled *Keaton*.<sup>106</sup> Although *Keaton*’s categorical bar was rejected, it does not mean that verbatim copies of police reports are now always discoverable: “[A] trial court has discretion in matters of discovery ‘to guide and control the trial in the best interests of justice.’ To do so, . . . Trial Rule 26(B)(3) provides adequate guidance for the trial court to determine—on a case-by-case basis—whether a police report is protectible work product.”<sup>107</sup>

## V. WITNESSES: RULES 601 THROUGH 617

### A. Rule 601: Incompetency Under the Dead Man’s Statute

Rule 601 generally establishes that all persons are deemed competent to testify as a witness unless provided otherwise by the rules of evidence or

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100. *Id.* at \*7 (quoting IND. CODE §§ 34-30-15-3(a), -4) (citations omitted).

101. *Id.*

102. *Id.*

103. *Id.* at \*7-8.

104. *Id.* at \*8-9.

105. *Minges v. State*, 192 N.E.3d 893, 897 (Ind. 2022) (quoting *State ex rel. Keaton v. Cir. Ct. of Rush Cnty.*, 475 N.E.2d 1146, 1148 (Ind. 1985)).

106. *Id.* at 897-902.

107. *Id.* at 902 (citation omitted) (quoting *State ex rel. Keller v. Crim. Ct. of Marion Cnty.*, 317 N.E.2d 433, 435 (1974)).

statutes.<sup>108</sup> A common statutory basis for deeming a witness incompetent is by operation of Indiana's Dead Man's Statute, codified at Indiana Code section 34-45-2-4.<sup>109</sup> The Dead Man's Statute "prohibits testimony by survivors in certain circumstances in proceedings involving a decedent's estate."<sup>110</sup> Where a person is both "a necessary party to the issue or record" and possesses interests "adverse to" the decedent's estate, the person "is not a competent witness as to matters against the estate."<sup>111</sup>

The Dead Man's Statute establishes as a matter of legislative policy that claimants to an estate of a deceased person should not be permitted to present a court with their version of their dealings with the decedent. The statute does not render the claimant incompetent for all purposes; instead, application of the Dead Man's Statute "is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party."<sup>112</sup>

During the survey period, the Indiana Court of Appeals affirmed the application of the Dead Man's Statute to strike portions of an affidavit submitted by a defendant in an action brought by a decedent's estate.<sup>113</sup> The defendant's affidavit included assertions pertaining to business transactions with the decedent.<sup>114</sup> Because the defendant was unquestionably a necessary party to the suit and his interests were directly adverse to the estate, the court of appeals had no difficulty in upholding the striking of those portions of the affidavit.<sup>115</sup>

#### *A. Rule 608: Distinguishing Opinion from Reputation*

Rule 608(a) allows "[a] witness's credibility [to] 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."<sup>116</sup> Only persons who testify as witnesses are subject to attacks or attempts to support their credibility.<sup>117</sup> Easily overlooked in the text of Rule 608(a) is that it creates distinct categories: reputation and opinion. The distinction

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108. IND. R. EVID. 601. Rule 601 is mirrored by statute. *See* IND. CODE § 34-45-2-1 (2022) ("All persons, whether parties to or interested in the suit, are competent witnesses in a civil action or proceeding, except as otherwise provided.").

109. IND. CODE § 34-45-2-4.

110. *Arnett v. Est. of Beavins*, 184 N.E.3d 679, 684 (Ind. Ct. App. 2022).

111. IND. CODE § 34-45-2-4(d).

112. *Arnett*, 184 N.E.3d at 684 (citations omitted) (quoting *Bergal v. Bergal*, 153 N.E.3d 243, 254 (Ind. Ct. App. 2020)).

113. *Id.* at 684-85.

114. *Id.* at 684.

115. *Id.* at 684-85.

116. IND. R. EVID. 608(a).

117. *Skeens v. Warden*, No. 3:21-CV-692, 2022 U.S. Dist. LEXIS 80736, at \*57 n.8 (N.D. Ind. May 4, 2022) (interpreting IND. R. EVID. 608).

between the two presented a question of first impression in *Hayko v. State*.<sup>118</sup>

The Indiana Court of Appeals began its analysis by rejecting application of prior caselaw that established the foundational requirements to apply the rule for reputation evidence.<sup>119</sup> When applied to reputation evidence, the proponent must show that:

(1) the general reputation [is] held by an identifiable group of people; (2) this group of people [has] an adequate basis upon which to form their belief in this reputation; (3) the witness testifying [has had] sufficient contact with this group to qualify as knowledgeable of this general reputation; and (4) the group [is] of a sufficient size such that the belief in this general reputation has an indicium of inherent reliability.<sup>120</sup>

Looking to Senior Judge Robert Miller's treatise on Indiana evidence, *Hayko* agreed with Judge Miller's observation that the provision of opinion evidence under Rule 608(a) must meet the requirements for lay opinion testimony under Rule 701, but rejected Judge Miller's assertion that, "[i]n practice, this amounts to a foundation little different from that required for reputation evidence . . . ."<sup>121</sup> Instead, following federal authority, the court found:

As respects Indiana's Rule 608, we do not believe that the admission of opinion testimony should be limited in the way reputation evidence is limited. For example, we conclude that a witness's testimony about their perception of the victim's character for truthfulness at the time the accusations are made is particularly helpful. And . . . we agree that cross-examination remains a beneficial tool in probing the opinion testimony in a variety of ways.

These are two distinct types of evidence under the Rule and the foundation for the testimony as opinion testimony had been met in this instance. For these reasons, we conclude that the court abused its discretion by ruling that the testimony was inadmissible.<sup>122</sup>

The primary takeaway from *Hayko* is that opinion and reputation "are two distinct types of evidence under the Rule and the foundation for" each is different.<sup>123</sup>

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118. 196 N.E.3d 259, 262, 265-68 (Ind. Ct. App. 2022), *vacated*, 201 N.E.3d 603 (Ind. 2023).

119. *Id.* at 266-67 (discussing *Bowles v. State*, 737 N.E.2d 1150 (Ind. 2000)); *see also* *Norton v. State*, 785 N.E.2d 625 (Ind. Ct. App. 2003).

120. *Id.* at 266 (citing *Bowles*, 737 N.E.2d at 1153).

121. *Id.* at 267 (quoting 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 608.104 (4th ed. Aug. 2021 update)).

122. *Id.* at 268.

123. *Id.*

*C. Rule 609: Article 15 Non-Judicial Punishment Is Not Admissible Under Rule 609*

Rule 609(a) of “[t]he Indiana Rules of Evidence allows parties to present evidence that a witness has been convicted of a crime of dishonesty.”<sup>124</sup> Although Rule 609 allows impeachment of defendants in criminal cases, provided the defendant chooses to testify,<sup>125</sup> it does not provide carte blanche use of everything arising from the criminal arena. “Rule 609(a) does not allow evidence that a witness has merely been arrested for such a crime . . . .”<sup>126</sup> Indiana courts have “draw[n] a bright line at conviction[.]”<sup>127</sup> In *Corbett v. State*, the Indiana Court of Appeals tackled a question of first impression: Whether Rule 609 allows use of Article 15 non-judicial punishment for violations of the Uniform Code of Military Justice?<sup>128</sup> “Article 15 punishment, conducted personally by the accused’s commanding officer, is an administrative method of dealing with the most minor offenses.”<sup>129</sup> Adhering to the bright line at conviction and reaffirming that “[a] non-judicial punishment is deemed an administrative rather than a criminal proceeding,” the court of appeals ruled that admission of evidence of the criminal defendant’s Article 15 non-judicial punishment did not comport with Rule 609.<sup>130</sup>

*D. Rule 611: Examining Witnesses*

Rule 611(a) entrusts trial courts with substantial discretion “over the mode and order of examining witnesses and presenting evidence.”<sup>131</sup> In *McClendon v. Triplett*, the Indiana Court of Appeals found that substantial discretion was not abused when a trial court excluded a child’s mother and father from the courtroom in order to hear testimony of the child during custody proceedings.<sup>132</sup> Although the parents were excluded, each parent’s counsel was permitted to remain and examine the child.<sup>133</sup> The trial court’s actions were consistent with the spirit of Indiana Code section 31-17-2-9, which allows courts to conduct *in-*

124. *Cook v. Warden*, No. 3:22-CV-100, 2022 U.S. Dist. LEXIS 128599, at \*7 (N.D. Ind. July 19, 2022) (citing IND. R. EVID. 609(a)).

125. *Miller v. State*, 177 N.E.3d 893, 899 (Ind. Ct. App. 2021), *vacated*, 188 N.E.3d 871 (Ind. 2022).

126. *Cook*, 2022 U.S. Dist. LEXIS 128599, at \*7 (interpreting IND. R. EVID. 609(a)).

127. *Corbett v. State*, 179 N.E.3d 475, 491 (Ind. Ct. App. 2021), *trans. denied*, 182 N.E.3d 839 (Ind. 2022) (quoting *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 84-85 (Ind. 2006)).

