2024 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

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On January 1, 1994, the Indiana Rules of Evidence went into effect.[1] This survey period encompasses the thirtieth anniversary of the Rules' enactment.[2] As the rules enter their fourth decade of application, there remains no shortage of new insights into their application and reminders that there are yet more questions to answer in the years to come.

Consistent with prior surveys,[3] the format of this article tracks developments in order of the Indiana Rules of Evidence and then covers additional developments of common-law practices and statutes not included within the Indiana Rules of Evidence. As with last year's survey, where appropriate, this edition addresses memoranda decisions of the Indiana Court of Appeals.[4] Practitioners are reminded that citation to memoranda decisions of the Indiana Court of Appeals is only permitted for opinions decided after January 1, 2023.[5] Those seeking to cite a memorandum opinion to an Indiana court should use the format provided by Indiana Appellate Rule 22(A).[6]

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

A. Rule 101: Scope of the Indiana Rules of Evidence

Although the Indiana Rules of Evidence generally "apply in all proceedings in the courts of the State of Indiana,"[7] there are exceptions.[8] The survey period highlighted that the rules of evidence do not extend to bail hearings,[9] sentencing

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1. Garnes v. State, 231 N.E.3d 239, 243 n.3 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 310 (Ind. 2024); Cale J. Bradford, *The First Twenty Years of Rule of Evidence 702 and the Current State of Expert Testimony in Indiana*, 48 IND. L. REV. 1115, 1115 (2015); Jeffrey O. Cooper, *Recent Developments in Indiana Evidence Law*, 32 IND. L. REV. 811, 811 (1999).

2. The survey period covers October 1, 2023 through September 30, 2024.

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

4. *See* Colin E. Flora, *2023 Developments in Indiana Evidentiary Practice*, 57 IND. L. REV. 917, 917 (2024) [hereinafter *2023 Survey*].

5. *See* IND. R. APP. P. 65(D)(2); Gerth v. Est. of Bloemer, 240 N.E.3d 702, 706 n.1 (Ind. Ct. App. 2024).

6. Willis v. Ringbauer, No. 23A-PL-1739, 2024 Ind. App. Unpub. LEXIS 56, at *4 n.2 (Ind. Ct. App. Jan. 23, 2024), *trans. denied*, 2024 Ind. LEXIS 307 (Ind. 2024); *see also* Joel Schumm, *Citation Matters: An Updated Guide to Correct Citation Form in Indiana*, 68 RES GESTAE 12, 15 (Dec. 2024). This survey's format does not adhere to the format required by Indiana Appellate Rule 22(A).

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

8. IND. R. EVID. 101(d).

9. IND. R. EVID. 101(d)(2); *In re* Harris, 550 P.3d 116, 129 (Cal. 2024) (surveying state evidentiary rules).

hearings,[10] probation hearings,[11] and in determining "a question of fact preliminary to the admission of evidence, where the court determines admissibility under Rule 104(a)."[12]

Although the evidence rules do not apply to probation hearings, there are still limitations: "a trial court may consider 'any relevant evidence bearing some substantial indicia of reliability'"[13] but "may only admit hearsay evidence . . . when the hearsay evidence bears 'substantial trustworthiness.'"[14] Appellate courts prefer "that a trial court explains on the record why the hearsay is reliable, [but] a failure to do so is not fatal where the record supports such a determination."[15] In review of probation revocation hearings, the Indiana Court of Appeals upheld admission of hearsay testimony corroborated by the declarant's injuries,[16] hearsay statements made to an investigating officer,[17] and the results of a portable breath test.[18]

As with probation hearings, the rules of evidence do not extend to sentencing proceedings. Nevertheless, "the evidence before the trial court must [still] be reliable,"[19] and "'a defendant being sentenced must be given the opportunity to refute any information he claims is inaccurate.'"[20] In *Russell v. State*, the Indiana Supreme Court confronted the question of whether a resentencing court erred by excluding the results of a polygraph test the defendant sought to admit.[21] "In Indiana, polygraph results are generally inadmissible in criminal trials '[b]ecause of their inherent unreliability combined with their likelihood of unduly influencing a jury's decision.'"[22] Looking to guidance from the Georgia Supreme Court, which observed that

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10. IND. R. EVID. 101(d)(2); Russell v. State, 234 N.E.3d 829, 858–59 (Ind. 2024), *cert. denied*, No. 24-5420, 2024 U.S. LEXIS 4406 (U.S. Oct. 21, 2024).

11. IND. R. EVID. 101(d)(2); Peterson v. State, No. 23A-CR-2041, 2024 Ind. App. Unpub. LEXIS 268, at *5–6 (Ind. Ct. App. Mar. 1, 2024).

12. IND. R. EVID. 101(d)(1); *see* Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *13 (Ind. Ct. App. July 15, 2024).

13. Jones v. State, No. 23A-CR-2779, 2024 Ind. App. Unpub. LEXIS 880, at *8 (Ind. Ct. App. July 9, 2024) (quoting Monroe v. State, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009)).

14. Scott v. State, No. 23A-CR-2840, 2024 Ind. App. Unpub. LEXIS 452, at *9–10 (Ind. Ct. App. Apr. 10, 2024) (quoting Reyes v. State, 868 N.E.2d 438, 442 (Ind. 2007)).

15. *Peterson*, 2024 Ind. App. Unpub. LEXIS 268, at *6–7 (citing *Reyes*, 868 N.E.2d at 442); *accord Scott*, 2024 Ind. App. Unpub. LEXIS 452, at *10.

16. Sentell v. State, No. 23A-CR-1862, 2024 Ind. App. Unpub. LEXIS 277, at *5–6 (Ind. Ct. App. Mar. 5, 2024).

17. *Peterson*, 2024 Ind. App. Unpub. LEXIS 268, at *6–7.

18. Whitlock v. State, No. 23A-CR-1485, 2024 Ind. App. Unpub. LEXIS 459, at *6–7 (Ind. Ct. App. Apr. 12, 2024).

19. Wilkie-Carr v. State, No. 23A-CR-779, 2023 Ind. App. Unpub. LEXIS 1347, at *11 (Ind. Ct. App. Nov. 28, 2023) (citing Malenchik v. State, 928 N.E.2d 564, 573–74 (Ind. 2010)).

20. Johnson v. State, No. 24A-CR-32, 2024 Ind. App. Unpub. LEXIS 844, at *13–14 (Ind. Ct. App. June 28, 2024) (quoting Cloum v. State, 779 N.E.2d 84, 92 (Ind. Ct. App. 2002)).

21. Russell v. State, 234 N.E.3d 829, 858–59 (Ind. 2024), *cert. denied*, No. 24-5420, 2024 U.S. LEXIS 4406 (U.S. Oct. 21, 2024).

22. *Id.* at 858 (quoting Smith v. State, 547 N.E.2d 817, 820 (Ind. 1989)) (alteration in original).

introduction of "unstipulated polygraph test results as mitigation evidence" is left to "the trial court [to] exercise its discretion to determine whether those results are sufficiently reliable to be admitted," the Indiana Supreme Court held that it was not error to exclude the polygraph results.[23]

B. Rule 103: Preserving Evidentiary Rulings for Appeal

The method for preserving challenges to evidentiary rulings depends on whether the evidence was admitted or excluded. "Whenever the trial court's evidentiary ruling excludes evidence, a party preserves a challenge to that ruling only if the party 'informs the court of [the] substance [of the evidence] by an offer of proof, unless the substance was apparent from the context.'"[24] If the challenge is to the admission of evidence, then the party seeking exclusion "must lodge a 'contemporaneous objection at the time the evidence is introduced at trial.'"[25] "This procedure not only gives the trial court an opportunity to cure the alleged error, but also can result in 'enormous savings in time, effort and expense to the parties and the court.'"[26]

While the wholesale failure to object to evidence will constitute waiver on appeal,[27] as the survey period reminded, the objection must also be with sufficient specificity to preserve error. In *Jenkins v. State*, the Indiana Court of Appeals deemed a general objection insufficient to comply with the requirements of Rule 103(a)(1) but, preferring to resolve appeals on their merits, analyzed the ultimately unsuccessful challenge.[28] The defendants in *Ortiz v. State* and *Owens v. State* were not afforded the same leniency.[29]

Similarly, an offer of proof must be specific as to the proposed basis for the

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23. *Id.* at 859 (quoting Height v. State, 604 S.E.2d 796, 799 (Ga. 2004)) (formatting and emphasis omitted).

24. Cobb v. State, 222 N.E.3d 373, 388 (Ind. Ct. App. 2023) (quoting IND. R. EVID. 103(a)(2)) (alterations in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024); *see, e.g.*, Dehaai-Johnson v. State, No. 23A-CR-2110, 2024 Ind. App. Unpub. LEXIS 745, *8–9 (Ind. Ct. App. June 13, 2024) (appellate review waived for failure to make offer of proof); Kaluza v. State, No. 24A-CR-130, 2024 Ind. App. Unpub. LEXIS 948, at *12–13 (Ind. Ct. App. July 25, 2024) (same), *trans. denied*, 2024 Ind. LEXIS 626 (Ind. 2024); Ford v. State, No. 24A-CR-12, 2024 Ind. App. Unpub. LEXIS 1217, at *3–5 (Ind. Ct. App. Sep. 16, 2024) (same).

25. A.V. v. State, 228 N.E.3d 504, 508 (Ind. Ct. App. 2024) (quoting Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010)), *reh'g denied*, 2024 Ind. App. LEXIS 141 (Ind. Ct. App. May 23, 2024), *trans. denied*, 2024 Ind. LEXIS 600 (Ind. 2024); IND. R. EVID. 103(a)(1).

26. Ryburn v. State, No. 22A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *18–20 (Ind. Ct. App. Feb. 16, 2024) (alteration in original) (quoting Durden v. State, 99 N.E.3d 645, 651 (Ind. 2018)), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

27. *A.V.*, 228 N.E.3d at 508; *see, e.g.*, Dierckman v. Dierckman, 225 N.E.3d 185, 194 n.5 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 274 (Ind. 2024); Arellano v. State, No. 23A-CT-1884, 2024 Ind. App. Unpub. LEXIS 457, at *7–8 (Ind. Ct. App. Apr. 12, 2024).

28. Jenkins v. State, No. 23A-CR-1033, 2024 Ind. App. Unpub. LEXIS 330, at *11–12 (Ind. Ct. App. Mar. 18, 2024), *trans. denied*, 2024 Ind. LEXIS 377 (Ind. 2024).

29. Ortiz v. State, No. 23A-CR-1252, 2024 Ind. App. Unpub. LEXIS 624, at *7 (Ind. Ct. App. May 21, 2024); Owens v. State, No. 24A-CR-782, 2024 Ind. App. Unpub. LEXIS 1204, at *4 (Ind. Ct. App. Sep. 13, 2024).

evidence's admission. *Noel v. State* exemplified the pitfall in proposing to make an offer of proof on the wrong basis.[30] The proponent of character testimony made an offer of proof asserting that the testimony was reputation testimony under Rule 608(a).[31] On appeal, however, the proponent argued that the trial court erroneously applied the analysis of reputation testimony instead of opinion testimony, also under Rule 608(a).[32] The contradictory positions waived the challenge on appeal.[33]

The survey period also demonstrated that rulings on motions in limine, even when the motion is brought after trial has begun, do not necessarily preserve error.[34] Despite objecting to evidence outside the presence of the jury, the procedure required by the panel in *Finch v. State* was to reissue the same arguments at the time the evidence was sought to be admitted or to have requested a continuing objection at the time of the argument outside the presence of the jury.[35]

C. Rule 104: Conditional Admission of Evidence

Rule 104(b) allows a court to admit evidence on the condition that proof of a necessary fact to its admission will "be introduced later."[36] The survey period reminded that subsequent proof does not always come and an opposing party does not protect its rights to review without seeking remedial measures. In *Fuller v. State*, a challenge based on the failure to ultimately provide foundational evidence was deemed waived because the criminal defendant "never moved to strike [the] testimony on the basis that the State had failed to present the additional proof."[37] The court explained: "Where evidence is admitted subject to being connected up later, and no subsequent motion to strike the evidence is made, any error in the admission of the evidence is waived."[38]

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30. Noel v. State, No. 23A-CR-2457, 2024 Ind. App. Unpub. LEXIS 1180, at *9–11 (Ind. Ct. App. Sep. 10, 2024).

31. *Id.* at *11.

32. *Id.* at *10–11.

33. *Id.* at *11. For distinction between opinion and reputation testimony under Rule 608(a), *see 2023 Survey*, *supra* note 4, at 933–34 (discussing Hayko v. State, 211 N.E.3d 483 (Ind. 2023)).

34. Finch v. State, No. 23A-CR-1394, 2024 Ind. App. Unpub. LEXIS 608, *7–9 (Ind. Ct. App. May 15, 2024), *trans. denied*, 2024 Ind. LEXIS 547 (Ind. 2024).

35. *Id.* at *8–9.

36. IND. R. EVID. 104(b); *see also* Fuller v. State, No. 23A-CR-2842, 2024 Ind. App. Unpub. LEXIS 776, at *9–10 (Ind. Ct. App. June 20, 2024) (citing Granger v. State, 946 N.E.2d 1209, 1215–16 (Ind. Ct. App. 2011)), *trans. denied*, 2024 Ind. LEXIS 545 (Ind. 2024).

37. *Fuller*, 2024 Ind. App. Unpub. LEXIS 776, at *10.

38. *Id.* (quoting *Granger*, 946 N.E.2d at 1215) (quotation marks omitted).