128. *Id.* at 491-92.

129. *Id.* at 491 (quoting *Middendorf v. Henry*, 425 U.S. 25, 31-32 (1976)).

130. *Id.* at 491-92.

131. IND. R. EVID. 611(a); *see also* *United States ex rel. Poong Lim/Pert Joint Venture v. Dick Pac./Ghemm Joint Venture*, No. 3:03-cv-00290, 2006 U.S. Dist. LEXIS 13046, at \*5 (D. Alaska Mar. 7, 2006).

132. 184 N.E.3d 1202, 1211 (Ind. Ct. App.), *trans. denied*, 190 N.E.3d 926 (Ind. 2022).

133. *Id.*

camera interviews of children during custody proceedings.<sup>134</sup>

In a separate matter, the Indiana Court of Appeals was presented with a challenge to Indiana Code section 35-40-5-13, which permits children under the age of sixteen years to testify with the assistance of comfort items or animals, as conflicting with Rule 611.<sup>135</sup> The argument was deemed insufficiently developed and waived, so there is not a great deal to be gleaned from the opinion.<sup>136</sup> It appears that the contention was that by mandating certain procedures, thereby narrowing the discretion afforded to trial judges under Rule 611(a), the statute impermissibly conflicts with the rule.<sup>137</sup> Whatever merit the argument may have, the lack of development prevented it from going anywhere.

#### *E. Rule 613: Witness's Prior Statement*

“Indiana Evidence Rule 613 allows the use of a prior inconsistent statement to impeach a witness, and when used in this manner, the statement is not hearsay.”<sup>138</sup> Although Rule 613(b) permits impeachment through extrinsic evidence, generally “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.”<sup>139</sup> The “requirement [of an opportunity] to explain or deny a prior inconsistent statement” need not occur immediately, but can “be afforded to that witness at any point during the proceedings.”<sup>140</sup> The Indiana Supreme Court has, however, stated a preference that the witness be confronted “with the alleged statement before seeking to admit extrinsic impeachment evidence of that statement.”<sup>141</sup> Trial courts are also afforded substantial discretion to determine whether to permit extrinsic evidence for impeachment.<sup>142</sup> That discretion is guided by “a variety of relevant factors” including:

the availability of the witness, the potential prejudice that may arise from recalling a witness only for impeachment purposes, the significance afforded to the credibility of the witness who is being impeached, and any other factors that are relevant to the interests of justice.<sup>143</sup>

Despite the possibility of using extrinsic evidence for impeachment, there is

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134. *Id.* (discussing IND. CODE § 31-17-2-9 (2022)).

135. *Izaguirre v. State*, 194 N.E.3d 1224, 1226 (Ind. Ct. App. 2022).

136. *Id.*

137. *See B.H. v. Ind. Dep’t of Child Servs.*, 989 N.E.2d 355, 357 (Ind. Ct. App. 2013) (noting that the Indiana Rules of Evidence control over conflicting procedural statutes).

138. *Gray v. State*, 982 N.E.2d 434, 437 (Ind. Ct. App. 2013) (citing *Jackson v. State*, 925 N.E.2d 369, 375 (Ind. 2010)).

139. IND. R. EVID. 613(b).

140. *Hall v. State*, 177 N.E.3d 1183, 1195 (Ind. 2021).

141. *Id.*

142. *Id.*

143. *Id.* at 1195-96 (quoting *Griffith v. State*, 31 N.E.3d 965, 973 (Ind. 2015)).



no absolute right to do so. “[O]nce a witness has admitted an inconsistent prior statement she has impeached herself and further evidence is unnecessary for impeachment purposes.”<sup>144</sup> Adhering to that rule, in *Hall v. State*, the Indiana Supreme Court affirmed the exclusion of extrinsic evidence of inconsistent statements because the witness’s deposition containing the admission that the witness had lied had been presented to the jury, rendering additional extrinsic evidence unnecessary.<sup>145</sup> Moreover, the witness had been afforded sufficient opportunity to explain the inconsistency during the deposition.<sup>146</sup>

The Indiana Supreme Court also rejected the argument that Rule 613(b) “required” the witness “to explain or deny” prior inconsistent statements.<sup>147</sup> As the court observed, “Rule 613(b) applies to ‘extrinsic evidence of a witness’s prior inconsistent statement,’ where *if such extrinsic evidence is introduced*, the witness must be given an opportunity to explain or deny such prior inconsistent statement and an adverse party is given an opportunity to examine the witness about it.”<sup>148</sup> Because “the trial court *declined* to admit extrinsic evidence . . . Rule 613(b)’s requirement to give a witness an opportunity to explain or deny such prior inconsistent statement [was] inapplicable.”<sup>149</sup>

The Indiana Court of Appeals also had opportunity to address the procedural requirements of Rule 613(b) in *Angulo v. State*.<sup>150</sup> There, a key failing to using extrinsic evidence was the failure to both give the witness “an opportunity to explain or deny the statement” and to allow the opposing party to examine the witness on it.<sup>151</sup> Because the criminal defendant did not lay a sufficient foundation to “warn” the witness about the prior inconsistent statements and allow the witness to explain them, Rule 613(b) did not allow admission.<sup>152</sup> The “warning” to the witness “must adequately call the specific statement to the witness’s attention to enable him to form a sufficient recollection.”<sup>153</sup>

#### *F. Rule 615: Separation of Witnesses*

Under Indiana’s common-law evidentiary practices, the decision of whether to separate witnesses was entrusted to the sound discretion of trial courts, with “court[s] usually order[ing] a separation of the witnesses.”<sup>154</sup> Following adoption of the Indiana Rules of Evidence, Rule 615 now mandates separation of witnesses

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144. *Id.* at 1196 (quoting *Appleton v. State*, 740 N.E.2d 122, 125 (Ind. 2001)).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (quoting IND. R. EVID. 613(b)) (emphasis added).

149. *Id.*

150. 191 N.E.3d 958, 969-71 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 825 (Ind. 2022).

151. *Id.* at 970.

152. *Id.*

153. *Id.*

154. 1 CARL SEET & FRANK I. HAMILTON, MCDONALD’S INDIANA TREATISE § 36.2(a) (10th ed. 1964) (citing *Coolman v. State*, 72 N.E. 568, 568 (Ind. 1904)).

upon a party's request.<sup>155</sup> "The basic premise of Rule 615 is that, upon request of any party, witnesses should be insulated from the testimony of other witnesses."<sup>156</sup> That is accomplished by excluding witnesses from being present during testimony of other witnesses so as to prevent witnesses from "'adjusting their testimony accordingly."<sup>157</sup>

*McClendon v. Triplett* presented the question of whether "chit chat," unrelated to witnesses' testimony constituted a violation of a separation order.<sup>158</sup> The witnesses were ordered to sit in the hall outside the courtroom and "not to 'talk about the case.'"<sup>159</sup> The trial court found that the conversation did not violate the separation order because it occurred before any of the witnesses testified.<sup>160</sup> On review, the Indiana Court of Appeals agreed:

As the conversation occurred prior to any of the three witnesses testifying, the witnesses did not adjust their testimony based upon the testimony of another. Additionally, a separation of witnesses order does not require witnesses to refrain from all communication with other witnesses. Here, the trial court excluded the witnesses from the courtroom and ordered the witnesses to refrain from talking about the case.<sup>161</sup>

The Court of Appeals also provided advice for best practices in issuing and enforcing separation orders:

The separation of witnesses order, such as it is, is difficult to enforce. A better practice would be to: (1) specify exactly what the witnesses are allowed to do; (2) make a record of the witnesses in the courtroom at the time of the order; and (3) admonish counsel to communicate the existence and scope of the order to other potential witnesses who were not in the courtroom at the time of the order. Many issues, such as the issues in this case, could be avoided by utilizing these practices.<sup>162</sup>

#### *G. Rule 617: Unrecorded Statements During Custodial Interrogation*

Subject to enumerated exceptions, Indiana Evidence Rule 617 generally requires electronic recording of any "statement made by a person during a Custodial Interrogation in a Place of Detention."<sup>163</sup> Previous installments of this

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155. IND. R. EVID. 615.

156. *McClendon v. Triplett*, 184 N.E.3d 1202, 1211 (Ind. Ct. App.) (quoting *Long v. State*, 743 N.E.2d 253, 256 (Ind. 2001)), *trans. denied*, 190 N.E.3d 926 (Ind. 2022).

157. *Id.* at 1212 (quoting *Morell v. State*, 933 N.E.2d 484, 489 (Ind. Ct. App. 2010)).

158. *Id.* at 1212-13.

159. *Id.* at 1212.

160. *Id.*

161. *Id.*

162. *Id.* at 1212 n.7.

163. IND. R. EVID. 617(a).

survey have addressed what constitutes “Custodial Interrogation” and “Place of Detention.”<sup>164</sup> During this survey period, the Indiana Court of Appeals addressed application of two of the enumerated exceptions to Rule 617.<sup>165</sup>

Of the seven exceptions, the two relevant to the court’s decision were:

(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.<sup>166</sup>

Each applied in that case. First, the custodial interrogation was conducted by a Michigan police detective in Michigan.<sup>167</sup> While that alone would have been dispositive, the record also established “that the recording system in the [Michigan] jail, unbeknownst to [the interviewing detective], malfunctioned to such a degree that it was replaced and that, as a result, the recording was lost.”<sup>168</sup>

## VI. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

### *A. Rule 701: Opinion Testimony by Lay Witnesses*

“Evidence Rule 701 allows for the admission of opinion testimony by lay witnesses.”<sup>169</sup> The rule requires the opinion be “rationally based on the witness’s perception.”<sup>170</sup> “The requirement that the opinion be ‘rationally based’ on perception simply means that the opinion must be one that a reasonable person could normally form from the perceived facts.”<sup>171</sup> In *Gee v. State*, the Indiana Court of Appeals ruled that the wife of a criminal defendant could properly give lay opinion testimony identifying a man in a surveillance video as her husband.<sup>172</sup>

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164. Colin E. Flora, *2018 Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 736-38 (2019) (Place of Detention); Colin E. Flora, *2019 Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 921-22 (2021) (Custodial Interrogation).

165. *Weed v. State*, 192 N.E.3d 247, 249-50 (Ind. Ct. App. 2022).

166. *Id.* (quoting IND. R. EVID. 617(a)(3), (4)).

167. *Id.* at 249-50.

168. *Id.* at 250.

169. *Five Star Roofing Sys., Inc. v. Armored Guard Window & Door Grp., Inc.*, 191 N.E.3d 224, 234 (Ind. Ct. App. 2022).

170. IND. R. EVID. 701(a).

171. *Five Star Roofing Sys., Inc.*, 191 N.E.3d at 234 (internal quotations omitted).

172. 193 N.E.3d 1036, 1040 (Ind. Ct. App. 2022).

*B. Rule 702: Testimony by Expert Witnesses*

Pursuant to Evidence Rule 702, in order to provide an opinion beyond that of a lay or skilled witness, the witness must qualify as an expert through “knowledge, skill, experience, training, or education” so long as the witness’s “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”<sup>173</sup> *Daniels v. Drake*, from the Indiana Court of Appeals, presented the question of what must be shown in order to admit expert testimony as a canine-behavioral expert in a dog-bite case.<sup>174</sup>

On appeal, the civil defendants argued that the canine-behavioral expert’s testimony was “immaterial” and cannot be used as evidence of what the defendants “as lay people” should have known about the animal.<sup>175</sup> “In essence, they argue[d] that in order to raise a genuine issue of material fact [the expert] needed to state an opinion regarding what a lay person should know about Great Danes.”<sup>176</sup> The court of appeals rejected the “novel” argument as unpersuasive.<sup>177</sup> The plaintiff needed to designate evidence that the breed of the dog possesses dangerous propensities.<sup>178</sup> The expert’s testimony did just that.<sup>179</sup>

Though not discussed in *Daniels*, there is another problem with the defendants’ argument. In arguing that the expert testimony should have established what lay persons would have known about the animal, the defendants created a logical contradiction. As the Indiana Court of Appeals has recognized, “[w]hen . . . matters at issue are within the common knowledge and experience of the jury, expert testimony regarding the exercise of reasonable care is improper and should be excluded.”<sup>180</sup> Had the expert testified regarding what lay persons should know, then it would not have been expert testimony at all.

*C. Rule 704: Opinion on an Ultimate Issue*

Even if a person satisfies the requirements of either Rule 701 or Rule 702 to provide opinion testimony, there remain some limitations as to what the witness

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173. IND. R. EVID. 702(a).

174. 195 N.E.3d 866, 871 (Ind. Ct. App. 2022).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Emig v. Physicians’ Physical Therapy Serv., Inc.*, 432 N.E.2d 52, 53 (Ind. Ct. App. 1982); *accord* *Winona Mem’l Found. of Indianapolis v. Lomax*, 465 N.E.2d 731, 740 (Ind. Ct. App. 1984); *see also* *Unknown Party v. Ariz. Bd. of Regents*, No. CV-18-01623, 2022 U.S. Dist. LEXIS 175121, at \*5-6 (D. Ariz. Sep. 27, 2022) (“[E]xpert testimony is inadmissible if it concerns factual issues within the knowledge and experience of ordinary lay people because it would not assist the trier of fact in analyzing the evidence.”) (quoting *Liberty Life Ins. Co. v. Myers*, No. CV 10-2014, 2013 U.S. Dist. LEXIS 18811, at \*5 (D. Ariz. Feb. 11, 2013)).

may opine.<sup>181</sup> Rule 704(b) prohibits “opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.”<sup>182</sup> The purpose of the rule is to prevent witnesses from intruding into the matters deemed purely the province of the finder of fact.<sup>183</sup>

Applying Rule 704 can turn on fine but important distinctions. Demonstrating the hairline distinctions was an affidavit in *Akin v. Simons*.<sup>184</sup> In a claim for breach of oral contract, a party produced his own affidavit stating that he “entered into a mutual oral agreement” for the defendant to repay him.<sup>185</sup> That assertion was impermissible under Rule 704(b). As the court explained: “While, as we have noted, [the] assertion that he and [the defendant] had ‘entered into a mutual oral agreement’ that she would repay him \$130,000 is admissible as an expression of his opinion, it is inadmissible as a legal conclusion under Evidence Rule 704(b).”<sup>186</sup>

## VII. HEARSAY: RULES 801 THROUGH 806

### *A. Rules 801 & 802: Hearsay Generally Prohibited*

Pursuant to Rule 802, “[h]earsay is generally not admissible unless it falls under certain exceptions.”<sup>187</sup> While hearsay is often said to be “a statement not made by the declarant while testifying at trial that is offered to prove the truth of the matter asserted,”<sup>188</sup> that definition does not reflect the full picture. In obvious cases, such as unsworn opinion letters of a medical expert,<sup>189</sup> writings and symbols on packages for THC-infused candy,<sup>190</sup> and assertions in a probable-cause affidavit,<sup>191</sup> when offered for the truths of the matters asserted, it may be

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181. IND. R. EVID. 704(b).

182. *Id.*

183. *Richardson v. State*, 189 N.E.3d 629, 635 (Ind. Ct. App. 2022).

184. 180 N.E.3d 366, 377-78 (Ind. Ct. App. 2021).

185. *Id.* at 377.

186. *Id.* at 377-78.

187. *Smith v. State*, 190 N.E.3d 462, 465 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 831 (Ind. 2022) (citing IND. R. EVID. 802). Exceptions may arise through the evidence rules, such as Rules 803 and 804, or by statute. *See Priest v. State*, 181 N.E.3d 1046, 1048 n.4 (Ind. Ct. App. 2022) (“The Indiana legislature has enacted statutory hearsay exceptions providing that evidence of blood alcohol content shown by chemical breath-test results are admissible in charges involving operating a motor vehicle while intoxicated, I.C. § 9-30-6-15, and operating a motorboat while intoxicated, I.C. § 35-46-9-15.”).

188. *Turner v. State*, 183 N.E.3d 346, 358 (Ind. Ct. App.) (citing IND. R. EVID. 801(c)), *trans. denied*, 188 N.E.3d 853 (Ind. 2022); *see also Albrecht v. State*, 185 N.E.3d 412, 420 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 857 (Ind. 2022).

189. *ArcBest Corp. v. Wendel*, 192 N.E.3d 915, 927 (Ind. Ct. App. 2022).

190. *Fedij v. State*, 186 N.E.3d 696, 702 (Ind. Ct. App. 2022).

191. *Baumholser v. State*, 186 N.E.3d 684, 690-91 (Ind. Ct. App.), *trans. denied*, 190 N.E.3d

sufficient to go no further than that general definition. But there are additional inquiries that must be made in less obvious cases.