D. Rule 105: Limiting Instructions

Sometimes, evidence may be admissible for a discreet purpose.[39] Under Rule 105, it falls on the court to "restrict the evidence to its proper scope and instruct the jury accordingly."[40] But, as the survey period exemplified, the obligation for a court to issue a limiting instruction is dependent upon a "timely request."[41] When a party timely requests an admonition, "[t]he language of th[e] rule is mandatory."[42] If, however, a party could have but fails to request a limitation on the admission of certain evidence, the evidence is admitted without limitation and may be used accordingly.[43] And the failure to request a limiting instruction "waive[s] any [appellate] claim based on the trial court's failure to provide an admonishment."[44]

E. Rule 106: Completeness Rule

"Rule 106 encompasses the doctrine of completeness."[45] The rule generally allows a party to require the entirety of a document or recording be placed into evidence if any portion is presented by another party.[46] "The purpose of the doctrine of completeness 'is to provide context for otherwise isolated comments when fairness requires it.'"[47] To accomplish that purpose, Rule 106 "is a rule where a party may introduce additional evidence, not a rule under which a party seeks to exclude evidence."[48] "The omitted portions are still subject to the normal rules of admissibility, such that any portions found to be immaterial, irrelevant, or prejudicial must be redacted."[49]

Jackson v. State addressed whether it was error to exclude a portion of a

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39. Perry v. State, No. 23A-PC-544, 2023 Ind. App. Unpub. LEXIS 1346, at *6 (Ind. Ct. App. Nov. 28, 2023) ("It is undisputed that evidence may be admitted for a limited purpose."), *trans. denied*, 2024 Ind. LEXIS 295 (Ind. 2024).

40. IND. R. EVID. 105.

41. *Id.* "Rule 105 does not preclude trial courts from giving a limiting admonition or instruction *sua sponte* as a matter of discretion, but by its plain terms imposes no affirmative duty to do so." Humphrey v. State, 680 N.E.2d 836, 839 (Ind. 1997) (footnotes omitted).

42. Anderson v. State, No. 24A-CR-921, 2024 Ind. App. Unpub. LEXIS 1187, at *9 (Ind. Ct. App. Sep. 11, 2024).

43. *Perry*, 2023 Ind. App. Unpub. LEXIS 1346, at *6.

44. Gordillo-Cansigno v. State, No. 23A-CR-1352, 2024 Ind. App. Unpub. LEXIS 216, at *11–12 (Ind. Ct. App. Feb. 23, 2024) (citing IND. R. EVID. 105; Small v. State, 736 N.E.2d 742, 746 (Ind. 2000)), *trans. denied*, 2024 Ind. LEXIS 391 (Ind. 2024).

45. Hollifield v. State, No. 23A-CR-1014, 2023 Ind. App. Unpub. LEXIS 1379, at *12 (Ind. Ct. App. Dec. 1, 2023).

46. IND. R. EVID. 617(a); Douglas v. State, No. 23A-CR-1670, 2024 Ind. App. Unpub. LEXIS 98, at *11 n.1 (Ind. Ct. App. Jan. 30, 2024) (quoting Sweeney v. State, 704 N.E.2d 86, 110 (Ind. 1998)), *trans. denied*, 2024 Ind. LEXIS 304 (Ind. 2024).

47. Jackson v. State, 222 N.E.3d 390, 404 (Ind. Ct. App. 2023) (quoting Sanders v. State, 840 N.E.2d 319, 323 (Ind. 2006)).

48. *Hollifield*, 2023 Ind. App. Unpub. LEXIS 1379, at *12.

49. Shannon v. State, No. 23A-CR-2744, 2024 Ind. App. Unpub. LEXIS 1135, at *7–8 (Ind. Ct. App. Aug. 29, 2024).

recording following the completion of an officer's interview of a criminal defendant when the rest of the recording was admitted.[50] The Indiana Court of Appeals concluded that there was no error for two reasons. First, the omitted portion of the video, which demonstrated the defendant "talking to himself about the incident,"[51] was not part of the interview because it occurred only after the interview had concluded.[52] And second, the trial court indicated that the defendant could "present that portion of the recording in his case-in-chief" if he desired to do so.[53] Because the defendant did not choose to do so, he could not establish reversible error.[54]

II. JUDICIAL NOTICE: RULE 201

The doctrine of judicial notice, embodied in Rule 201, empowers courts to establish as true certain "matters of common and general knowledge" and about which there can be no "reasonable dispute" without requiring unnecessary formalities or obliging courts to "pretend to be more ignorant than the rest of mankind."[55] "'[T]he ultimate purpose of judicial notice is efficient consideration of uncontroversial facts . . . .'"[56] The survey period revealed a handful of notable aspects of judicial notice and provided further examples of when judicial notice is appropriate.

The survey period showed, on appeal, if the substance of a trial court's ruling makes clear that certain records were judicially noticed, the absence of a specific statement that the trial court has taken judicial notice will not prevent an Indiana appellate court from considering the judicially noticed materials in review of the underlying ruling.[57] Another point addressed during the survey period was that a challenge to overly expansive use of judicial notice will not be well taken on an appeal from a probation revocation hearing because "the flexibility of probation revocation procedures [makes] strict rules of evidence" inapplicable.[58]

Indiana appellate courts also approved use of judicial notice in the following circumstances: "house bills, public laws, joint resolutions, and other related

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50. *Jackson*, 222 N.E.3d at 403–04.

51. *Id.* at 404 (citation and quotation marks omitted).

52. *Id.* ("Detective Shaffer did not leave and return. Rather, he completed his questioning and left.").

53. *Id.*

54. *Id.*

55. Page v. State, 139 N.E. 143, 144 (Ind. 1923) (citation and quotation marks omitted); IND. R. EVID. 201(a)(1)(A); *see also* Wachstetter v. State, 99 Ind. 290, 299 (1885) ("It is not reasonable to presume that courts or juries can be ignorant of a fact so well and widely known . . . .").

56. *In re* I.S., No. 23A-JC-1097, 2023 Ind. App. Unpub. LEXIS 1443, at *4 (Ind. Ct. App. Dec. 14, 2023) (quoting Horton v. State, 51 N.E.3d 1154, 1161 (Ind. 2016)) (alteration and ellipsis in original).

57. Chitwood v. Guadagnoli, 230 N.E.3d 932, 937 (Ind. Ct. App. 2024).

58. Holland v. State, No. 23A-CR-756, 2023 Ind. App. Unpub. LEXIS 1458, at *5 n.1 (Ind. Ct. App. Dec. 15, 2023).

source materials" cited in a brief;[59] notice of the fact of a criminal charge, but not the substance of the allegations;[60] records of another Indiana court;[61] prior order by same court awarding custody of child to father based on violence between child and mother;[62] records from CHINS cases involving a mother's other children;[63] existence of the federal-court PACER docket system;[64] order in a related case;[65] other criminal cases involving one or more parties;[66] and the trial setting of a case involving one of the lawyers to a proceeding.[67]

Easily the most-common use of judicial notice by Indiana appellate courts was to remedy deficiencies in the appellate record.[68] The ability for such notice is not, however, a panacea. As the Indiana Court of Appeals made clear in *Smith v. State*: "'[J]udicial notice may not be used on appeal to fill evidentiary gaps in the trial record.' [The court] will not take judicial notice of [a] prior conviction to satisfy the State's burden of showing [a defendant] is a sex offender required to register as such."[69]

There was one additional opinion of note, in which the Indiana Court of Appeals found a trial court's refusal to take judicial notice was error. *In re H.S.R.* arose from a grant of summary judgment in a child-support proceeding.[70] The mother, resisting summary judgment, requested judicial notice of the related paternity case.[71] The trial court declined to do so because "neither the court nor

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59. Sawlani v. Lake Cnty Assessor, 240 N.E.3d 734, 747 n.18 (Ind. Tax Ct. 2024).

60. *In re* J.P., No. 23A-JC-476, 2023 Ind. App. Unpub. LEXIS 1170, at *14–15 (Ind. Ct. App. Oct. 4, 2023).

61. Turner v. State, No. 23A-MI-90, 2023 Ind. App. Unpub. LEXIS 1162, at *4 n.2 (Ind. Ct. App. Oct. 2, 2023) (citing Christie v. State, 939 N.E.2d 691, 693–94 (Ind. Ct. App. 2011)); *In re* Ale.A., No. 24A-JC-790, 2024 Ind. App. Unpub. LEXIS 1230, at *10 n.1 (Ind. Ct. App. Sept. 19, 2024).

62. Hoover v. Ferrell, No. 23A-DR-1116, 2023 Ind. App. Unpub. LEXIS 1271, at *11 (Ind. Ct. App. Oct. 31, 2023).

63. *In re* T.S., No. 23A-JT-2295, 2024 Ind. App. Unpub. LEXIS 403, at *24 n.2 (Ind. Ct. App. Mar. 28, 2024) (citing IND. R. EVID. 201(a)(2)(C)); *but see In re* J.P., No. 23A-JT-3003, 2024 Ind. App. Unpub. LEXIS 635, at *4 n.2 (Ind. Ct. App. May 23, 2024) (declining to take judicial notice of CHINS proceedings), *trans. denied*, 2024 Ind. LEXIS 569 (Ind. 2024).

64. Sisk v. State, No. 23A-CR-1834, 2023 Ind. App. Unpub. LEXIS 1370, at *9 n.4 (Ind. Ct. App. Nov. 30, 2023).

65. M.W. v. H.Y., 230 N.E.3d 359, 361 n.2 (Ind. Ct. App. 2024).

66. Kelly v. State, No. 23A-CR-2424, 2024 Ind. App. Unpub. LEXIS 357, at *4 n.1 (Ind. Ct. App. Mar. 21, 2024) (citing IND. R. EVID. 201(a)(2)(c)); *In re* I.S., No. 23A-JC-1097, 2023 Ind. App. Unpub. LEXIS 1443, at *4–8 (Ind. Ct. App. Dec. 14, 2023).

67. Swindler v. Swindler, No. 24A-DN-71, 2024 Ind. App. Unpub. LEXIS 1008, at *12 n.6 (Ind. Ct. App. Aug. 6, 2024) (citing IND. R. EVID. 201(a)(2)(c)).

68. *See, e.g.*, *In re* A.L., 223 N.E.3d 1126, 1135–36 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 194 (Ind. 2024); Gosnell v. Gosnell, No. 23A-PL-2436, 2024 Ind. App. Unpub. LEXIS 542, at *3 n.1, *4 n.2, *7 n.3, *8 n.4, n.5, *14 n.7, *22 n.8 (Ind. Ct. App. Apr. 30, 2024).

69. Smith v. State, No. 24A-CR-153, 2024 Ind. App. Unpub. LEXIS 874, at *3–4 (Ind. Ct. App. July 8, 2024) (quoting Banks v. Banks, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012)).

70. *In re* H.S.R., 233 N.E.3d 490, 491 (Ind. Ct. App. 2024), *trans. denied*, 238 N.E.3d 1290 (Ind. 2024).

71. *Id.* at 493.

the court staff were able to locate" the case.[72] The Indiana Court of Appeals observed: "Even if the trial court was unable to locate the file for the [ ] Paternity Case, the chronological case summary ('CCS') was still available. Accordingly, the trial court should have taken judicial notice of the CCS in the [ ] Paternity Case."[73]

III. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

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

"Evidence is relevant if it has 'any tendency to make a fact more or less probable' and is 'of consequence' in resolving the issue. If evidence is not relevant, it is inadmissible."[74] "[T]he standard for relevant evidence is a liberal one under Rule 401"[75] and presents "'a low bar.'"[76] During the survey period, two published opinions of the Indiana Court of Appeals provided useful insight into what is and is not relevant evidence.

Cobb v. State found phone calls from a criminal defendant to a witness that could be interpreted as requesting the witness alter her testimony were relevant because "[a]ny testimony tending to show an accused's attempt to conceal implicating evidence or to manufacture exculpatory evidence may be considered by the trier of fact as relevant."[77]

Garnes v. State affirmed exclusion of irrelevant evidence.[78] There, a criminal defendant sought to admit evidence of a guilty verdict for murder against a defendant in a related action.[79] The intention was "'to show that someone else' murdered" the victim.[80] The Indiana Court of Appeals rejected that attempt, extending to this circumstance precedent preventing the prosecution from using the conviction of a co-defendant and precedent that "make improper any attempt by a defendant to disclose the previous conviction or guilty plea of a co-defendant in hopes of establishing his innocence of the

72. *Id.* (formatting omitted).

73. *Id.* at 496 (footnote and citation omitted).

74. Garnes v. State, 231 N.E.3d 239, 243 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 401; citing IND. R. EVID. 402) (footnote omitted), *trans. denied*, 2024 Ind. LEXIS 310 (Ind. 2024).

75. Hendrickson v. State, No. 23A-CR-999, 2024 Ind. App. Unpub. LEXIS 120, at *10 (Ind. Ct. App. Feb. 5, 2024) (quoting Jackson v. State, 712 N.E.2d 986, 988 (Ind. 1999)) (quotation marks omitted), *trans. denied*, 2024 Ind. LEXIS 245 (Ind. 2024).

76. Robinson v. State, No. 23A-CR-400, 2023 Ind. App. Unpub. LEXIS 1274, at *7–8 (Ind. Ct. App. Oct. 31, 2023) (quoting Snow v. State, 77 N.E.3d 173, 177 (Ind. 2017)).

77. Cobb v. State, 222 N.E.3d 373, 387 (Ind. Ct. App. 2023) (quoting Grimes v. State, 450 N.E.2d 512, 521 (Ind. 1983)) (quotation marks omitted; second alteration in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024).

78. *Garnes*, 231 N.E.3d at 242–44.

79. *Id.* at 242–43.