Rule 801(d), for example, provides a list of items that would otherwise constitute hearsay but are excepted from the definition.<sup>192</sup> There is also nuance to be found in the definitions of “statement” and “declarant,” provided by Rules 801(a) and 801(b) respectively.<sup>193</sup> In *Priest v. State*, the prosecution attempted to avoid the hearsay bar by contending that the “breath-test results” at issue were not hearsay.<sup>194</sup> Well before *Priest*, in *Mullins v. State*, the Indiana Supreme Court stated “that ‘[b]reath-test results as shown by a printout are hearsay’ and therefore inadmissible unless they fall within one of the statutory or judicial exceptions to the hearsay rule.”<sup>195</sup> Relying on a more-recent opinion in *Cranston v. State*, “in which a panel of [the Indiana Court of Appeals] held that a mechanically generated or computerized breath-test result is hearsay only if it incorporates ‘a certain degree of human input and/or interpretation,’” the State argued that no hearsay exception was needed.<sup>196</sup>

The appellate panel in *Priest* avoided having to reconcile *Mullins* and *Cranston* by recognizing that the evidentiary record before the panel did not sufficiently mirror either case:

However, we need not resolve the alleged conflict between *Mullins* and *Cranston* because the case before us does not involve the same evidence that was at issue in those cases. Both of those cases related to evidence in the form of a printout from a “B.A.C. Datamaster” breath test, which *Mullins* found admissible under a statutory exception to hearsay, and *Cranston* found admissible as non-hearsay. But here, although the trial court and parties’ counsel seemed to assume a breath-test result was in the record, the record actually contains no evidence of any breath test at all. The only evidence in the record related to [Defendant]’s ACE or B.A.C. is the traffic citation itself, and that document does not state who was tested, what test was used, who did the testing, and what the test results were, all of which were in evidence in both *Mullins* and *Cranston*. Rather, the traffic ticket issued to [Defendant]—which was completed and signed by an Indiana State Police Officer who did not appear at the suppression hearing or otherwise testify—stated only: “B.A.C. 0.042.” That statement, alone, is clearly hearsay; it is an out-of-court statement offered to prove the truth of the matter asserted.<sup>197</sup>

Due to the deficiency in the record, the determination of whether *Cranston* may

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922 (Ind. 2022).

192. IND. R. EVID. 801(d); *Rosenbaum v. State*, 193 N.E.3d 417, 423 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 832 (Ind. 2022).

193. IND. R. EVID. 801(a), (b).

194. 181 N.E.3d 1046, 1048-49 (Ind. Ct. App. 2022).

195. *Id.* at 1048 (quoting *Mullins v. State*, 646 N.E.2d 40, 48 (Ind. 1995)).

196. *Id.* (quoting *Cranston v. State*, 936 N.E.2d 342, 344 (Ind. Ct. App. 2010)).

197. *Id.* at 1049 (citations omitted).

stand alongside *Mullins* remains for another day.

*B. Rule 803: Hearsay Exceptions Regardless of Declarants' Availability*

Even if a statement constitutes hearsay under Rule 801, it is not necessarily subject to exclusion under Rule 802.<sup>198</sup> One pathway for admission is through the exceptions of Rule 803.<sup>199</sup> During the survey period, the Indiana Court of Appeals issued four opinions addressing three of Rule 803's exceptions: excited utterances under Rule 803(2),<sup>200</sup> recorded recollections under Rule 803(5),<sup>201</sup> and market reports under Rule 803(17).<sup>202</sup>

*1. Rule 803(2) – Excited Utterances.*—The first of the three Rule 803 exceptions applied by the Indiana Court of Appeals was Rule 803(2)'s allowance for excited utterances.<sup>203</sup>

Statements made by a witness are admissible as substantive evidence pursuant to Indiana Evidence Rule 803(2) when the statements (a) pertain to a startling event or condition; (b) are made while the declarant was under the stress or excitement caused by the event or condition; and (c) are related to the event or condition. This test is not mechanical and admissibility turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications. The lapse of time is not dispositive, but if a statement is made long after a startling event, it is usually less likely to be an excited utterance. The heart of the inquiry is whether the declarant was incapable of thoughtful reflection.<sup>204</sup>

At issue in *Turner v. State* was a witness's police interview in which she identified the criminal defendant "as the person fighting" with the victim.<sup>205</sup> Because the interview occurred "less than an hour after" the witness saw the defendant kill the victim, the witness "saw blood spraying" from the victim's neck, the witness "tried to stop the bleeding while screaming for help," and the witness was described as "almost hysterical" during the interview, the killing "was a startling event" and the witness "was still under stress caused by that

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198. IND. R. EVID. 802 ("Hearsay is not admissible *unless* these rules or other law provides otherwise." (emphasis added)).

199. IND. R. EVID. 803.

200. *Turner v. State*, 183 N.E.3d 346, 358-59 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 853 (Ind. 2022).

201. *Garth v. State*, 182 N.E.3d 905, 913 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 858 (Ind. 2022).

202. *Washington v. State*, 178 N.E.3d 1275, 1277-80 (Ind. Ct. App. 2021); *Fedij v. State*, 186 N.E.3d 696, 701-07 (Ind. Ct. App. 2022).

203. *Turner*, 183 N.E.3d at 358-59.

204. *Id.* (quoting *Stinson v. State*, 126 N.E.3d 915, 920-21 (Ind. Ct. App. 2019)).

205. *Id.* at 358.

event” when she made the identification.<sup>206</sup> The identification of the defendant as the perpetrator of the crime was also “clearly related to the event.”<sup>207</sup> That was sufficient to satisfy the excited-utterance exception.

2. *Rule 803(5) – Recorded Recollections.*—The recorded-recollection exception of Rule 803(5) “allows admission of a record that ‘is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately[,] was made or adopted by the witness when the matter was fresh in the witness’s memory[,] and accurately reflects the witness’s knowledge.’”<sup>208</sup> In *Garth v. State*, a criminal defendant sought to admit a letter written to her by another person involved in the charged crime as a recorded recollection.<sup>209</sup> The Indiana Court of Appeals affirmed exclusion of the letter, finding it failed to satisfy Rule 803(5) for two reasons. First, although offered to contradict the witness’s testimony regarding the motive for the charged murder, “the letter was written weeks or months after [the] murder.”<sup>210</sup> That separation of time undermined the requirement “that the recorded recollection be ‘made or adopted by the witness when the matter was fresh in the witness’s memory.’”<sup>211</sup> Second, although the witness “did not recall the letter well enough to testify fully and accurately about it,” it was offered to contradict his testimony regarding the motive for the killing.<sup>212</sup> Because he could “recall well enough to testify fully and accurately” regarding his motive for killing the victim, it failed the threshold requirement of Rule 803(5)(A).<sup>213</sup>

3. *Rule 803(17) – Market Reports and Similar Commercial Publications.*—Prior to the survey period, Rule 803(17) had been cited in only five published Indiana appellate decisions.<sup>214</sup> Despite the historical scarcity, the survey period produced two opinions from the Indiana Court of Appeals substantively addressing the exception.<sup>215</sup> The “exception permits admission into evidence of ‘market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.’”<sup>216</sup> It

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206. *Id.* at 359.

207. *Id.*

208. *Garth v. State*, 182 N.E.3d 905, 913 (Ind. Ct. App.) (quoting IND. R. EVID. 803(5)), *trans. denied*, 188 N.E.3d 858 (Ind. 2022).

209. *Id.* at 912-13. The defendant also invoked Rule 803(3) and Rule 616, but the arguments were deemed waived. *Id.* at 913 n.2.

210. *Id.* at 913.

211. *Id.* (quoting IND. R. EVID. 803(5)(B)).

212. *Id.*

213. *Id.*

214. *See* *Reemer v. State*, 835 N.E.2d 1005, 1007-09 (Ind. 2005); *Forler v. State*, 846 N.E.2d 266, 268-71 (Ind. Ct. App. 2006); *Robertson v. State*, 877 N.E.2d 507, 511-14 (Ind. Ct. App. 2007); *Montgomery v. State*, 22 N.E.3d 768, 776 (Ind. Ct. App. 2014), *trans. denied*, 52 N.E.3d 796 (Ind. 2015); *Phillips v. State*, 25 N.E.3d 1284, 1288 n.2 (Ind. Ct. App. 2015).

215. *Washington v. State*, 178 N.E.3d 1275, 1277-80 (Ind. Ct. App. 2021); *Fedij v. State*, 186 N.E.3d 696, 701-06 (Ind. Ct. App. 2022).

216. *Washington*, 178 N.E.3d at 1277-78 (quoting IND. R. EVID. 803(17)).



is not limited to “compilations” but may also “support admission of other published materials where they are generally relied upon either by the public or by people in a particular occupation.”<sup>217</sup>

In *Washington v. State*, the Indiana Court of Appeals confronted a question of first impression: Whether the market-reports exception of Rule 803(17) allows an officer to identify an illicit substance based on his search and comparison of the substance using Drugs.com.<sup>218</sup> At trial, the officer “explained that he had matched the physical characteristics of the pills to hydrocodone as described on” the website.<sup>219</sup> There was no chemical test done to identify the pills.<sup>220</sup> Although the Indiana Supreme Court had previously allowed admission of “the labels of commercially marketed drugs,”<sup>221</sup> the Indiana Court of Appeals, following guidance from the Colorado Court of Appeals, ruled the use of Drugs.com a bridge too far.<sup>222</sup>

Shortly after *Washington v. State*, the Indiana Court of Appeals again addressed a trial court’s admission of evidence under Rule 803(17) in *Fedij v. State*.<sup>223</sup> The issue there was use of writings and symbols on THC candies to identify the substances as illicit.<sup>224</sup> Although more closely analogous to existing Indiana caselaw than *Washington*, the court still found reliance on Rule 803(17) improper.<sup>225</sup> The court distinguished prior caselaw because the “writing and symbols on the [packages] are in stark contrast to the federally regulated drug labels on pharmaceuticals,” previously allowed by the Indiana Supreme Court.<sup>226</sup> “[U]nlike ‘the contemporary nature of pharmaceutical practice,’” it cannot be said that “the manufacturing of [] federally outlawed products ‘exemplifies the inherent trustworthiness’ of the products’ own descriptions.”<sup>227</sup> Although prior caselaw “is not limited to pharmaceutical labels,” it requires “the packaging at issue [be] ‘generally relied upon either by the public or by people in a particular occupation.’”<sup>228</sup> That the substances at issue are banned from sale in Indiana counseled against finding them generally relied upon by the public.<sup>229</sup>

On appeal, the State argued that the writing and symbols were “consistent with California law.”<sup>230</sup> That argument was rejected because no such evidence was provided to the trial court, there was no evidence that the specific products

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217. *Id.* at 1278 (quoting *Reemer*, 835 N.E.2d at 1008).