80. *Id.*

crime charged."[81]

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

Relevance is a threshold determination, in so much as irrelevant evidence is *per se* inadmissible,[82] but the mere fact that evidence is relevant does not guarantee its admissibility. "Under Rule 403, 'relevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.'"[83] "Because 'all relevant evidence is "inherently prejudicial" in a criminal prosecution,' the weighing test under Evidence Rule 403 'boils down to a balance of probative value against the likely unfair prejudicial impact . . . the evidence may have on the jury.'"[84]

Two published opinions from the Indiana Court of Appeals provide particular insight into application of Rule 403 balancing. In *Jackson v. State*, the court affirmed admission of images depicting the victim who was still suffering the effects of a stabbing despite other testimony describing the victim's condition.[85] The decision adhered to prior precedent recognizing "that [g]enerally, photographs that depict a victim's injuries or demonstrate the testimony of a witness are admissible. Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally."[86]

In the other opinion, *Cobb v. State*, the court affirmed admission of jail phone calls that "reasonably indicate[d] that [the defendant] was conscious of his guilt and trying to manufacture exculpatory testimony."[87] In doing so, the court rejected the argument that the admission unfairly informed the jury that the defendant "had been incarcerated."[88] The appellate panel observed that the defendant cited "to no caselaw regarding the risk of prejudice arising from the jury's awareness that the accused was at one point incarcerated."[89] Authority applying Federal Rule 403 has found that the prejudice of a jury learning a

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81. *Id.* at 243 (quoting Jefferson v. State, 399 N.E.2d 816, 825 (Ind. Ct. App. 1980)) (quotation marks omitted). Despite the cited authority predating adoption of the Indiana Rules of Evidence, the cases remain authoritative. *Id.* at 243 n.3.

82. IND. R. EVID. 402.

83. Blattert v. State, 241 N.E.3d 29, 37 (Ind. Ct. App. 2024) (quoting Snow v. State, 77 N.E.3d 173, 179 (Ind. 2017)) (ellipsis in original).

84. Cobb v. State, 222 N.E.3d 373, 387 (Ind. Ct. App. 2023) (quoting Hall v. State, 177 N.E.3d 1183, 1194 (Ind. 2021)) (ellipsis in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024).

85. Jackson v. State, 222 N.E.3d 390, 403 (Ind. Ct. App. 2023).

86. *Id.* (quoting Jackson v. State, 973 N.E.2d 1123, 1127 (Ind. Ct. App. 2012)) (alteration in original; quotation marks omitted).

87. *Cobb*, 222 N.E.3d at 387.

88. *Id.*

89. *Id.*

criminal defendant had been incarcerated is "slight."[90]

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

Rule 404, like Rule 403, acts to exclude otherwise relevant evidence.[91] Subdivision (b) generally prohibits use of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[92] "Evidence Rule 404(b) was 'designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so called "forbidden inference."'"[93] Rule 404(b), however, only excludes evidence used for the forbidden inference.[94]

During the survey period, in published opinions, the Indiana Court of Appeals approved admission into evidence of other criminal offenses in the following circumstances: text messages "to rebut [the defendant]'s claim of self-defense and show his motive and intent;"[95] social-media messages arranging uncharged drug deals that were subject to a limiting instruction;[96] and introduction of an arrest warrant used to establish motive.[97]

D. Rule 407: Subsequent Remedial Measures

Unless offered for a non-prohibited purpose, evidence of subsequent remedial measures may not be admitted "to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction."[98] "Among the policies underlying [Rule 407] is a concern that admitting such evidence would 'deter a party from taking action that will prevent future injuries.'"[99] The Indiana Supreme Court addressed application of the rule in *Pennington v. Memorial Hospital of South Bend, Inc*.[100] In a classic application of the rule, the court affirmed exclusion of photographs taken of a

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90. United States v. Obi, 239 F.3d 662, 668 (4th Cir. 2001); *see also* United States v. Allee, 299 F.3d 996, 1003 (8th Cir. 2002).

91. IND. R. EVID. 404; IND. R. EVID. 403.

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

93. Pittman v. State, 234 N.E.3d 874, 885 (Ind. Ct. App. 2024) (quoting Hicks v. State, 690 N.E.2d 215, 218–19 (Ind. 1997)).

94. Hardiman v. State, 222 N.E.3d 1049, 1056 (Ind. Ct. App. 2023) (citation and quotation marks omitted), *trans. denied*, 232 N.E.3d 639 (Ind. 2024); *see also* IND. R. EVID. 404(b)(2); Kendall v. State, 225 N.E.3d 794, 797 (Ind. Ct. App. 2023).

95. *Hardiman*, 222 N.E.3d at 1056.

96. Doyle v. State, 223 N.E.3d 1113, 1123–24 (Ind. Ct. App. 2023).

97. *Kendall*, 225 N.E.3d at 797.

98. IND. R. EVID. 407.

99. Pennington v. Mem'l Hosp. of South Bend, Inc., 223 N.E.3d 1086, 1096 (Ind. 2024) (citation omitted).

100. *Id.* at 1095–96.

pool a year after the personal-injury plaintiff was injured while swimming.[101] The photographs "show[ed] a subsequently installed floating lane-divider and padding on the exposed end of the wing-wall."[102] The court found exclusion warranted under Rule 407 because "[a] factfinder could infer that this apparatus was added to prevent further injuries—an action that could be interpreted as an implicit admission that the pool was previously unsafe."[103]

E. Rule 412: Victims' Sexual History

Rule 412, in conjunction with Indiana's Rape Shield Statute,[104] "reflects the principle that '[i]nquiry into a victim's prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense.'"[105] The survey period showed that "the insight of Indiana's Rape Shield Statute," reflected in Rule 412,[106] may provide some guidance in discovery. *Plouch v. State* saw the Indiana Court of Appeals affirm a trial court's conclusion to limit discovery under Indiana Trial Rule 26(C) despite the trial court relying on "the principles supporting" the Rape Shield Statute to do so.[107] In *Frye v. State*, however, a separate appellate panel[108] found invocation of rape-shield protections to limit discovery went too far when it became "tantamount to allowing the State to use our Rape Shield provisions 'both as a shield and a sword.'"[109]

The Indiana Court of Appeals also applied the Rape Shield Rule and Rape Shield Statute to prohibit: evidence that the victim "had allegedly participated in a game that had a possible sexual dimension";[110] evidence of a DCS investigation that would show the victim "allegedly engaged in other sexual behavior with someone other than" the defendant;[111] and evidence relating to whether the victim "had ever: (1) 'lied to her prior sexual partners about her age'; (2) 'traded sexual favors for drugs with her prior partners'; and (3)

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101. *Id.*

102. *Id.* at 1095.

103. *Id.*

104. State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) ("Indiana Evidence Rule 412, the Rape Shield Rule, incorporates the basic principles of Indiana Code § 35-37-4-4." (footnotes omitted)); Francum v. State, No. 23A-CR-1227, 2024 Ind. App. Unpub. LEXIS 680, at *5 (Ind. Ct. App. May 31, 2024), *trans. denied*, 2024 Ind. LEXIS 516 (Ind. 2024).

105. Himes v. State, No. 22A-CR-3011, 2023 Ind. App. Unpub. LEXIS 1372, at *8 (Ind. Ct. App. Nov. 30, 2023) (quoting Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997)) (alteration in original), *trans. denied*, 2024 Ind. LEXIS 121 (Ind. 2024).

106. *Francum*, 2024 Ind. App. Unpub. LEXIS 680, at *5.

107. Plouch v. State, 222 N.E.3d 357, 360–61 (Ind. Ct. App. 2023) ("During a hearing on Plouch's objection, the trial court stated that while the Rape Shield Statute does not operate as a privilege to preclude discovery, the principles supporting it are consistent with Ind. Trial Rule 26, which allows a court to limit discovery to protect a person's privacy.").

108. Judge Melissa May, who authored *Frye* was a member of the panel in *Plouch*.

109. Frye v. State, 240 N.E.3d 727, 734 (Ind. Ct. App. 2024).

110. *Himes*, 2024 Ind. App. Unpub. LEXIS 1372, at *5–10.

111. *Francum*, 2024 Ind. App. Unpub. LEXIS 680, at *4–6.

'claimed she had sex with other people.'"[112]

IV. PRIVILEGES: RULES 501 & 502

Rules 501 and 502 generally serve to facilitate and preserve privileges.[113] In Indiana, "[a] grant of privilege and the scope of that privilege are policy choices of the Legislature."[114] That allocation of power led the Indiana Court of Appeals to determine that a "trial court was not empowered to create a common law privilege that materials withheld in a FOIA request are non-discoverable due to a federal interest."[115] The flip side is also true: Indiana courts must respect statutory privileges. That fact led the Indiana Court of Appeals to affirm application of the privilege of Indiana Code section 31-33-18-1 to records of the Indiana Department of Child Services.[116]

Another privilege that was the subject of caselaw is the attorney-client privilege. Generally, the privilege must be waived in order to allow invasion.[117] Nevertheless, the Indiana Court of Appeals affirmed the invasion of the privilege by applying the crime-fraud exception of Indiana Rule of Professional Conduct 1.6(b)(2) because the communications "were made for the purpose of perpetrating a fraud on the State and trial court and for the purpose of committing the crime of obstruction of justice."[118]

In addition to generally applying rules of privilege, subject to exceptions, Rule 501(d) prohibits informing juries of the exercises of privileges.[119] The Indiana Court of Appeals addressed the propriety of how a trial court handled invocation of the Fifth Amendment privilege against self-incrimination in *Irwin v. State*.[120] Once the privilege is invoked, Rule 501(d) prevents the judge or counsel from commenting on the privilege and the proceedings are to be conducted in a manner to allow invocation of the "privilege without the jury's knowledge."[121] The criminal defendant sought to have the jury instructed

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112. F.H. v. State, No. 23A-JV-2733, 2024 Ind. App. Unpub. LEXIS 650, at *5 (Ind. Ct. App. May 28, 2024).

113. IND. R. EVID. 501 & 502.

114. Goalsetter Sys., Inc. v. Est. of Gerwels, 230 N.E.3d 341, 346 (Ind. Ct. App. 2024) (quoting State v. Int'l Bus. Machines Corp., 964 N.E.2d 206, 210 (Ind. 2012)) (alteration in original; quotation marks omitted), *trans. denied*, 2024 Ind. LEXIS 393 (Ind. 2024); *see also* Pruitt v. State, 243 N.E.3d 416, 419–20 (Ind. Ct. App. 2024).

115. *Id.* at 348.

116. *Pruitt*, 243 N.E.3d at 419–20.

117. *See* Browne v. Waldo, No. 2:20-CV-196 JD, 2024 U.S. Dist. LEXIS 20422, at *11–12 (N.D. Ind. Feb. 6, 2024) (citing P.T. Buntin, M.D., P.C. v. Becker, 727 N.E.2d 734, 740 (Ind. Ct. App. 2000)).

118. Brook v. State, 221 N.E.3d 1239, 1253–55 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 107 (Ind. 2024).

119. IND. R. EVID. 501.

120. Irwin v. State, 229 N.E.3d 567, 572–73 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 381 (Ind. 2024).

121. *Id.* at 572 (quoting IND. R. EVID. 501(d)(1); IND. R. EVID. 501(d)(2)).

regarding a witness's invocation of the Fifth Amendment privilege.[122] The appellate court rejected the argument that its precedent on circumstances in which a witness may be called to the stand despite the expectation that the privilege will be invoked mandated the giving of the desired instruction and otherwise found that the matter of instructing the jury was within the sound discretion of the trial court.[123]

V. WITNESSES: RULES 601 THROUGH 617

A. Rule 604: Oaths or Affirmations of Interpreters

Indiana law recognizes the indispensable role an interpreter plays for non-English speaking persons involved in the justice system.[124] Rule 604 requires "[a]n interpreter [to] be qualified and [to] give an oath or affirmation to make a true translation."[125] Indiana trial courts are tasked with "examin[ing] an interpreter on the record to confirm the interpreter is qualified and 'should also administer an oath or affirmation that the interpreter will make a true translation.'"[126] "Indiana precedent has 'long held' the form and manner of the examination of the interpreter is left to the trial court's discretion."[127] The survey period provided two examples as to what is an adequate examination and administration of oath by a trial court. In *Shar v. State*, the Indiana Court of Appeals approved of the following colloquy:

> THE COURT: And Mr. Yu, can you please raise your right hand? And do you swear or affirm under penalties for perjury that you will accurately [translate] in this case all the questions and the statements made to the defendant or the witnesses, as well as their responses?
>
> THE INTERPRETER: Yes, I do, Your Honor.[128]

Ceron v. State also provided an important example because it showed an acceptable means of rectifying the initial error to examine a translator and administer an oath.[129] There, upon discovering that the interpreter had not been administered an oath, the trial court immediately swore in the interpreter and

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122. *Id.*

123. *Id.* at 572–73 (discussing Martin v. State, 179 N.E.3d 1060, 1068 (Ind. Ct. App. 2021)).

124. Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989).

125. IND. R. EVID. 604.

126. Shar v. State, No. 23A-CR-1596, 2024 Ind. App. Unpub. LEXIS 997, at *6 (Ind. Ct. App. July 31, 2024) (quoting Mariscal v. State, 687 N.E.2d 378, 382 (Ind. Ct. App. 1997)), *trans. denied*, 2024 Ind. LEXIS 665 (Ind. 2024).

127. *Id.* (quoting Cruz Angeles v. State, 751 N.E.2d 790, 795 (Ind. Ct. App. 2001)).

128. *Id.* at *6–7 (alteration in original; citation omitted).

129. Ceron v. State, No. 23A-PC-1444, 2024 Ind. App. Unpub. LEXIS 405, at *18–22 (Ind. Ct. App. Apr. 1, 2024), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

examined the interpreter by asking whether "the translations to that point had been 'honest[]' and 'fair[] . . . [a]s if [they] had been under oath.'"[130]

B. Rule 609: Can Error Be Preserved Without Accused Testifying?

Rule 609 governs the use of prior criminal convictions for impeachment.[131] When applied to stale convictions, in which ten years have passed since the later of the conviction or the release from the resulting incarceration, Rule 609 carries a "presumption against admissibility."[132] The survey period highlighted an important, unresolved question in applying Rule 609. In the non-precedential opinion of *Douglass v. State*, the Indiana Court of Appeals acknowledged that neither the court of appeals nor the Indiana Supreme Court have answered whether a criminal defendant waives appellate review of a trial court's decision to admit evidence under Rule 609 if the accused never testifies.[133] The appellate briefing highlighted the separate paths taken by the Supreme Court of the United States and some states.[134] The Indiana Supreme Court has denied transfer, so this question will remain for another day.

C. Rule 611: Courts Retain Discretion to Allow Recalling of Witnesses

Rule 611 reflects the broad powers and discretion afforded to trial courts to manage the presentation of evidence and examination of witnesses.[135] That power not only extends to matters such as allowing leading questions to certain witnesses[136] and consolidating evidentiary hearings,[137] but, as the Indiana

130. *Id.* at *20 (alterations in original; citation omitted).

131. IND. R. EVID. 609.

132. Allman v. State, No. 23A-CR-75, 2023 Ind. App. Unpub. LEXIS 1537, at *20 (Ind. Ct. App. Dec. 28, 2023) (citing Schwestak v. State, 674 N.E.2d 962, 964 (Ind. 1996)), *trans. denied*, 2024 Ind. LEXIS 196 (Ind. 2024).

133. Douglass v. State, No. 23A-CR-2766, 2024 Ind. App. Unpub. LEXIS 1199, at *26 (Ind. Ct. App. Sep. 12, 2024), *trans. denied*, 2025 Ind. LEXIS 22 (Ind. 2025).

134. Brief of Appellant at 39–42, Douglass v. State, No. 23A-CR-2766 (Ind. Ct. App. May 21, 2024) (*comparing* Luce v. United States, 469 U.S. 38 (1984) (requiring witness to testify), *and* State v. Hester, 703 P.2d 518 (Ariz. Ct. App. 1985), *and* Smith v. State, 778 S.W.2d 947 (Ark. 1989), *and* People v. Collins, 722 P.2d 173 (Cal. 1986), *with* People v. Contreras, 485 N.Y.S.2d 261 (1985), *and* State v. McBride, 517 A.2d 152 (N.J. Super. Ct. App. Div. 1986), *and* State v. Ford, 381 N.W.2d 30 (Minn. Ct. App. 1986)); *see also* Edward L. Raymond, Jr., *Requirement That Defendant in State Court Testify in Order to Preserve Alleged Trial Error in Rulings on Admissibility of Prior Conviction Impeachment Evidence under Uniform Rule of Evidence 609, or Similar Provision or Holding – Post-*Luce *Cases*, 80 A.L.R.4TH 1028 (1990).

135. IND. R. EVID. 611; J.K. v. State, No. 23A-JV-1772, 2024 Ind. App. Unpub. LEXIS 241, at *8 (Ind. Ct. App. Feb. 27, 2024) (citing *In re* S.E., 15 N.E.3d 37, 44 (Ind. Ct. App. 2014)).

136. IND. R. EVID. 611(c); *see, e.g.*, Moredock v. State, No. 23A-CR-2123, 2024 Ind. App. Unpub. LEXIS 536, at *16–17 (Ind. Ct. App. Apr. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 441 (Ind. 2024); Orshonsky v. State, No. 23A-CR-982, 2024 Ind. App. Unpub. LEXIS 669, at *8–18 (Ind. Ct. App. May 29, 2024), *trans. denied*, 2024 Ind. LEXIS 554 (Ind. 2024).

137. *J.K.*, 2024 Ind. App. Unpub. LEXIS 241, at *7–10.

Supreme Court reaffirmed, also to the power to recall witnesses.[138] Adhering to precedent recognizing the power of courts to allow recalling witness "to correct or add testimony due to mistake or oversight,"[139] the court found no error in recalling a forensic biologist "'to provide additional explanation' about DNA recovered from . . . the crime scene."[140]

D. Rule 612: Refreshing a Witness's Recollection

"Indiana Evidence Rule 612(a) allows a questioner to refresh a witness's memory using a writing or similar device after the witness indicates she has no memory of the information sought."[141] Because "[t]he item used to refresh the witness's memory does not need to have been written by the witness," the Indiana Court of Appeals found it was error for a trial court to prevent an attempt at refreshing a witness's recollection with the letter of another person.[142] Similarly, it was not error to allow use of a statement given by the witness to a detective to refresh the witness's recollection.[143] But, to engage in refreshing a witness's recollection, a proper foundation must first be laid. That failure, in *Portillo v. State*, led the Indiana Court of Appeals to find Rule 612 was not satisfied where the witness "testified positively," albeit in contradiction to a prior statement.[144]

E. Rule 613: Once a Witness Is Impeached, Further ImpeachmentI May Be Limited

"The Indiana Rules of Evidence allow the impeachment of a witness, including through the use of extrinsic evidence."[145] Rule 613 governs the use of extrinsic evidence for impeachment.[146] In *Hall v. State*, the Indiana Court of Appeals affirmed a trial court's prohibiting of questions that would have served to further elicit evidence impeaching a witness.[147] On examination, the witness testified that two events had not occurred.[148] Later, testimony was elicited from

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138. Hancz-Barron v. State, 235 N.E.3d 1237, 1245–47 (Ind. 2024).

139. *Id.* at 1245 (quoting Boyd v. State, 494 N.E.2d 284, 302 (Ind. 1986)) (quotation marks omitted).

140. *Id.* at 1246; *but cf. In re* A.L., 223 N.E.3d 1126, 1136 (Ind. Ct. App. 2023) (affirming refusal to allow recalling of witness), *trans. denied*, 2024 Ind. LEXIS 194 (Ind. 2024).

141. *A.L.*, 223 N.E.3d at 1135.

142. *Id.*

143. Yarbrough v. State, No. 23A-CR-2188, 2024 Ind. App. Unpub. LEXIS 493, at *3–5 (Ind. Ct. App. Apr. 24, 2024), *trans. denied*, 2024 Ind. LEXIS 469 (Ind. 2024).

144. Portillo v. State, No. 24A-CR-240, 2024 Ind. App. Unpub. LEXIS 815, at *6–8 (Ind. Ct. App. June 26, 2024).

145. Hall v. State, 231 N.E.3d 868, 873 (Ind. Ct. App. 2024) (citing IND. R. EVID. 607; IND. R. EVID. 613), *trans. denied*, 2024 Ind. LEXIS 395 (Ind. 2024) (citation omitted).

146. *Id.*

147. *Id.* at 873–74.

148. *Id.* at 874.

a detective that the witness had told him that both events had occurred.[149] "At th[at] point, the impeachment of [the witness] was complete because [the detective]'s testimony about [the witness]'s statements during the investigation directly contradicted her trial testimony."[150] Further testimony regarding the witness's actions was unnecessary for the purpose of impeachment.[151]

F. Rule 615: Separation of Witnesses

"Indiana Evidence Rule 615 allows litigants to move for separation of witnesses so they cannot hear each other's testimony."[152] The rule received consideration by the Indiana Court of Appeals in three memoranda decisions. In *Land v. State*, the court observed that the failure to include a separation order in the record made it "impossible" to determine whether coaching of a witness during a recess violated the order.[153] Notably, with respect to a criminal defendant, the Sixth Amendment prevents a trial court from prohibiting consultation between the defendant and counsel during an overnight recess but may allow it during a brief recess in testimony.[154]

Gilbert v. State concerned the propriety of requesting a separation of witnesses after testimony had begun.[155] The court observed: "Evidence Rule 615 does not address when such a motion must be made, although, ideally, it should be made before any testimony has been offered. Nevertheless, making a separation of witness motion after testimony has begun 'may be permissible as long as basic notions of fundamental fairness are not offended.'"[156] Despite the mandatory language of Rule 615, in the absence of any prejudice, the court found no error in the trial court denying a motion for separation of witnesses made after the first witness has testified.[157]

Easily overlooked, but arguably the most significant Rule 615 decision was *Estate of Lease v. Estate of Hershey*.[158] The contention on appeal was that the trial court exceeded its authority under Rule 615 by not only ordering exclusion of non-party witnesses from the courtroom but by taking the further step of prohibiting discussion of the matter between witnesses.[159] To many, the panel

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149. *Id.*

150. *Id.*

151. *Id.*

152. Griffith v. State, 59 N.E.3d 947, 956 (Ind. 2016).

153. Land v. State, No. 22A-CR-2863, 2023 Ind. App. Unpub. LEXIS 1389, at *15–16 (Ind. Ct. App. Dec. 6, 2023), *trans. denied*, 2024 Ind. LEXIS 150 (Ind. 2024).

154. *See* Geders v. United States, 425 U.S. 80 (1976); Perry v. Leeke, 488 U.S. 272 (1989); Frierson v. State, 543 N.E.2d 669, 672–73 (Ind. Ct. App. 1989).

155. Gilbert v. State, No. 23A-CR-206, 2023 Ind. App. Unpub. LEXIS 1345, at *10–11 (Ind. Ct. App. Nov. 28, 2023), *trans. denied*, 2024 Ind. LEXIS 127 (Ind. Feb. 22, 2024).

156. *Id.* at *10 (quoting *In re* K.L., 137 N.E.3d 301, 306 (Ind. Ct. App. 2019)).

157. *Id.* at *10–11.

158. Estate of Lease v. Estate of Hershey, No. 22A-PL-2186, 2023 Ind. App. Unpub. LEXIS 1166, at *29–32 (Ind. Ct. App. Oct. 4, 2023).

159. *Id.*

of the Indiana Court of Appeals included, that challenge seems easily rejected. There is no shortage of authority that supports a judge's power to prevent discussion between witnesses under Rule 615.[160] Indeed, the Committee Commentary to Indiana Evidence Rule 615 from the 1994 enactment specifically states: "Rule 615 should also include conversations conducted outside the courtroom. Witnesses should be restricted from not only being in the courtroom at the same time, but also from discussing the substance of testimony which is being presented to the trier of fact."[161]

The problem arises because the rule was amended in September 2013.[162] Although the amendment is "substantially similar,"[163] there is one significant distinction between the 1994 iteration and the amended language. In relevant part, the pre-amendment language read: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion."[164] The post-2014 language no longer mentions discussions between witnesses: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony."[165]

Despite the Appellants' Brief addressing the amendment,[166] the panel's opinion did not.[167] Instead, the panel found the extension of the separation beyond the courtroom door was both consistent with the purpose of Rule 615 and was "simply" an extension of "the same prohibitions within the courtroom to discussions that may occur outside the courtroom while the trial was pending."[168] While that conclusion is consistent with the expansive view of separation orders espoused by some scholars[169] and the assertion by Judge Robert Miller's Indiana Evidence treatise that "[t]he conduct addressed by a witness separation order traditionally has been based on custom rather than the language of any rule,"[170] it is inconsistent with the presumption that a significant

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160. *See*, *e.g.*, 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 615.102 (3d ed. 2007); J. ALEXANDER TANFORD, INDIANA TRIAL EVIDENCE MANUAL § 33.02 (2022) ("The order should include a prohibition against discussing testimony outside the courtroom.").

161. MILLER, *supra* note 160, at 13.

162. *Order Amending Indiana Rules of Evidence*, No. 94S00-1301-MS-30, at 21 (Ind. Sept. 13, 2013), https://web.archive.org/web/20200925190811/https://www.in.gov/judiciary/files/order-rules-2013-0913-evidence.pdf [https://perma.cc/8E5Z-2H3T].

163. 30 JOHN J. DVORSKE, INDIANA LAW ENCYCLOPEDIA., *Witnesses* § 74 (2008 & Supp. 2015).

164. IND. R. EVID. 615 (2013) (emphasis added).

165. IND. R. EVID. 615 (2014).

166. Appellants' Brief at 34–37, Estate of Lease v. Estate of Hershey, No. 22A-PL-2186 (Ind. Ct. App. Dec. 6, 2022).

167. Estate of Lease v. Estate of Hershey, No. 22A-PL-2186, 2023 Ind. App. Unpub. LEXIS 1166, at *29–32 (Ind. Ct. App. Oct. 4, 2023).

168. *Id.* at *30–31.

169. *See* MILLER, *supra* note 160, at § 615.101 n.2; JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 50 (4th ed. 1992).

170. *Id.* at *30–31.

change in language indicates a change in meaning.[171] As a memorandum decision, *Estate of Lease* has not resolved the question.[172]

G. Rule 616: Evidence of Bias Not Always Admissible

"Indiana Evidence Rule 616 explicitly makes 'evidence of bias, prejudice, or interest of the witness for or against any party' relevant and admissible for impeachment purposes, as this evidence can impact the weight of the witness's testimony."[173] In *Keller v. State*, the Indiana Court of Appeals rejected the contention that "evidence of a witness' bias is 'always relevant' at trial because it 'may discredit the witness or affect the weight of the witness' testimony.'"[174] Instead, the alleged bias must be more than "'purely speculative'; it must be grounded in fact."[175] Moreover, as highlighted in *Moyes v. State*, it is not enough that a witness may have a bias or prejudice in general, the bias or prejudice must concern a party to the proceedings.[176]

H. Rule 617: Incomplete Electronic Recordings of Custodial Interrogations

First taking effect in 2011, for the first half-decade of its existence, Rule 617 "received very little attention from Indiana's appellate courts."[177] In more-recent years, Rule 617 has repeatedly drawn discussion in appellate opinions.[178] The rule requires "Electronic Recording" of "Custodial Interrogations"[179] used in support of felony criminal prosecutions.[180] Although the memorandum decision in *Andrade-Guiterrez v. State* did not establish new precedent as to the application of Rule 617, it did highlight an area in need of further clarification

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171. *See* State *ex rel*. Socialist Labor Party v. State Election Bd., 241 N.E.2d 69, 74 (Ind. 1968); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256–60 (2012) (Reenactment Canon); Durbois v. Deutsche Bank Nat'l Tr. Co., 37 F.4th 1053, 1059–60 (5th Cir. 2022) (applying Reenactment Canon to procedural rule).

172. IND. R. APP. P. 65(D)(2).

173. Konopasek v. State, 946 N.E.2d 23, 27–28 (Ind. 2011) (quoting IND. R. EVID. 616).

174. Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *6 (Ind. Ct. App. Jan. 11, 2024) (citation omitted).