218. *Id.*

219. *Id.* at 1277.

220. *Id.*

221. *Id.* at 1278 (quoting *Reemer*, 835 N.E.2d at 1008).

222. *Id.* at 1278-80 (citing *People v. Hard*, 342 P.3d 572 (Colo. App. 2014)).

223. 186 N.E.3d 696, 701-06 (Ind. Ct. App. 2022).

224. *Id.* at 700-01.

225. *Id.* at 701-06.

226. *Id.* at 705.

227. *Id.* (quoting *Reemer v. State*, 835 N.E.2d 1005, 1009 (Ind. 2005)).

228. *Id.* (quoting *Reemer*, 835 N.E.2d at 1008).

229. *Id.*

230. *Id.* at 706.

at issue “were manufactured or sold in California and were in fact subjected to California oversight and regulation,” and the cited California authority appeared to have requirements “substantially above” what was on the packaging at issue.<sup>231</sup> As the court of appeals summarized:

In essence, the State is claiming that, because some regulation must exist somewhere, the specific products here must have been captured by that regulation as a matter of law, even if the products themselves do not demonstrate that regulation. Neither Evidence Rule 803(17), [nor caselaw] supports such a broad reading of the market reports exception to the general rule against hearsay, and we reject the State’s argument accordingly.<sup>232</sup>

### *C. Rule 804: Hearsay Exceptions for Unavailable Declarants*

In addition to the exceptions of Rule 803, Rule 804 similarly allows use of hearsay across defined parameters, but only if the declarant is unavailable at trial.<sup>233</sup> Two of the exceptions under Rule 804 were addressed during the survey period. In each case, however, there was no dispute over unavailability of the witness, just application of the exception.<sup>234</sup>

*1. Rule 804(b)(2) – Dying Declarations.*—In *Smith v. State*, the asserted exception was the dying declaration under Rule 804(b)(2).<sup>235</sup> Contrary to the exception’s name, the witness may die after some prolonged period following the declaration or may not even pass away.<sup>236</sup> Instead, the declarant must: (i) *believe* “death [is] imminent and abandon[] all hope for recovery”<sup>237</sup> and (ii) have made the declaration about the “cause or circumstances” of expected impending death.<sup>238</sup> The mere fact of ultimate death does not itself trigger the exception.<sup>239</sup>

231. *Id.*

232. *Id.* (citing *Reemer*, 835 N.E.2d 1005; *Forler v. State*, 846 N.E.2d 266 (Ind. Ct. App. 2006)).

233. IND. R. EVID. 804(b).

234. *Smith v. State*, 190 N.E.3d 462, 465-66 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 831 (Ind. 2022) (declarant deceased); *Garth v. State*, 182 N.E.3d 905, 916 (Ind. Ct. App. 2022) (witness subpoenaed to testify but did not appear; prosecution did not object to finding her unavailable).

235. 190 N.E.3d at 465; IND. R. EVID. 804(b)(2).

236. 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE SERIES: INDIANA EVIDENCE § 804.202 (4th ed. 2022) (“The time between the statement and the declarant’s death does not affect admissibility.” (citing *inter alia* *Jones v. State*, 71 Ind. 66 (1880))); EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 282 (3d ed. 1984) (“Neither the Federal nor the Revised Uniform Evidence Rules contain any requirement that declarant be dead. They do require that declarant be unavailable, which of course, includes death as well as other situations.” (footnotes omitted)); JOSEPH W. COTCHETT & G. RICHARD POEHNER, FEDERAL COURTROOM EVIDENCE § 804.3.2 (5th ed. 2023) (“declarant need not actually have died”).

237. *Smith*, 190 N.E.3d at 465.

238. IND. R. EVID. 804(b)(2).

239. *Smith*, 190 N.E.3d at 465.

When the declarant is unavailable to establish belief of imminent death, courts look to surrounding circumstances and indicia from which to infer the belief.<sup>240</sup> Such indicia include “the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound, or state of his illness” as well as the “character of the wound.”<sup>241</sup> In *Smith*, the indicia were easily sufficient to draw the requisite inference: the declarant, a victim shot at least eleven times, including shots to the chest and stomach, soon died from the wounds; it would be “hard to imagine . . . NOT believ[ing] his death was imminent.”<sup>242</sup> The content of the declaration—the identity of the shooter—rounded out the requisite showing to apply the exception.<sup>243</sup>

2. *Rule 804(b)(3) – Statements Against Interest.*—The other exception drawing appellate attention was statements against interest under Rule 804(b)(3).<sup>244</sup> The exception is triggered when the statement is one

that a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability.<sup>245</sup>

There is, however, an important carveout to the rule: “A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.”<sup>246</sup>

That carveout prevented use of statements from a witness’s police interview in *Garth v. State*:

There is no dispute that [the witness] was unavailable . . . . As for whether [the witness] made statements that exposed her to civil or criminal liability, we note that prior to the interview, [she] had been charged with assisting a criminal in connection with [the] murder. In the interview, [she] admitted that she was present in the trailer, saw [the victim] lying on the floor with a rope tied around her neck, and heard [a third person] drag the body to the car, but did not call police. In addition, [the witness] repeatedly stated that she used methamphetamine. These statements are facially incriminating. Thus, admissibility . . . under Evidence Rule 804(b)(3) turns on whether [the witness] made statements

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240. *Id.*

241. *Id.* (quoting *Williams v. State*, 168 Ind. 87, 90-91 (1907); *Gipe v. State*, 75 N.E. 881, 882 (Ind. 1905)).

242. *Id.*

243. *Id.*

244. *Garth v. State*, 182 N.E.3d 905, 916-17 (Ind. Ct. App. 2022).

245. IND. R. EVID. 804(b)(3).

246. *Id.*

that implicated [the defendant] in civil or criminal liability.<sup>247</sup>

Because the statements did “implicate [the defendant] in criminal activity” they were “inadmissible under Evidence Rule 804(b)(3).”<sup>248</sup>

#### VIII. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

Certain tangible and electronic evidence must first be authenticated before being admitted.<sup>249</sup> Rule 901(a) provides, “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>250</sup> The proponent need not provide “[a]bsolute proof of authenticity” or demonstrate more than “a reasonable probability” that the evidence is authentic.<sup>251</sup> The evidence may even be altered, so long as the alteration is “likely insignificant.”<sup>252</sup> Once the threshold for admissibility has been crossed, ultimate questions of veracity are for the factfinder.<sup>253</sup>

To help guide application of Rule 901(a), subdivision “901(b) provides examples of evidence that satisfy the authentication requirement.”<sup>254</sup> While parties and courts are not confined to the illustrative examples of Rule 901(b),<sup>255</sup> they invariably attempt to hew as closely to the examples as possible. The easiest method for authentication is that provided by Rule 901(b)(1): “Testimony that an item is what it is claimed to be, by a witness with knowledge.”<sup>256</sup> Due to the ease of that method, disputes as to authenticity tend to arise when witnesses do not possess personal knowledge.<sup>257</sup>

When electronic data are at issue, Rule 901(b)(4) is one of the most frequently invoked examples for authentication.<sup>258</sup> That example relies on “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”<sup>259</sup> Guiding the analysis of “distinctive characteristics,” the Indiana Court of Appeals has

247. 182 N.E.3d at 916 (citation omitted).

248. *Id.* at 917.

249. *Hape v. State*, 903 N.E.2d 977, 990 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009); *Smith v. State*, 179 N.E.3d 1074, 1078 (Ind. Ct. App. 2022).

250. IND. R. EVID. 901(a).

251. *Kerner v. State*, 178 N.E.3d 1215, 1227 (Ind. Ct. App. 2021), *trans. denied*, 180 N.E.3d 939 (Ind. 2022).

252. *Id.*

253. *Id.*

254. *Smith v. State*, 179 N.E.3d 1074, 1078 (Ind. Ct. App. 2022).

255. IND. R. EVID. 901(b) (“The following are *examples* only, *not a complete list*, of evidence that satisfies the requirement . . . .” (emphasis added)).

256. *Id.* at (1).