175. *Id.* (quoting Tolliver v. State, 922 N.E.2d 1272, 1286 (Ind. Ct. App. 2010)).

176. Moyes v. State, No. 23A-CR-704, 2023 Ind. App. Unpub. LEXIS 1487, at *11–12 (Ind. Ct. App. Dec. 22, 2023).

177. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1063 (2018).

178. *See id.* at 1063–65; Colin E. Flora, *2018 Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 736–38 (2019); Colin E. Flora, *2019 Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 921–22 (2021); Colin E. Flora, *2022 Developments in Indiana Evidentiary Practice*, 56 IND. L. REV. 763, 780–81 (2023).

179. Both "Electronic Recording" and "Custodial Interrogation" are terms defined within the rule. IND. R. EVID. 617(b).

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

that is likely to spawn future appellate argument.[181] The criminal defendant "argue[d that] the recording of his interview violate[d] Rule 617 because the recording was not started until after [the detective] informed Andrade-Gutierrez of his *Pirtle* rights and obtained Andrade-Gutierrez's consent to search his apartment."[182] This, the defendant argued, violated the requirement of Rule 617(c) that "[t]he Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation."[183] The matter was left unresolved because the appellate panel deemed any error harmless.[184] Nevertheless, by way of footnote, the Indiana Court of Appeals provided some guidance for future litigation of the question:

> Although we have found no reported cases discussing what constitutes a "complete" Electronic Recording, when the Indiana Supreme Court issued its order adopting Rule 617, it included a lengthy statement explaining the process and policy behind adding the rule. Neither party cited the Court's order, and given our resolution of this issue, we need not consider the Court's intention behind this aspect of the rule.[185]

Future litigants would be well-served to consult the Indiana Supreme Court's statement.[186] Because transfer to the Indiana Supreme Court was denied, *Andrade-Gutierrez* simply highlights what remains for another day.[187]

VI. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Opinion Testimony by Lay Witnesses

Rule 701 limits non-expert witnesses to opinions that are "(a) rationally based on the witness's perception; and (b) helpful to a clear understanding of

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181. Andrade-Gutierrez v. State, No. 22A-CR-2902, 2023 Ind. App. Unpub. LEXIS 1384, at *22–24 (Ind. Ct. App. Dec. 4, 2023), *trans. denied*, 2024 Ind. LEXIS 167 (Ind. 2024).

182. *Id.* at *23. "*Pirtle* rights" reflect the rights secured by "Article 1, § 11 of the Indiana Constitution, [which requires] 'a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent.'" Meredith v. State, 906 N.E.2d 867, 873 (Ind. 2009) (citations omitted)).

183. IND. R. EVID. 617(C); *Andrade-Gutierrez*, 2023 Ind. App. Unpub. LEXIS 1384, at *23.

184. *Andrade-Gutierrez*, 2023 Ind. App. Unpub. LEXIS 1384, at *23–24. "No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." IND. R. APP. P. 66(A).

185. *Andrade-Guitierrz*, 2023 Ind. App. Unpub. LEXIS 1384, at *23 n.12.

186. *In re* Order Amending Rules of Evidence, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), https://web.archive.org/web/20091119043248/http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-evid617.pdf [https://perma.cc/76R7-3S32]; *see also* Jon Murray, *State Raising the Bar on Taped Interrogations*, INDIANAPOLIS STAR, Sep. 23, 2009, at A1.

187. Andrade-Gutierrez v. State, 2024 Ind. LEXIS 167 (Ind. 2024).

the witness's testimony or to a determination of a fact in issue."[188] During the survey period, the Indiana Court of Appeals affirmed the admission of purely lay witness testimony that a criminal defendant had "shot at" a police-officer witness,[189] and a guardian *ad litem*'s opinion that bruising on a child "appeared to be injuries kids would receive from normal childhood activities."[190]

Unlike its federal counterpart,[191] Indiana Rule 701 allows a middle ground between purely lay opinions and expert opinions subject to Rule 702.[192] Such "[a] 'skilled witness' is a person with a degree of knowledge short of that sufficient to be declared an expert under [ ] Rule 702, but somewhat beyond that possessed by the ordinary jurors."[193] In *Bush v. State*, the Indiana Court of Appeals affirmed admission of a handwriting analyst to opine on whether a criminal defendant had been the actual author of an alibi statement.[194] Notably, under long-standing Indiana precedent, one need not have a special degree of skill or training to offer an opinion on handwriting anyway.[195] The Indiana Court of Appeals also upheld admission of the opinion of a paramedic as to whether an injury was consistent with a blow from a ball bat.[196]

B. Rule 702: Testimony by Expert Witnesses

For opinions that go beyond the limitations of Rule 701, a witness must be qualified as an expert under Rule 702.[197] The most notable decision from the survey period applying Rule 702 is *Zaragoza v. Wexford of Indiana, LLC*.[198] Seeking to resist summary judgment, the plaintiff put forward an "affidavit of a physician deploring the defendants' treatment decisions."[199] The opinion addressed two important applications of Rule 702. The first was the question of

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188. IND. R. EVID. 701; *see also* Ryburn v. State, No. 23A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *20–21 (Ind. Ct. App. Feb. 16, 2024), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

189. Gentry v. State, No. 23A-CR-3048, 2024 Ind. App. Unpub. LEXIS 913, at *5–6 (Ind. Ct. App. July 17, 2024).

190. Deckard v. Deckard, No. 23A-DC-1796, 2024 Ind. App. Unpub. LEXIS 378, at *8–9 (Ind. Ct. App. Mar. 26, 2024), *trans. denied*, 2024 Ind. LEXIS 373 (Ind. 2024).

191. "Federal Rule of Evidence 701 now contains an additional requirement that the testimony 'not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.'" Cain v. Back, 889 N.E.2d 1253, 1258 n.4 (Ind. Ct. App. 2008) (quoting FED. R. EVID. 701).

192. *See* Bush v. State, 243 N.E.3d 405, 414–15 (Ind. Ct. App. 2024).

193. *Id.* at 414 (citation and quotation marks omitted).

194. *Id.* at 415–16.

195. *See id.* at 415 (quoting Spencer v. State, 147 N.E.2d 581, 583 (Ind. 1958)); *see also* IND. R. EVID. 901(b)(2). Handwriting analysts could also be qualified as experts under Rule 702. *Bush*, 243 N.E.3d at 416 n.4 (citing Riley v. State, No. 45A05-1708-CR-1821, 2018 Ind. App. Unpub. LEXIS 613, at *7–13 (Ind. Ct. App. May 25, 2018)).

196. Woods v. State, No. 22A-CR-2980, 2023 Ind. App. Unpub. LEXIS 1318, at *7–10 (Ind. Ct. App. Nov. 15, 2023).

197. IND. R. EVID. 702.

198. Zaragoza v. Wexford of Ind., LLC, 225 N.E.3d 146, 152–53 (Ind. 2024).

199. *Id.* at 149.

what constitutes an adequate expert affidavit at summary judgment.[200] The Indiana Supreme Court instructed:

> At the summary-judgment stage, [ ] an expert need only provide the trial court with enough information to proceed with a reasonable amount of confidence that the principles used to form the opinion are reliable." This does not always require a complete exposition of the expert's methodology. Still, to comply with Rule 702(b) at summary judgment, we would expect a medical expert's affidavit at least to provide enough information to enable the trial court to infer what the standard of care is and in what way the defendant's care fell short.[201]

Because "[t]he affidavit [ ] describe[d], in considerable detail, [the plaintiff]'s medical history, the treatment each doctor provided, and [the expert]'s views on what they should have done differently to comply with the standard of care," the affidavit was sufficient.[202]

The second question was whether the medical expert's opinion required "specialist expertise or experience with" the plaintiff's specific condition.[203] Consistent with precedent, the Indiana Supreme Court reminded that "Indiana case-law has not demanded specialist medical qualifications from experts who possess demonstrable professional knowledge of the relevant medical matters."[204] That reminder stands in contrast to a statement from the Indiana Court of Appeals' subsequent opinion in *Esposito v. Eppley*, which, despite reversing the exclusion of an expert medical affidavit, stated: "Defendants are correct in their contention that the mere fact that Dr. Burres is a physician was not sufficient to qualify him as an expert who possesses sufficient knowledge of the relevant medical matter . . . . "[205] Aside from running contrary to the Indiana Supreme Court's guidance in *Zaragoza*, that portion of *Esposito* is further suspect in light of the fact that Indiana "physicians receive unlimited licenses as to the entire medical field."[206]

Indiana appellate courts also affirmed the admission of numerous other experts during the survey period, including: a "'Risk and Safety Management Consultant' with experience managing 'aquatic facilities'" but who was not an architect or engineer to opine on the safety of a pool design because the claim was against the owner of the pool and not a claim applying an engineering professional's standard of care;[207] a fire marshal's opinion that a fire was started

200. *Id.* at 152–53.
201. *Id.* at 152 (citations omitted).
202. *Id.* at 152–53.
203. *Id.* at 153.
204. *Id.*
205. Esposito v. Eppley, 238 N.E.3d 680, 688 (Ind. Ct. App. 2024).
206. Faulkner v. Markkay of Ind., Inc., 663 N.E.2d 798, 801 (Ind. Ct. App. 1996).
207. Pennington v. Mem'l Hosp. of S. Bend, Inc., 223 N.E.3d 1086, 1095, 1101–02 (Ind. 2024).

by a marijuana cigarette;[208] the testimony of a doctor who specialized in general psychology offered during a civil-commitment proceeding;[209] and testimony establishing evidence of intoxication.[210]

C. Rule 704: Opinion on an Ultimate Issue

Rule 704 generally permits witnesses to testify "in the form of an opinion or inference" even if "it embraces an ultimate issue."[211] The rule serves to eliminate the historical practice that "witnesses were expressly prohibited from testifying about the ultimate issues facing the jury."[212] "Evidence Rule 704(b), however, 'draws a bright-line exception.'"[213] Rule 704(b) prohibits testimony of "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."[214]

The line between what is excluded by Rule 704(b) and what may come in under Rule 704(a) can be difficult to ascertain. This can be particularly problematic in criminal cases, wherein:

> [O]pinion testimony may include "evidence that *leads* to an [incriminating] inference, even if no witness could state [an] opinion with respect to that inference." "But an opinion must stop short of the question of guilt—because under Rule 704(b) and our constitution, that is one 'ultimate issue' that the jury alone must resolve."[215]

The published opinion in *Gillespie v. State* touched upon two of the categories prohibited by Rule 704(b).[216] The category prohibiting opinions as to

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208. Dunigan v. State, No. 24A-CR-83, 2024 Ind. App. Unpub. LEXIS 980, at *3–11 (Ind. Ct. App. July 30, 2024).

209. *In re* Civ. Commitment of N.H., No. 23A-MH-2828, 2024 Ind. App. Unpub. LEXIS 616, at *8–11 (Ind. Ct. App. May 16, 2024).

210. *See, e.g.*, Salgado v. State, No. 22A-CR-2738, 2023 Ind. App. Unpub. LEXIS 1160, at *10–12 (Ind. Ct. App. Oct. 2, 2023); Miller v. State, No. 23A-CR-1391, 2024 Ind. App. Unpub. LEXIS 287, at *9–11 (Ind. Ct. App. Mar. 8, 2024).

211. IND. R. EVID. 704(a).

212. Walker v. Soo Line R.R., 208 F.3d 581, 587 n.2 (7th Cir. 2000). "In interpreting [Indiana] Evidence Rule 704(b), [the Indiana Court of Appeals] has looked to the Seventh Circuit for guidance." See v. Curtis, No. 85A02-0604-CV-293, 2006 Ind. App. Unpub. LEXIS 205, at *5 (Ind. Ct. App. Nov. 21, 2006).

213. Ryburn v. State, No. 22A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *21 (Ind. Ct. App. Feb. 16, 2024) (quoting Williams v. State, 43 N.E.3d 578, 581 (Ind. 2015)), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. May 23, 2024).

214. IND. R. EVID. 704(b); *see, e.g.*, Doe v. K.M.W., 230 N.E.3d 306, 321–22 (Ind. Ct. App. 2024) (affirming striking of assertions in expert affidavit "pertain[ing] to the legal conclusion the court should make about foreseeability in the context of duty").

215. *Ryburn*, 2024 Ind. App. Unpub. LEXIS 182, at *21–22 (quoting Williams v. State, 43 N.E.3d 578, 581 (Ind. 2015)) (second and third alterations in original).

216. Gillespie v. State, 244 N.E.3d 423, 436 (Ind. Ct. App. 2024).

guilt was easily found violated when a detective testified that "he was confident [the defendant] was a drug dealer."[217] The second category was the prohibition on opinions about whether a witness has testified truthfully.[218] Such "vouching" evidence is prohibited "because 'it is essential that the trier of fact determine the credibility of the witnesses and the weight of the evidence.'"[219] In *Gillespie*, a detective "vouched for the reliability of incriminating information provided by unnamed sources who did not testify at trial and were not subject to cross-examination."[220]

Although *Gillespie*'s authoring panel easily found Rule 704(b) should have prohibited the vouching testimony, last year's survey period shows that conclusion may not be as obvious as it was presumed.[221] Fourteen months before *Gillespie* was issued, the memorandum decision in *Treadwell v. State* remarked: "We first note that Rule 704(b) 'prohibits a witness from testifying about whether a witness *has testified* truthfully.' Here, [the detective]'s testimony involved the truthfulness of the witnesses' out-of-court statements to him, not their testimony."[222] The clear implication of that decision was that opinions on the truthfulness of non-testifying witnesses may not be barred by Rule 704. The panel in *Gillespie* applied Rule 704(b) to the detective's vouching for statements of "unnamed sources who did not testify at trial," without acknowledging any problem with the statements being out-of-court.[223] Despite the general rule that "a court won't normally accept as binding precedent a point that was passed by in silence,"[224] that the author of the unpublished *Treadwell* decision concurred in the published *Gillespie* opinion probably signals the *Gillespie* view is most likely to be repeated in the future.[225]

The most frequent challenges to vouching arise in the context of testimony concerning minor victims reporting sexual crimes. The survey period highlighted techniques for permitting the jury insight into why a child may delay reporting without crossing into proscribed vouching. *Pacheco v. State* reinforced that testimony does "not run afoul of Evidence Rule 704(b)" so long as it "merely describe[s] 'how victims of child molestation behave in general'

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217. *Id.*

218. *Id.*

219. *Id.* (citation omitted).

220. *Id.* (citation omitted).

221. *2023 Survey*, *supra* note 4, at 940.

222. Treadwell v. State, No. 22A-CR-1857, 2023 Ind. App. Unpub. LEXIS 835, at *6 (Ind. Ct. App. July 24, 2023) (quoting Halliburton v. State, 1 N.E.3d 670, 680 (Ind. 2013)).

223. *Gillespie*, 244 N.E.3d at 436.

224. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 229 (2016); *see, e.g.*, Payday Today, Inc. v. Defreeuw, 903 N.E.2d 1057, 1059 n.1 (Ind. Ct. App. 2009).

225. As Justice Oliver Wendell Holmes famously defined "law" for purposes of the so-called "bad man": "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

and d[oes] not opine on [the specific victim]'s veracity."[226] It does not matter that the testimony may be voluminous, because, as the *Pacheco* panel noted, "it is the content of the testimony that matters, not the extent."[227] Another technique that succeeded in *Finch v. State*, which may represent best practice when feasible, was to have such testimony provided by a qualified mental-health witness who "never interviewed [the victim] and did not know the facts of th[e] case."[228] That approach minimizes the risk of the testimony being deemed to vouch for the victim, because the witness has no involvement with the victim or the facts of the case from which to opine.

Other instances of vouching, like in *Gillespie*, are far less difficult to find running afoul of Rule 704(b). For example, a witness's answer to the prosecution's question of whether a victim's statements "'ma[de] sense' or 'seem[ed] incredible,'" "was effectively a comment on the truthfulness of [the victim]'s story, which is [impermissible] indirect vouching."[229]

The survey period also showed that not all instances of vouching are impermissible. The Indiana Court of Appeals also recognized scenarios in which otherwise impermissible vouching may become permissible when a door is opened to it. In *Merriweather v. State*, the criminal defendant was deemed to have opened the door for vouching evidence by questioning the witness as to the victim's "truthfulness and believability."[230] Another scenario in which the door was opened occurred in the trial closings of *Pearson v. State*.[231] There, the defendant's "attempt[] to impugn [the victim]'s credibility during his closing argument" opened the door to allow the prosecution to cross into vouching for the victim's credibility.[232]

Finally, practitioners are reminded that Indiana appellate courts look with favor on federal authority when interpreting Indiana Rules of Evidence. In *Kaluza v. State*, the Indiana Court of Appeals noted the Supreme Court of the United States' interpretation of Federal Rule 704(b) in *Diaz v. United States*.[233]

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226. Pacheco v. State, No. 23A-CR-2709, 2024 Ind. App. Unpub. LEXIS 771, at *7 (Ind. Ct. App. June 20, 2004) (quoting Baumholser v. State, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016)); *see also* Henson v. State, 237 N.E.3d 1160, 1168 (Ind. Ct. App. 2024) ("[B]ecause Detective Anderson's testimony was about children generally rather than K.H. specifically, there was no vouching under our current precedent, and the trial court did not abuse its discretion in admitting Detective Anderson's testimony."), *trans. denied*, 244 N.E.3d 907 (Ind. 2024).

227. *Pacheco*, 2024 Ind. App. Unpub. LEXIS 771, at *7 n.1.

228. Finch v. State, No. 23A-CR-1394, 2024 Ind. App. Unpub. LEXIS 608, at *10–11 (Ind. Ct. App. May 15, 2024), *trans. denied*, 2024 Ind. LEXIS 547 (Ind. 2024).

229. Brooks v. State, No. 23A-CR-2421, 2024 Ind. App. Unpub.LEXIS 966, at *5, *8 (Ind. Ct. App. July 29, 2024), *trans. denied*, 2024 Ind. LEXIS 694 (Ind. 2024).

230. Merriweather v. State, No. 23A-CR-2400, 2024 Ind. App. Unpub. LEXIS 754, at *8 (Ind. Ct. App. June 14, 2024).

231. Pearson v. State, No. 23A-CR-1491, 2024 Ind. App. Unpub. LEXIS 384, at *24–26 (Ind. Ct. App. Mar. 27, 2024), *trans. denied*, 2024 Ind. LEXIS 694 (Ind. 2024).

232. *Id.* at *25–26.

233. Kaluza v. State, No. 24A-CR-130, 2024 Ind. App. Unpub. LEXIS 948, at *15 (Ind. Ct. App. July 25, 2024) (citing Diaz v. United States, 602 U.S. 526, 538 (2024)), *trans. denied*, 2024

D. Rule 705: Expert Opinions at Summary Judgment

"Rule 705 permits an expert to give opinion testimony without prior disclosure of the underlying facts or data."[234] That is, it "allows experts to present naked opinions."[235] The underlying purpose of the rule "is to avoid complex and time[-]consuming testimony by permitting an expert to state his opinion and reasons without first specifying the data upon which it is based."[236] In *Zaragoza v. Wexford of Indiana, LLC*, the Indiana Supreme Court looked to Rule 705's standard for expert testimony at trial to recognize that an expert's affidavit is sufficient to defeat summary judgment even if the affidavit includes bare and conclusory assertions.[237] As the court stated: "an expert may testify in the form of an opinion at trial without providing detailed factual explanations. We would not require greater substance on summary judgment than at trial. Nor do we wish to subject the affidavits of non-lawyers to unnecessary hurdles."[238]

VII. HEARSAY: RULES 801 THROUGH 806

A. Rules 801 & 802: Hearsay Generally Prohibited

Under Rule 802, "hearsay" is generally inadmissible unless subject to an exception.[239] Although the Rules of Evidence provide specific exceptions to Rule 802's prohibition,[240] before any analysis of those exceptions should commence, it must first be determined if a statement is "hearsay." Rule 801 generally defines "hearsay" as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the

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Ind. LEXIS 626 (Ind. 2024). Notably, although *Diaz* considered "[a]n expert's conclusion that 'most people' in a group have a particular mental state" under Rule 704(b), long ago, the Indiana Supreme Court ruled that "what an ordinary man would likely do under a known state of affairs" is a matter subject to judicial notice. Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 486–87 (1884).

234. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). "Indiana Rule 705 is functionally identical to Federal Rule 705." A.J. STEPHANI & GLEN WEISSENBERGER, WEISSENBERGER'S INDIANA EVIDENCE 2024–2025 COURTROOM MANUAL 705 (2024).

235. Mid-State Fertilizer Co. v. Exch. Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989).

236. Symbol Techs., Inc. v. Opticon, Inc., 935 F.2d 1569, 1576 (Fed. Cir. 1991) (citations and quotation marks omitted).

237. Zaragoza v. Wexford of Ind., LLC, 225 N.E.3d 146, 152–54 (Ind. 2024). The affidavit at issue was, in the court's esteem, considerably detailed. *Id.* at 152.

238. *Id.* at 154 (citing IND. R. EVID. 705; Dorsett v. R.L. Carter, Inc., 702 N.E.2d 1126, 1128 (Ind. Ct. App. 1998)).

239. IND. R. EVID. 802; J.G. v. State, No. 23A-JV-113, 2024 Ind. App. Unpub. LEXIS 94, at *8 (Ind. Ct. App. Feb. 1, 2024).

240. IND. R. EVID. 803; IND. R. EVID. 804. A party may also open the door to use of otherwise excludable hearsay evidence, *see, e.g.*, Turner v. State, No. 23A-CR-1487, 2024 Ind. App. Unpub. LEXIS 106, at *5–8 (Ind. Ct. App. Jan. 31, 2024), *trans. denied*, 2024 Ind. LEXIS 253 (Ind. 2024), or admission may be permitted by an "other law." *See, e.g.*, *Hobbs v. State*, No. 23A-CR-1092, 2024 Ind. App. Unpub. LEXIS 437, at *10 (Ind. Ct. App. Apr. 2, 2024) ("Protected Persons Statute is one such law.").

truth of the matter asserted."[241] But a statement may fall outside of that definition for many reasons, such as: it is not offered for the truth of the matter asserted,[242] it "does not assert a fact susceptible of being true or false,"[243] or it falls within Rule 801(d)'s list of items excluded from "hearsay."[244]

Rule 801(d)(1) allows use of a declarant witness's prior statement.[245] A prerequisite to applying Rule 801(d)(1)'s exclusion is that the declarant testifies.[246] *Davis v. State* found that the requirement the declarant testify is satisfied by the ability to call the declarant at trial.[247] Looking to *Goodner v. State*, the *Davis* panel observed that Rule 801(d)(1)'s "'mandate[ ] that the declarant testify at trial and be "subject to cross-examination concerning the statement," if the declarant has not already been cross-examined on the statement, [is satisfied by] his availability to be recalled for cross-examination.'"[248] Extending that view, the *Davis* panel found Rule 801(d)(1) applied because the declarant "had signed an agreement requiring her to provide truthful testimony; she had not been formally released from her subpoena to appear at [the] trial; and she was then in State custody."[249]

Another frequently litigated exclusion is Rule 801(d)(2)'s exclusion for statements of a party opponent.[250] Two published opinions from the Indiana Court of Appeals addressed application of the exclusion when applied to statements of co-conspirators.[251] "A statement made by a co-conspirator 'during

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241. IND. R. EVID. 801(c).

242. Cook v. State, 220 N.E.3d 72, 75 n.2 (Ind. Ct. App. 2023) (citations omitted); *see, e.g.*, Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *8 (Ind. Ct. App. Jan. 11, 2024) (that declarant's cellphone was stolen at gun point offered to show why two persons "did not speak to each other" not to prove person "stole those items"); Heiny v. State, No. 23A-CR-1082, 2024 Ind. App. Unpub. LEXIS 355, at *10 (Ind. Ct. App. Mar. 21, 2024) ("Webb's statements to Heiny were not offered for their truth, but only to give context to Heiny's threats."), *trans. denied*, 2024 Ind. LEXIS 366 (Ind. 2024); *see also* Sincere v. State, 228 N.E.3d 439, 445 (Ind. Ct. App. 2024) ("Further, '[o]ut-of-court statements made to law enforcement are non-hearsay if introduced primarily to explain why the investigation proceeded as it did.'" (quoting *Blount v. State*, 22 N.E.3d 559, 565 (Ind. 2014)); *but see* Ingram v. State, No. 24A-CR-201, 2024 Ind. App. Unpub. LEXIS 886, at *4 (Ind. Ct. App. July 10, 2024) (eviction notice was hearsay to show more than identity when used to link personal belongings in bedroom where drugs found to defendant).

243. Jackson v. State, 222 N.E.3d 321, 331 (Ind. Ct. App. 2023) (citation omitted), *trans. denied*, 2024 Ind. LEXIS 80 (Ind. 2024).

244. IND. R. EVID. 801(d).

245. IND. R. EVID. 801(d)(1).

246. *Id.*

247. Davis v. State, No. 23A-CR-640, 2023 Ind. App. Unpub. LEXIS 1303, at *8–9 (Ind. Ct. App. Nov. 13, 2023).

248. *Id.* (quoting Goodner v. State, 714 N.E.2d 638, 643 (Ind. Ct. App. 1999)).

249. *Id.* at *9.

250. IND. R. EVID. 801(d)(2); Pennington v. Mem'l Hosp. of S. Bend, Inc., 223 N.E.3d 1086, 1095 (Ind. 2024); *see, e.g.*, J.R. v. Ind. Dep't of Child Servs., 233 N.E.3d 1069, 1076 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 524 (Ind. 2024); Bush v. State, 243 N.E.3d 405, 414 (Ind. Ct. App. 2024).

251. *See* Jackson v. State, 222 N.E.3d 321, 333 (Ind. Ct. App. 2023); Gillespie v. State, 244 N.E.3d 423, 436 (Ind. Ct. App. 2024).

and in furtherance of the conspiracy' is not hearsay."[252] The bar for admitting such testimony is "relatively low" and may be satisfied by either direct or circumstantial evidence.[253] *Jackson v. State* found sufficient evidence of a conspiracy where "testimony about typical gang behavior and the analysis of common 'symbology'" was provided along with social media links between the alleged co-conspirators.[254] *Gillespie v. State*, however, rejected application simply because there was no evidence of a conspiracy.[255]

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

Even if evidence falls within the definition of hearsay, it may still be admitted if it meets any of the exceptions found in Evidence Rules 803 and 804.[256] The survey period provided insightful opinions covering seven of Rule 803's twenty-two exceptions: excited utterances under Rule 803(2), then-existing state of mind under Rule 803(3), statements for medical diagnoses or treatment under Rule 803(4), recorded recollections under Rule 803(5), records of regularly conducted activity under Rule 803(6), public records under Rule 803(8), and judgment of a previous conviction under Rule 803(22).[257]

1. Rule 803(2) – Excited Utterances.—"Evidence Rule 803(2) provides that hearsay may be admissible if the statement is an excited utterance, which is '[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.'"[258] "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection."[259] Most often, the arguments on Rule 803(2) turn on whether a declarant is still under the shock of the exciting event.

During the survey period, the Indiana Court of Appeals found sufficient continued excitement under the following circumstances: a declarant upset and crying in the aftermath of witnessing "her fiancé angrily wielding a firearm while yelling at her daughter and her son's girlfriend, followed swiftly by her fiancé having an armed confrontation with several officers, during which [the declarant] had told her fiancé to put down the handgun";[260] a declarant covered

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252. *Jackson*, 222 N.E.3d at 333 (quoting IND. R. EVID. 801(d)(2)(E)), *trans. denied*, 2024 Ind. LEXIS 80 (Ind. 2024).