257. *See, e.g., Arnett v. Est. of Beavins*, 184 N.E.3d 679, 686 (Ind. Ct. App. 2022); *Smith v. State*, 179 N.E.3d 1074, 1077-78 (Ind. Ct. App. 2022).

258. IND. R. EVID. 901(b)(4); *Arnett*, 184 N.E.3d at 685; *Smith*, 179 N.E.3d at 1078.

259. IND. R. EVID. 901(b)(4).

explained:

In some cases, the purported sender actually admitted to authorship, either in whole or in part, or was seen composing it. In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone. Sometimes the communication has contained information that only the purported sender could be expected to know. Sometimes the purported sender has responded to an exchange of electronic communications in such a way as to indicate circumstantially that he was in fact the author of the particular communication, the authentication of which is in issue. And sometimes other circumstances, peculiar to the facts of the particular case, have sufficed to establish at least a prima facie showing of authentication.<sup>260</sup>

During the survey period, Rule 901(b)(4) proved a viable conduit for admitting text messages where testimony of an officer was able to establish the cell phone belonged to the defendant and the messages were extracted from the phone.<sup>261</sup> Subdivision 901(b)(4), accompanied by 901(b)(5),<sup>262</sup> allowed admission of two voice memos, one of the criminal act occurring, recorded by a defendant based on corroborating cellphone records, testimony, voice-identification testimony, and distinctive characteristics of the recording reflecting commission of the crime.<sup>263</sup> Notably, the evidence was admissible despite a forensic scientist testifying that the recordings had been altered because “the alterations were likely insignificant.”<sup>264</sup>

Not every appellate invocation of Rule 901(b)(4) proved as fruitful. In *Arnett v. Estate of Beavins*, the Indiana Court of Appeals affirmed the striking of a portion of an affidavit stating that the affiant had received an email from the decedent with an attachment.<sup>265</sup> The affidavit made no attempt to lay a foundation for authentication and the court of appeals has previously cautioned that “[a]n email address alone ‘might be insufficient to authenticate any text or email messages as having been authored by the person linked to the cell phone number or email address, given that “computers can be hacked, protected passwords can

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260. *Arnett*, 184 N.E.3d at 686 (quoting *Pavlovich v. State*, 6 N.E.3d 969, 977 (Ind. Ct. App. 2014)).

261. *Smith*, 179 N.E.3d at 1078-79.

262. IND. R. EVID. 901(b)(5) (“An opinion identifying a person’s voice whether heard firsthand or through mechanical or electronic transmission or recording based on hearing the voice at any time under circumstances that connect it with the alleged speaker.”).

263. *Kerner v. State*, 178 N.E.3d 1215, 1227-28 (Ind. Ct. App. 2021), *trans. denied*, 180 N.E.3d 939 (Ind. 2022).

264. *Id.* at 1227.

265. 184 N.E.3d at 686.

be compromised, and cell phones can be purloined.””<sup>266</sup> Even if the proponent had established authenticity of the email, the operating agreement attached to the email also lacked any evidence of authenticity.<sup>267</sup>

Another method for authenticating electronic data is the silent-witness theory. The theory predates adoption of the Indiana Rules of Evidence.<sup>268</sup> “The ‘silent witness’ theory . . . permits the admission of photographs as substantive evidence, rather than merely as demonstrative evidence, so long as the photographic evidence is also relevant.”<sup>269</sup> It applies equally to still photographs and video recordings.<sup>270</sup> “Where images were taken by automatic devices . . . ‘there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera.’”<sup>271</sup> Of the Rule 901(b) examples, the closest parallel to the silent-witness theory is Rule 901(b)(9).<sup>272</sup>

In *Hamilton v. State*, the silent-witness theory allowed admission of a surveillance video where the witnesses testified that it “was an accurate copy of the surveillance video they had obtained from their security system . . . , albeit lacking the time and date stamp” and, in describing the contents of the video, identified features depicted therein.<sup>273</sup>

#### IX. CONTENTS OF WRITINGS & RECORDINGS: RULES 1001 THROUGH 1008

Often referred to as the “best evidence rule,”<sup>274</sup> Rule 1002 requires use of an “original writing, recording, or photograph” unless provided otherwise by rule or statute.<sup>275</sup> The rule was put to the test in *Hamilton v. State* after “a duplicate of the original surveillance video was admitted” at trial.<sup>276</sup> But, as Rule 1002 recognizes, the best evidence rule is subject to other rules of evidence.<sup>277</sup> One such other rule is Rule 1003, which allows use of a duplicate “to the same extent as an original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.”<sup>278</sup> Although the copy of the

266. *Id.* at 686 n.5 (quoting *Pavlovich v. State*, 6 N.E.3d 969, 976 (Ind. Ct. App. 2014)).

267. *Id.* at 686.

268. *See Bergner v. State*, 397 N.E.2d 1012, 1015-18 (Ind. Ct. App. 1979).

269. *Hamilton v. State*, 182 N.E.3d 936, 939 (Ind. Ct. App. 2022) (quoting *Bergner*, 397 N.E.2d at 1014-15).

270. *See, e.g., id.* at 939-41; *Gee v. State*, 193 N.E.3d 1036, 1039 (Ind. Ct. App. 2022).

271. *Hamilton*, 182 N.E.3d at 939 (quoting *Bergner*, 397 N.E.2d at 1014-15).

272. *Id.*; IND. R. EVID. 901(b)(9) (“Evidence describing a process or system and showing that it produces an accurate result.”).

273. *Hamilton*, 182 N.E.3d at 939-40.

274. *See, e.g., id.* at 938.

275. IND. R. EVID. 1002.

276. 182 N.E.3d at 938-39.

277. IND. R. EVID. 1002.

278. *Id.* 1003.

surveillance video “differe[d] from the original in that the copy [did] not show a ‘full screen’ view of the video, including the time date and stamp shown in the original video,” the criminal defendant’s failure to “explain how the absence of the time and date stamp on the copy undermines the exhibit’s authenticity in light of the testimony that the copy was, in all other substantive respects, the same as the original recording” and to demonstrate that use of a copy “was unfair to him” defeated his reliance on Rule 1002.<sup>279</sup>

#### X. COMMON LAW RULES: *RES GESTAE*, *RES IPSA LOQUITUR*, PAROL EVIDENCE, & SPOILIATION

Although the Indiana Rules of Evidence largely supplanted common-law evidentiary practices,<sup>280</sup> where the rules “do not cover a specific evidence issue, common or statutory law shall apply.”<sup>281</sup> As the survey period shows, some doctrines remain useful, while others persist only as the simmering embers of history.

##### A. Res Gestae

The 2018 publication of this survey covered the Indiana Supreme Court’s continued efforts in *Snow v. State* to stamp out the remnants of the common-law evidentiary doctrine of *res gestae*.<sup>282</sup> A product of nineteenth century common-law practices, *res gestae* was “employed as a convenient escape from the hearsay objection, before the understanding of what is and what is not hearsay was as precise as it is today.”<sup>283</sup> The doctrine was “used loosely to refer to the acts and statements surrounding the event being litigated”<sup>284</sup> and generally allowed admission of

testimony regarding declarations, whether written or oral, and acts or other circumstances which, though not in issue, are related to the main transaction or a main fact in controversy and so directly connected with it or illustrative of it as to explain or qualify it or show the intent with which it was done.<sup>285</sup>

In its time, the doctrine was a well-entrenched part of Indiana practice.<sup>286</sup> But,

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279. *Hamilton*, 182 N.E.3d at 938-39.

280. *Specht v. State*, 734 N.E.2d 239, 240 (Ind. 2000).

281. IND. R. EVID. 101(b).

282. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1080-81 (2018) (discussing *Snow v. State*, 77 N.E.3d 173, 176-77 (Ind. 2017)).

283. CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 274 (1954).

284. J. ALEXANDER TANFORD & RICHARD M. QUINLAN, *INDIANA TRIAL EVIDENCE MANUAL* § 49.1, at 303 (2d ed. 1987).

285. 12 JOHN J. DVORSKE, *INDIANA LAW ENCYCLOPEDIA, Evidence* § 76 (2022) (footnotes omitted).

286. See SEET & HAMILTON, *supra* note 154, at § 36.8(b), 403 (“It is obvious that what a person says at the time he does an act explains the act itself and his intentions. When, therefore, an act

as reminded in *Snow*, the doctrine “did not survive the adoption of Indiana’s Rules of Evidence in 1994. That is, *res gestae* is no longer a proper basis for admitting evidence; instead, admissibility is determined under Indiana’s Rules of Evidence.”<sup>287</sup>

During the survey period, the Indiana Court of Appeals drove another nail in the doctrine’s coffin, clarifying that *res gestae* by any other name is still as improper:

The State argues that evidence of all the molestations would have been admissible as direct evidence of the class A felony charges, citing *Marshall v. State*. There, another panel of this Court concluded that the evidence of the defendant’s uncharged acts of molesting the victims was admissible as direct evidence of the charged molestations because it was “intrinsic” to the crimes charged. However, our supreme court has held that *res gestae* . . . “[i]s no longer a proper basis for admitting evidence; instead, admissibility is determined under Indiana’s Rules of Evidence.” Thus, “the many flavors of *res gestae*—‘inextricably bound up,’ ‘inextricably intertwined,’ ‘circumstances and context,’ and ‘part and parcel,’ to name a few—are not proper grounds for admissibility.” Although the supreme court did not specifically include “intrinsic” in its list of *res gestae* terms, that list was clearly not exclusive, and the *Snow* court explicitly abrogated a case that did.<sup>288</sup>

What should have been clear from *Snow*, is now ever more clear: regardless of the terms used, the substance of *res gestae* no longer has a place in Indiana evidentiary practice.

### B. Res Ipsa Loquitur

“The doctrine of *res ipsa loquitur* is a rule of evidence which allows an inference of negligence to be drawn from certain surrounding facts.”<sup>289</sup>

The central question in *res ipsa loquitur* cases is whether the incident probably resulted from the defendant’s negligence rather than from some other cause. To establish this inference of negligence, a plaintiff must demonstrate: (1) that the injuring instrumentality was within the exclusive management and control of the defendant, and (2) the accident is of the type that ordinarily does not happen if those who have management or control exercise proper care.<sup>290</sup>

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material to the controversy is proved, what was written or spoken at the time the act was done is, in general, inseparably connected with and indeed forms a part of the act itself.”).

287. *Snow*, 77 N.E.3d at 176.

288. *Baumholser v. State*, 186 N.E.3d 684, 693 n.5 (Ind. Ct. App.) (citations omitted) (quoting *Snow*, 77 N.E.3d at 176), *trans. denied*, 190 N.E.3d 922 (Ind. 2022).

289. *Merriman v. Kraft*, 249 N.E.2d 485, 491 (Ind. 1969).

290. *Griffin v. Menard, Inc.*, 175 N.E.3d 811, 815 (Ind. 2021) (citation omitted).



At the beginning of the survey period, the Indiana Supreme Court was confronted with a novel question: Does the doctrine of *res ipsa loquitur* even apply in premises liability actions?<sup>291</sup> The Indiana Supreme Court answered the question with a “yes, but.”<sup>292</sup> The court began by recognizing that a 2004 opinion from the Indiana Court of Appeals cast doubt on the doctrine’s application to premises liability.<sup>293</sup> As the 2004 opinion observed:

[T]he position adopted from the Restatement (Second) of Torts . . . states that a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, the conditions listed therein are met. To say that a premises owner may be liable under the doctrine of *res ipsa loquitur* when they could not be liable under the premises liability standard would seem to fly in the face of [that] standard . . . .<sup>294</sup>

The Indiana Supreme Court found that, while the 2004 opinion does not “completely foreclose[] the application of *res ipsa* to a premises liability action, it . . . makes clear that if there’s no liability under a premises liability standard, *res ipsa* cannot apply.”<sup>295</sup> “If an injury results from a fixture or other component that customers did not or could not disturb—such as a chandelier suspended from the ceiling, or a set of shelves bolted to the wall—and the incident would not normally occur absent negligence, *res ipsa* could be appropriate.”<sup>296</sup>

The opinion also shed light on the question of “exclusive control” in the context of merchandise for sale at a store.<sup>297</sup> A customer was injured while removing a box containing a sink from a shelf when “the bottom of the box opened and the sink fell on him.”<sup>298</sup> In the court’s esteem, because other customers had access to the box it would be “speculation that the only way the sink could have fallen out of the box was because [the store] was negligent when the box could have been handled/tampered with by another customer.”<sup>299</sup> The court signaled, though did not explicitly so hold, that if other customers could access an item, the doctrine will not apply.<sup>300</sup>

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291. *Id.* at 812-17.

292. *Id.*

293. *Id.* at 815 (citing *Rector v. Oliver*, 809 N.E.2d 887 (Ind. Ct. App. 2004)).

294. *Id.* (quoting *Rector*, 809 N.E.2d at 895).

295. *Id.*

296. *Id.* at 816.

297. *Id.* at 815-16.

298. *Id.* at 812.

299. *Id.* at 816.

300. *Id.*

*C. Parol & Extrinsic Evidence Rule*<sup>301</sup>

The Indiana Supreme Court has stated that Indiana's "parol evidence rule is not a procedural rule that excludes evidence" but, rather, a matter of substantive law.<sup>302</sup> Nevertheless, there are circumstances in which the rule functions primarily as one of evidence, such as when an original instrument has been lost, thereby opening the door to parol evidence to prove the contents of the lost papers.<sup>303</sup> But, even when functioning primarily as a matter of substantive law, the parol evidence rule "is so closely connected with trials and the admission of evidence, any discussion of it seems to naturally fall within the category of evidentiary rules."<sup>304</sup>

"Generally, the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding terms to a written contract where an integration clause states that the written document embodies the complete agreement between the parties."<sup>305</sup> "Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement."<sup>306</sup> The rule is not, however, absolute and allows resort to extrinsic evidence to interpret ambiguous portions of a written agreement or where a party seeks to set aside the agreement under a theory of fraud in the inducement.<sup>307</sup> That the parties disagree over an agreement's meaning does not in itself create an ambiguity.<sup>308</sup>

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301. As noted in a prior survey, "[i]n a technical sense, the parol evidence rule may be considered as distinct from the extrinsic evidence rule, with parol evidence constituting a class of extrinsic evidence. Nevertheless, Indiana and a great many other jurisdictions have not meticulously recognized a distinction, instead using the terms interchangeably." Colin E. Flora, *2019 Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 948 n.544 (2021) (citation omitted).

302. *Franklin v. White*, 493 N.E.2d 161, 165 (Ind. 1986).

303. *See, e.g.,* *ATS Ford Drive Inv., LLC v. United States*, 159 Fed. Cl. 132, 148 (2022) (applying Indiana law); *see also* IND. R. EVID. 1004.

304. *SEET & HAMILTON*, *supra* note 154, at § 36.7(a). Fundamentally, the rule provides specific parameters for what evidence is relevant in contract matters. *See* *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 895 (10th Cir. 2006) (Hartz, J., concurring in part and dissenting in part) ("[I]f, under a state parol-evidence rule, the contract between two parties does not incorporate oral agreements that contradict the terms of the written contract, then evidence of the oral agreement is not relevant under Rule 401.").

305. *Munster Steel Co. v. CPV Partners, LLC*, 186 N.E.3d 143, 149 (Ind. Ct. App. 2022) (quoting *Patterson v. Grace*, 661 N.E.2d 580, 583-84 (Ind. Ct. App. 1996)).

306. *Franciscan All. Inc. v. Metzman*, 192 N.E.3d 957, 963 (Ind. Ct. App. 2022) (quoting *Tender Loving Care Mgmt v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

307. *Id.*; *Sri Shirdi Saibaba Sansthan of Tri State, Inc. v. Farmers State Bank of Alto Pass*, 194 N.E.3d 55, 60 n.2 (Ind. Ct. App. 2022).

308. *Five Star Roofing Sys., Inc. v. Armored Guard Window & Door Grp., Inc.*, 191 N.E.3d 224, 236 (Ind. Ct. App. 2022) (citing *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161

The survey period provided two important lessons in applying the rule. First, a party that concedes a written contract is unambiguous is barred by the parol-evidence rule from admitting extrinsic evidence.<sup>309</sup> And, second, the mere existence of an ambiguity will not necessarily open the door to extrinsic evidence. As the Indiana Court of Appeals explained in *Franciscan Alliance Inc. v. Metzman*:

Generally, when the language of a contract is ambiguous, its meaning must be determined by examining extrinsic evidence and its construction is a matter for the factfinder. “If, however, the ambiguity arises because of the language used in the contract and not because of extrinsic facts, its construction is purely a question of law to be determined by the trial court.”<sup>310</sup>

Because the ambiguity was created by the language of the contract, the court was able to resolve it as a matter of law instead of leaving it for the finder of fact.<sup>311</sup>

#### *D. Spoliation*

Spoliation is a common-law doctrine implicated when a party having exclusive possession or control over witnesses or evidence fail to make the witness or evidence available through discovery or otherwise at trial.<sup>312</sup> To invoke spoliation, a party “must prove that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence.”<sup>313</sup> Once spoliation is established, a court is afforded substantial discretion in determining an appropriate sanction based upon the culpability of the conduct and resulting prejudice.<sup>314</sup> The doctrine becomes a matter affecting evidentiary procedures when a court elects a remedy creating a presumption or inference regarding the lost or suppressed evidence.<sup>315</sup>

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N.E.3d 1218, 1223 (Ind. 2021)).

309. See *Munster Steel Co. v. CPV Partners, LLC*, 186 N.E.3d 143, 149 (Ind. Ct. App. 2022) (citing *Voss v. Eller*, 10 N.E. 74, 76 (Ind. 1887)).

310. 192 N.E.3d at 964 (quoting *Trustcorp Mortg. Co. v. Metro Mortg. Co.*, 867 N.E.2d 203, 212 (Ind. Ct. App. 2007)).

311. *Id.* at 964-65.

312. See *Synergy Healthcare Res., LLC v. Telamon Corp.*, 190 N.E.3d 964, 968 (Ind. Ct. App. 2022); see also *Breese v. State*, 449 N.E.2d 1098, 1106 (Ind. Ct. App. 1983).

313. *Synergy Healthcare*, 190 N.E.3d at 968 (citing *N. Ind. Pub. Serv. Co. v. Aqua Env’t Container Corp.*, 102 N.E.3d 290, 301 (Ind. Ct. App. 2018)).

314. *Howard Reg’l Health Sys. v. Gordon*, 952 N.E.2d 182, 189-90 (Ind. 2011) (quoting *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)).

315. See IND. R. EVID. 301 (“In a civil case, unless a constitution, statute, judicial decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally. A presumption has continuing effect even though contrary evidence is received.”); IND. MODEL CIV. JURY INST. 535 (2021); cf. *Adkins v. Wolever*, 554

*Synergy Healthcare Resolutions, LLC v. Telamon Corp.*, from the Indiana Court of Appeals, addressed an important issue in spoliation law—what constitutes “exclusive possession”—and provides an example of the doctrine’s application to modern technology.<sup>316</sup> Arising from a breakdown in a business relationship between a medical-billing provider (Synergy) and a software developer (Telamon), the key dispute was whether Synergy engaged in spoliation sufficient to warrant dismissal of its claim by failing to retain and produce source code relating to the dispute.<sup>317</sup>

In affirming the trial court’s dismissal, the Indiana Court of Appeals had to tackle the question of what constitutes “exclusive possession” necessary to trigger a duty to preserve.<sup>318</sup> Synergy never possessed the source code.<sup>319</sup> Instead, at Synergy’s direction, Telamon sent the source code to a subsequent developer, retained by Synergy.<sup>320</sup> Once transferred, Telamon did not retain a copy of the source code.<sup>321</sup> Following inception of litigation, Telamon sought to obtain the source code in discovery, but the original source code no longer existed; only a modified version remained.<sup>322</sup> The trial court deemed the loss of the source code sufficient to warrant dismissal of Synergy’s complaint.<sup>323</sup>

On appeal, Synergy argued that spoliation did not apply because the source code was not in Synergy’s “exclusive possession.”<sup>324</sup> The court of appeals rejected the argument, reminding that spoliation may apply when a party has a duty to preserve evidence, even if in possession of a third party.<sup>325</sup> As the court explained,

‘[E]xclusive’ in this context simply means that one party has the evidence while the other parties do not. In other words, here, where Synergy directed Telamon to deliver the source code to Synergy’s designee . . . and Telamon was contractually bound to relinquish all copies of the source code in its possession, Synergy’s possession was exclusive vis-à-vis Telamon.<sup>326</sup>

In affirming dismissal, the court of appeals provided two important lessons. First, the court clarified that exclusivity is assessed solely from the perspective of the opponent in litigation, not the world at large. And second, original copies of digital information can be as important as original copies of tangible

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F.3d 650, 652 (6th Cir. 2009) (“a spoliation ruling is evidentiary in nature”).

316. 190 N.E.3d at 966-71, 969 n.2.

317. *Id.* at 966-68.

318. *See id.* at 969 n.2.

319. *Id.* at 966-67.

320. *Id.*

321. *Id.* at 967.

322. *Id.*

323. *Id.* at 968.

324. *See id.* at 969 n.2.

325. *Id.*

326. *Id.*

documents.

Indiana's federal district courts also provided some insight into the doctrine of spoliation. In *Pendleton v. Murphy*, the Southern District granted summary judgment on a tort claim for spoliation because the "Plaintiffs ha[d] conceded that spoliation of evidence is not a cognizable tort claim under Indiana law."<sup>327</sup> While that may have provided an appropriate result in that case, it is a bit misleading. As the Northern District correctly observed, the Indiana Supreme Court has rejected recognition of a claim for first-party spoliation.<sup>328</sup> Although the Indiana Supreme Court has specifically declined to address the merit of torts for third-party spoliation,<sup>329</sup> the Indiana Court of Appeals has recognized their viability.<sup>330</sup>

#### XI. STATUTORY EVIDENTIARY PROCEDURES—PROTECTED PERSON STATUTE

To the extent that they do not contradict the Indiana Rules of Evidence, statutory evidence procedures remain applicable.<sup>331</sup> As such, Indiana's Protected Person Statute ("PPS") is "a part of Indiana evidence law, though not in the Rules."<sup>332</sup> "The PPS provides for the admission, under certain circumstances, of hearsay statements which would otherwise be inadmissible under the Indiana Evidence Rules."<sup>333</sup> A question in *Rosenbaum v. State* was whether the forensic interview of a victim of child molestation could be played for the jury when the child also testified at trial.<sup>334</sup> Under existing Indiana Supreme Court precedent, "where a child's pretrial recorded statement and the child's live testimony 'are consistent and both are otherwise admissible,' either the pretrial statement or the live testimony may be admitted into evidence, but not both."<sup>335</sup> A peculiarity of

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327. No. 1:20-cv-00489, 2022 U.S. Dist. LEXIS 161144, at \*12 n.4 (S.D. Ind. Sep. 6, 2022).

328. *Bowes-Northern v. Best Buy Stores, L.P.*, No. 2:21CV329, 2022 U.S. Dist. LEXIS 73786, at \*8 (N.D. Ind. Apr. 22, 2022) (quoting *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005)).

329. *Gribben*, 824 N.E.2d at 355 ("It may well be that the fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence. But the certified questions are directed only to first-party spoliation, and we therefore decline to address the issue with respect to third-party spoliation.").

330. *N. Ind. Pub. Serv. Co. v. Aqua Env't Container Corp.*, 102 N.E.3d 290, 301 n.8 (Ind. Ct. App. 2018) ("[I]f Aqua believes that it was harmed by Xtreme's spoliation of the evidence, its remedy would be an independent cause of action for third-party spoliation of evidence against Xtreme." (citing *Shirey v. Flenar*, 89 N.E.3d 1102, 1110-11 (Ind. Ct. App. 2017)); *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134, 136 (Ind. Ct. App. 1998), *trans. denied*, 726 N.E.2d 304 (Ind. 1999)); *see also Bowes-Northern*, 2022 U.S. Dist. LEXIS 73786, at \*8-9 (considering third-party claim).

331. IND. R. EVID. 101(b); *see also* IND. CODE § 34-8-1-3 (2022).

332. *Tyler v. State*, 903 N.E.2d 463, 467 (Ind. 2009); IND. CODE § 35-37-4-6 (2022).

333. *Rosenbaum v. State*, 193 N.E.3d 417, 422 (Ind. Ct. App. 2022) (citing *Shoda v. State*, 132 N.E.3d 454, 466 (Ind. Ct. App. 2019)), *trans. denied*, 197 N.E.3d 832 (Ind. 2022).

334. *Id.* at 422-24.

335. *Id.* at 422 (quoting *Tyler*, 903 N.E.2d at 467) (emphasis added).

this analysis is that it places the State, as advocate for the admission of both prerecorded and live testimony, in the peculiar position of arguing that its own witness has testified inconsistently.

A dilemma for the Indiana Court of Appeals in resolving the question of whether the child's pre-recorded statements were "consistent" with the trial testimony was "a dearth of law concerning what standard to apply" to determine consistency in the context of the PPS.<sup>336</sup> The court found guidance in how it determines consistency in other contexts:

However, courts are required to assess the consistency between trial testimony and prior statements in other contexts such as the impeachment of witnesses and the Evidence Rule pertaining to the admission of hearsay as substantive evidence. Our supreme court has acknowledged that the determination of whether a prior statement is inconsistent for impeachment purposes is not an exact science. A prior statement may be deemed to be insufficiently inconsistent to be impeaching where it is not directly inconsistent and the prior statement does not "foreclose the possibility" of the witness's trial testimony. We have also observed that a prior statement may not be used for impeachment if it and the trial testimony are "reconcilable with each other[.]" For a statement to be admissible non-hearsay as a prior consistent statement, it "need not be completely consistent" with trial testimony; rather it is enough if the two statements are "essentially the same." Put another way, "[m]inor inconsistencies between trial testimony and prior statements do not necessarily render the prior statements inadmissible" as a prior consistent, non-hearsay statement.<sup>337</sup>

After analyzing the prerecording and live testimony, the Indiana Court of Appeals determined that the alleged inconsistencies were insufficient to allow admission of both the prerecorded and live testimony.<sup>338</sup>

## XII. CONCLUSION

Despite a dramatic decrease in opportunities for Indiana's appellate courts to review trial decisions, the survey period still produced many important lessons for practitioners.

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336. *Id.* at 423.

337. *Id.* at 423-24 (citations omitted).

338. *Id.* at 424.