253. *Id.* at 333–34.

254. *Id.*

255. *Gillespie*, 244 N.E.3d at 435.

256. Kubsch v. State, No. 24A-CR-99, 2024 Ind. App. Unpub. LEXIS 856, at *4 (Ind. Ct. App. July 3, 2024); C.M. v. Ind. Dep't of Child. Servs. (*In re* De.M.), No. 23A-JT-2597, 2024 Ind. App. Unpub. LEXIS 646, at *15 (Ind. Ct. App. May 24, 2024), *trans. denied*, 241 N.E.3d 1129 (Ind. 2024).

257. IND. R. EVID. 803.

258. Applegate v. State, 230 N.E.3d 944, 950–51 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 803(2)), *trans. denied*, 2024 Ind. LEXIS 385 (Ind. 2024).

259. *Gillespie*, 244 N.E.3d at 435 (citation and quotation marks omitted).

260. Morgan v. State, 228 N.E.3d 512, 517 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 262 (Ind. 2024).

in "quite a bit of blood," "physically shaking," and "crying really bad";[261] a declarant "crying, nervous, scared, stressed, and appear[ing] to be in and out of shock" with her "face, knees, and feet [ ] visibly injured";[262] a child declarant who was "upset" and "scared" after seeing father strike mother in the face;[263] a declarant still visibly "'upset' and 'crying'" following a shooting;[264] statements shortly after declarant was dragged from her vehicle and assaulted;[265] despite an unknown period of time passing, a declarant who had been struck in the face and was crying while making statements;[266] and statements from a child to mother after an attempted molestation of the child.[267]

The court of appeals also affirmed a trial court's rejection of the excited-utterance exclusion, where:

> [T]he evidence shows that when [Defendant] made the statements, he was distraught, confused, and worried about St Laurent. On the other hand, [Defendant] did not spontaneously offer the information. He made the statements in response to [a witness]'s question. He told [the witness] that he was fine. And before answering [the witness]'s question about what happened, he asked her whether she had seen the accident. These facts suggest that he was capable of rational thought and was aware that he could face significant legal consequences.[268]

2. Rule 803(3): Then-Existing Mental, Emotional, or Physical Condition.—Rule 803(3) covers "statement[s] of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)."[269] "The Indiana Supreme Court has identified three instances when statements are admissible under Evidence Rule 803(3): to respond when the defendant puts the victim's state of mind in issue, to explain the physical injuries suffered by the victim, and

261. *Applegate*, 230 N.E.3d at 951.

262. McGraw v. State, 243 N.E.3d 394, 399 (Ind. Ct. App. 2024).

263. *In re* D.L., No. 23A-JC-1900, 2024 Ind. App. Unpub. LEXIS 197, at *7–8 (Ind. Ct. App. Feb. 20, 2024).

264. Dennis v. State, No. 23A-CR-1395, 2024 Ind. App. Unpub. LEXIS 404, at *8–10 (Ind. Ct. App. Apr. 1, 2024); *see also* Muhammad v. State, No. 23A-CR-1509, 2024 Ind. App. Unpub. LEXIS 502, at *7–8 (Ind. Ct. App. Apr. 25, 2024); Starks v. State, No. 23A-CR-2105, 2024 Ind. App. Unpub. LEXIS 564, at *9–13 (Ind. Ct. App. May 6, 2024).

265. Green v. State, No. 23A-CR-1730, 2024 Ind. App. Unpub. LEXIS 807, at *11 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 509 (Ind. 2024).

266. Kubsch v. State, No. 24A-CR-99, 2024 Ind. App. Unpub. LEXIS 856, at *4 (Ind. Ct. App. July 3, 2024).

267. Howard v. State, No. 23A-CR-2719, 2024 Ind. App. Unpub. LEXIS 978, at *9 (Ind. Ct. App. July 30, 2024).

268. Douglas v. State, No. 23A-CR-1670, 2024 Ind. App. Unpub. LEXIS 98, *14–15 (Ind. Ct. App. Jan. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 304 (Ind. 2024).

269. IND. R. EVID. 803(3).

to show the intent of the victim to act in particular way."[270] Under that exception, the Indiana Court of Appeals affirmed admission of text messages that showed the victim's "intent to act in a particular way, *i.e.*, that she intended to meet with [the defendant] on the night she disappeared."[271]

3. Rule 803(4): Statement Made for Medical Diagnosis or Treatment.—"Statements made for the purpose of receiving medical treatment are an exception to the hearsay rule."[272] To satisfy Rule 803(4)'s exception, the proponent of the evidence must first establish that "the declarant [was] motivated to provide truthful information in order to promote diagnosis and treatment, and . . . the content of the statement [is] such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[273] "But more is required when the declarant is 'a young child brought to the medical provider by a parent.'"[274] That "more" is "evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information."[275]

In *Wanke v. State*, the Indiana Court of Appeals found reversible error because the testifying nurse "provided no testimony that [the declarant] in particular, and on this occasion, understood [the nurse]'s role or the importance of being truthful to [the nurse] for the purpose of diagnosis or treatment."[276] The same conclusion was had in *Jordan v. State* due to the lack of "any evidence that [the declarant] understood that she was being questioned to reveal her injuries and develop a proper course of treatment."[277] Numerous memoranda decisions from the survey period exemplified proper laying of the requisite foundation.[278]

One other memoranda decision provided an important point:

> At trial, Hobbs objected to the admission of [a nurse]'s testimony under Evidence Rule 803(4) on the grounds that, based upon the length of time between the alleged offenses and the examination, the statements "were

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270. Fuller v. State, No. 23A-CR-2842, 2024 Ind. App. Unpub. LEXIS 776, at *15 (Ind. Ct. App. June 20, 2024) (citing D.R.C. v. State, 908 N.E.2d 215, 226 (Ind. 2009)), *trans. denied*, 2024 Ind. LEXIS 545 (Ind. 2024).

271. *Id.* at *16.

272. McGraw v. State, 243 N.E.3d 394, 400 (Ind. Ct. App. 2024) (citing IND. R. EVID. 803(4)), *trans. denied*, 2024 Ind. LEXIS 771 (Ind. 2024).

273. *Id.* (citation and quotation marks omitted).

274. Wanke v. State, 231 N.E.3d 878, 882 (Ind. Ct. App. 2024) (citation omitted).

275. *Id.* at 883 (citation and formatting omitted).

276. *Id.*

277. Jordan v. State, 244 N.E.3d 445, 460 (Ind. Ct. App. 2024).

278. *See, e.g.*, Blinson v. State, No. 22A-CR-2920, 2024 Ind. App. Unpub. LEXIS 78, at *27 (Ind. Ct. App. Jan. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 300 (Ind. 2024); J.K. v. State, No. 23A-JV-1772, 2024 Ind. App. Unpub. LEXIS 241, at *14–18 (Ind. Ct. App. Feb. 27, 2024); Howard v. State, No. 23A-CR-2719, 2024 Ind. App. Unpub. LEXIS 978, at *13 (Ind. Ct. App. July 30, 2024); Hollins v. State, No. 24A-CR-145, 2024 Ind. App. Unpub. LEXIS 1190, at *8 (Ind. Ct. App. Sept. 11, 2024); Green v. State, No. 23A-CR-1730, 2024 Ind. App. Unpub. LEXIS 807, at *14 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 509 (Ind. 2024).

> not made for any medical diagnosis or treatment" and because "no full and complete exam was done." Nothing in the language of Evidence Rule 803(4), however, requires that the person to whom the statements are made conduct a full, complete examination.[279]

4. Rule 803(5): Recorded Recollections.—A recorded recollection is exempt from the hearsay exclusion if the record: "(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge."[280] *Wilson v. State* concerned a challenge to the use of a child's forensic interview on the assertion that it did not accurately reflect the child's recollection.[281] The challenge was rejected because the child vouched for the accuracy of the interview in a 2018 competency hearing and again during a 2022 bench trial.[282]

5. Rule 803(6): Records of a Regularly Conducted Activity.—Rule 803(6) is the business records exception.[283] "'[T]he basis for the business records exception is that reliability is assured because the maker of the record relies on the record in the ordinary course of business activities.'"[284] The survey period saw the Indiana Court of Appeals once again address the exception in the context of debt collection.[285] The primary challenge on appeal was to the affiant's lack of attestation of personal knowledge of the loan originator's practices.[286] Adhering to recent rulings in *Smith v. National Collegiate Student Loan Trust* and *Akinlemibola v. National Collegiate Student Loan Trust 2007-01* but distinguishing *Holmes v. National Collegiate Student Loan Trust*, the court of appeals affirmed admission of the affidavit.[287]

6. Rule 803(8): Public Records.—Rule 803(8) permits evidence of certain public records on the premise "that public officials perform their duties properly

279. Hobbs v. State, No. 23A-CR-1092, 2024 Ind. App. Unpub. LEXIS 437, at *21 (Ind. Ct. App. Apr. 2, 2024) (record citation omitted).

280. IND. R. EVID. 803(5).

281. Wilson v. State, No. 23A-CR-5, 2023 Ind. App. Unpub. LEXIS 1452, at *7–9 (Ind. Ct. App. Dec. 13, 2023).

282. *Id.* at *8–9.

283. IND. R. EVID. 803(6).

284. *In re* B.A., No. 23A-JT-1932, 2024 Ind. App. Unpub. LEXIS 264, at *11 (Ind. Ct. App. Mar. 1, 2024) (quoting *In re* E.T., 808 N.E.2d 639, 643 (Ind. 2004)), *trans. denied*, 2024 Ind. LEXIS 379 (Ind. 2024).

285. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 650–53 (Ind. Ct. App. 2024).

286. *Id.* at 651.

287. *Id.* at 651–53 (analyzing Smith v. Nat'l Collegiate Student Loan Tr., 153 N.E.3d 222 (Ind. Ct. App. 2020); Akinlemibola v. Nat'l Collegiate Student Loan Tr. 2007-01, 205 N.E.3d 1014 (Ind. Ct. App. 2023); Holmes v. Nat'l Collegiate Student Loan Tr., 94 N.E.3d 722 (Ind. Ct. App. 2018)).

without motive or interest other than to submit accurate and fair reports."[288] "A document does not need to be open and available to the public in order to qualify for admission under the public records exception."[289] In the published opinion of *Hinkle v. State*, the Indiana Court of Appeals categorically found that service history entries on the Indiana Protective Order Registry[290] are matters covered by the public records exception.[291]

7. Rule 803(22): Judgment of a Previous Conviction.—Rule 803(22)(A) generally allows evidence of a conviction "entered after a trial or guilty plea."[292] It does not, however, exclude such evidence resulting from a "nolo contendere plea."[293] *Heffley v. State* observed that limitation of Rule 803(22)(A) does not prevent use of a *nolo contendere* plea under the public-records exception of Rule 803(8).[294]

C. Rule 804: Hearsay Exceptions for Unavailable Declarants

The primary difference between the exceptions of Rule 803 and those of Rule 804 is that the latter necessitates a showing that the declarant is unavailable to testify at trial.[295] As shown in *Lichtsinn v. State*, a declarant experiencing medical complications and subject to "conditions of rest and stress avoidance" is unavailable.[296] "[T]he plain language of Evidence Rule 804 does not include a requirement that the trial court must explore options for remote or delayed testimony."[297]

Another basis for finding a declarant unavailable is when "[a] statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying."[298] In order to prove entitlement to the exception for forfeiture by wrongdoing, the proponent must establish both the wrongdoing and its result in the unavailability of the declarant by a preponderance of the evidence.[299] In *Doyle v. State*, the

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288. Hinkle v. State, 241 N.E.3d 1154, 1157 (Ind. Ct. App. 2024) (citation and quotation marks omitted).

289. *Id.* (citation omitted).

290. "The Indiana Protective Order Registry is an Internet based electronic depository for protective orders that was established by the legislature and that is managed and maintained by the division of state court administration." *Id.* (citing IND. CODE §§ 5-2-9-1.4;-5.5 (2024)).

291. *Id.* at 1158. (citing IND. R. EVID. 803(8)(A)(i)(b); IND. R. EVID. 803(8)(A)(ii)).

292. IND. R. EVID. 803(22)(A).

293. *Id.*

294. Heffley v. State, No. 23A-CR-2724, 2024 Ind. App. Unpub. LEXIS 588, at *3–5 (Ind. Ct. App. May 9, 2024) (quoting Scott v. State, 949 N.E.2d 169, 178 (Ind. Ct. App. 2010)).

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

296. Lichtsinn v. State, No. 23A-CR-2478, 2024 Ind. App. Unpub. LEXIS 494, at *6 (Ind. Ct. App. Apr. 24, 2024).

297. *Id.*

298. IND. R. EVID. 804(b)(5).

299. Doyle v. State, 223 N.E.3d 1113, 1121 (Ind. Ct. App. 2023) (citing White v. State, 978 N.E.2d 475, 480 (Ind. Ct. App. 2012)).

Indiana Court of Appeals easily affirmed a finding of forfeiture by wrongdoing where the criminal defendant learned that the witness had made incriminating statements regarding the defendant and the defendant called to arrange to have his stepson batter the witness.[300] In criminal matters, "a defendant forfeits th[e] right [to cross-examine witnesses] by engaging in the wrongdoing contemplated by Indiana Evidence Rule 804(b)(5)."[301]

VIII. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Authenticating or Identifying Evidence

"Indiana Evidence Rule 901 requires the authentication or identification of 'an item of evidence' and directs that 'the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.'"[302] Highlighting the technological age, the two most common appellate challenges to authentication arose from introduction of social media posts and from evidence of surveillance cameras.[303]

Although videos and photographs may often be used purely as demonstrative evidence to help illustrate or facilitate a witness's testimony,[304] such evidence may also be offered "under the silent-witness theory . . . as substantive evidence."[305] To apply the silent-witness theory for videos or photographs, the proponent must lay the foundation of "a strong showing of authenticity and competency, including proof that the evidence was not altered."[306] In order to do so, "there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result."[307]

In *Irwin v. State*, a fractured panel produced three separate opinions, with the majority concluding that a sufficient foundation had been laid for admission

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300. *Id.* at 1121–22.

301. Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *17 (Ind. Ct. App. July 15, 2024) (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)).

302. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 653 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 901(a)).

303. H.O. v. C.L., No. 23A-PO-2644, 2024 Ind. App. Unpub. LEXIS 861, at *5–8 (Ind. Ct. App. July 3, 2024) (cellphone video); *In re* J.P., No. 23A-JC-476, 2023 Ind. App. Unpub. LEXIS 1170, at *8–9 (Ind. Ct. App. Oct. 4, 2023) (Facebook posts); Land v. State, No. 22A-CR-2863, 2023 Ind. App. Unpub. LEXIS 1389, at *11–13 (Ind. Ct. App. Dec. 6, 2023) (same), *trans. denied*, 2024 Ind. LEXIS 150 (Ind. 2024); Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *10–12 (Ind. Jan. 11, 2024) (same); Campbell v. State, No. 23A-CR-1759, 2024 Ind. App. Unpub. LEXIS 783, at *5–7 (Ind. Ct. App. June 21, 2024) (same).

304. Irwin v. State, 229 N.E.3d 567, 571 (Ind. Ct. App. 2024), *trans. denied*, 238 N.E.3d 640 (Ind. 2024); *see, e.g.*, Owens v. State, No. 24A-CR-782, 2024 Ind. App. Unpub. LEXIS 1204, at *5 (Ind. Ct. App. Sept. 13, 2024); Johnson v. State, No. 24A-CR-15, 2024 Ind. App. Unpub. LEXIS 1272, at *16–21 (Ind. Ct. App. Sept. 30, 2024).

305. *Irwin*, 229 N.E.3d at 571.

306. *Id.* (citation and quotation marks omitted).

307. *Id.* (citation and quotation marks omitted).

of surveillance video through the testimony of an officer that: "(1) the security system was located in a locked room; (2) the landlord was the only person with access to that room; (3) the landlord did not alter the footage; (4) [the officer] downloaded the Security system on the day of the arrest; and (5) there was no way the Security Footage could have been manipulated when [the officer] downloaded it from the security system."[308]

A point of disagreement between Judge Melissa May, who concurred only in the result, and Judge L. Mark Bailey, who concurred in Judge Paul Felix's lead opinion, was whether the 2023 opinion in *Kirby v. State*, which reached a similar result, inappropriately "amounts to a watering down of the authentication threshold."[309] Judge May's opinion would have required a sponsor for the evidence with greater familiarity with the security system—most likely, "the landlord, [who] was the one responsible for operating and maintaining the security system."[310] Because the Indiana Court of Appeals repeatedly purports to not be bound by horizontal *stare decisis*[311] and Indiana Appellate Rule 65(D)(1) is silent on the matter,[312] practitioners should recognize that a future appellate panel may adhere to Judge May's opinion and not that of *Kirby* or the *Irwin* majority.[313]

The Indiana Court of Appeals also found proper foundations laid in the following circumstance: a federal case filing accessed on the federal PACER docket system sponsored by an officer who was familiar with the PACER system;[314] text messages when the sponsor recognized the author based on the content, circumstances, and context;[315] a hand-written letter based upon the timing of a report made to police concerning the letter and testimony comparing writings;[316] and empty packaging based upon evidence that it was found within the store where the presumed theft of its contents was the underlying basis for confining a person suspected of stealing its contents.[317] The court of appeals did not find a sufficient foundation laid for tax documents at summary judgment

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308. *Id.* at 571–72; *id.* at 573 (Bailey, J., concurring).

309. *Id.* at 573–74 (Bailey, J., concurring) (discussing Kirby v. State, 217 N.E.3d 575 (Ind. Ct. App. 2023)); *id.* at 576–77 (May, J., concurring in result).

310. *Id.* at 575–76 (May, J., concurring in result).

311. *See, e.g.*, Wellman v. State, 210 N.E.3d 811, 816 n.4 (Ind. Ct. App. 2023); *In re* J.J. v. B.B., 911 N.E.2d 659, 659 (Ind. Ct. App. 2009).

312. IND. R. APP. P. 65(D)(1).

313. The day before *Irwin* was issued, a memorandum decision authored by Judge Terry Crone and joined by Judge Bailey and Judge Rudolph Pyle upheld admission of surveillance video based on the testimony of police-officer sponsors. Dalton v. State, No. 23A-CR-984, 2024 Ind. App. Unpub. LEXIS 240, at *4–8 (Ind. Ct. App. Feb. 27, 2024).

314. Sisk v. State, No. 23A-CR-1834, 2023 Ind. App. Unpub. LEXIS 1370, at *7–9 (Ind. Ct. App. Nov. 30, 2023).

315. *In re* K.M.W., No. 23A-JT-2016, 2024 Ind. App. Unpub. LEXIS 266, at *13–16 (Ind. Ct. App. Mar. 1, 2024).

316. Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *14–15 (Ind. Ct. App. July 15, 2024).

317. Lane v. Menard, Inc., 242 N.E.3d 1060, 1068 n.11 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 756 (Ind. 2024).

where the documents were not referenced in the party's affidavit.[318]

B. Rule 902: Self-Authenticating Evidence

Rule 902 allows certain items of evidence to be self-authenticating.[319] Among the items deemed self-authenticating are domestic public documents that are sealed and signed[320] and certified domestic records of regularly conducted activity.[321] For either to apply there must be a signature.[322] In *Smith v. State*, the Indiana Court of Appeals briefly addressed, although did not ultimately decide, whether initials in lieu of a signature were sufficient.[323] The panel noted that signatures may be accomplished in multiple ways and "that Bureau of Motor Vehicle documents bearing a stamped signature and computer-generated initials were properly authenticated under [Indiana] Trial Rule 44(A)."[324] Nevertheless, the panel declined to answer the question, instead finding any potential error harmless.[325] *In re B.A* similarly looked to the adequacy of a signature, observing that documents submitted without the signature of the affiant were improper, despite the party contesting admission possessing properly signed copies.[326]

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

Rule 1002 is frequently referred to as the "Best Evidence Rule."[327] As some courts have noted: "The phrase 'best-evidence rule' is something of a misnomer, as the rule does not demand that litigants furnish only the evidence that is categorically the 'best' in a qualitative sense of that term."[328] Instead, "[t]he rule is perhaps more accurately dubbed the original document rule, for instead of requiring the 'best' evidence in every case, the rule actually requires the

318. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 653 (Ind. Ct. App. 2024).

319. IND. R. EVID. 902.

320. IND. R. EVID. 902(1).

321. IND. R. EVID. 902(11).

322. IND. R. EVID. 902(1)(B); Williams v. State, 64 N.E.3d 221, 225 (Ind. Ct. App. 2016) (Rule 902(11) inapplicable without signature of custodian or other qualified person).

323. Smith v. State, No. 24A-CR-153, 2024 Ind. App. Unpub. LEXIS 874, at *3–6 (Ind. Ct. App. July 8, 2024) (quoting Brewer v. State, 605 N.E.2d 181, 183 (Ind. 1993)).

324. *Id.* at *5.

325. *Id.* at *5–6.

326. *In re* B.A., No. 23A-JT-1932, 2024 Ind. App. Unpub. LEXIS 264, at *13–14 (Ind. Ct. App. Mar. 1, 2024), *trans. denied*, 2024 Ind. LEXIS 379 (Ind. 2024). The panel found the argument waived on appeal, however, due to failure to adequately object. *Id.* at *14.

327. *See, e.g.*, Kirby v. State, 217 N.E.3d 575, 584 n.4 (Ind. Ct. App. 2023); *In re* R.L., No. 24A-JT-414, 2024 Ind. App. Unpub. LEXIS 1248, at *23 (Ind. Ct. App. Sep. 25, 2024).

328. United States v. Chavez, 976 F.3d 1178, 1194 n.9 (10th Cir. 2020).

production of an original document rather than a copy."[329] During the survey period, the Indiana Court of Appeals found the rule satisfied by admission of exhibits on CD because "there [was] no evidence that the exhibits that were admitted in CD form were not exact duplicates of the original records reflected on the CD" and Rule 1003 permits 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.'"[330]

X. STATUTORY EVIDENTIARY PROCEDURES

Rule 101(b) preserves application of statutory evidentiary procedures that apply to matters not governed by the Indiana Rules of Evidence.[331] Some statutes dictate that certain evidence will be admissible in certain proceedings.[332] During the survey period, the Indiana General Assembly enacted one such statute, codified at Indiana Code section 9-19-11-8.5 that now mandates:

> In a civil action seeking to recover damages for personal injuries or death experienced by a plaintiff who:
>
> (1) was in a motor vehicle that was manufactured after September 1, 1986, and equipped with at least one (1) inflatable restraint system; and
>
> (2) was fifteen (15) years of age or older at the time the cause of action accrued;
>
> evidence that the motor vehicle was not operating in compliance with section 2 or 3.6 [IC 9-19-11-2 or IC 9-19-11-3.6] of this chapter may be admitted as proof of failure to mitigate damages.[333]

If the statute is deemed to be enforceable and not an impermissible procedural statute,[334] it supplants robust caselaw prohibitions on such evidence.[335]

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329. DeMarco v. Ohio Decorative Prods., Inc., No. 92-2294, 1994 U.S. App. LEXIS 3848, at *26–27 (6th Cir. Feb. 25, 1994); *accord* Guillermety v. Sec'y of Educ., 341 F. Supp. 2d 682, 689 n.5 (E.D. Mich. 2003).

330. *In re* R.L., 2024 Ind. App. Unpub. LEXIS 1248, at *24 (quoting IND. R. EVID. 1003).

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

332. *See, e.g.*, *In re* N.E., 228 N.E.3d 457, 476 (Ind. Ct. App. 2024) (recognizing application of IND. CODE § 31-34-12-5 (2024) to CHINS proceedings); Gaddie v. State, No. 23A-CR-1059, 2023 Ind. App. Unpub. LEXIS 1366, at *4–5 (Ind. Ct. App. Nov. 29, 2023) (recognizing the procedures of IND. CODE § 9-30-3-15 (2023) in proving prior conviction for certain offenses); Setlak v. State, 234 N.E.3d 215 (Ind. Ct. App. 2024) (applying Indiana's Protected Persons Statute, codified at IND. CODE § 35-37-4-6 (2024)), *trans. denied*, 2024 Ind. LEXIS 455 (Ind. 2024).

333. IND. CODE § 9-19-11-8.5 (2024).

334. *See* Mellowitz v. Ball State Univ., 221 N.E.3d 1214, 1221 (Ind. 2023).

335. *See generally* City of Fort Wayne v. Parrish, 32 N.E.3d 275 (Ind. Ct. App. 2015).

XI. COMMON LAW RULES: *CORPUS DELICTI*, *RES IPSA LOQUITUR*, & SPOLIATION

The Indiana Rules of Evidence preserved common-law practices that were not otherwise covered by the Rules.[336] The common-law doctrines of *corpus delicti*, *res ipsa loquitur*, and *spoliation* each received further development during the survey period.

A. Corpus Delicti *Rule*

Indiana maintains the common-law principle "that the state cannot prove the commission of a crime by the extra-judicial confession alone of a defendant. . . . The crime or the *corpus delicti* must be established by some independent, additional, or corroborative evidence of probative value, aside from the confession alone."[337] In two opinions, the Indiana Court of Appeals reversed convictions due to the lack of independent admissible evidence apart from the defendant's own conviction. In *Fritz v. State*, after finding the state did not present sufficient evidence of a substance's THC concentration to indicate that it was unlawful marijuana and not legal hemp, the court of appeals ruled the conviction could not be supported by the defendant's admission alone.[338] Similarly, in *Neanover v. State*, the court of appeals reversed a conviction for possession of a firearm by a domestic batterer where the only evidence underlying the conviction was the defendant's confession that he had been shooting a weapon and a neighbor's testimony that she "heard what she believed to be gunshots coming from the neighboring property about two hundred yards away."[339] Because the neighbor never saw the defendant with a firearm and, upon the investigating officer's arrival, the defendant was "outside working on a motorcycle," "the evidence independent from [the defendant]'s statement was sparse."[340]

B. Res Ipsa Loquitur

Easily the most notable decision addressing the doctrine of *res ipsa loquitur* was the Indiana Court of Appeals' opinion in *Isgrig v. Trustees of Indiana University*, which held that the doctrine, when otherwise satisfied, applies to premises-liability cases.[341] This survey does not, however, cover the opinion in

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

337. Hogan v. State, 132 N.E.2d 908, 910 (Ind. 1956).

338. Fritz v. State, 223 N.E.3d 265, 277–78 (Ind. Ct. App. 2023).

339. Neanover v. State, No. 23A-CR-603, 2024 Ind. App. Unpub. LEXIS 46, at *5 (Ind. Ct. App. Jan. 19, 2024).

340. *Id.* at *5–6.

341. Isgrig v. Trs. of Ind. Univ., 225 N.E.3d 781, 785–90 (Ind. Ct. App. 2023). Two other memoranda decisions arising from premises liability cases declined to address applicability of *res*

more detail because the Indiana Supreme Court has granted transfer, thereby vacating the decision of the court of appeals.[342] The only other opinion of note to address the doctrine was the Seventh Circuit's opinion in *Aluminum Recovery Technologies, Inc. v. ACE American Insurance Company*, in which the court reminded that the doctrine cannot be invoked when there are two distinct potential explanations.[343]

C. Spoliation

The common-law doctrine of spoliation of evidence allows a court to sanction the suppression of evidence by a party with exclusive possession of the evidence by affixing "an inference that the production of the evidence would be against the interest of the party which suppresses it."[344] The survey period provided two notable insights into the doctrine. The first, observed in two opinions from the Indiana Court of Appeals, is that there appears to be some debate over whether the spoliation doctrine is confined to civil actions or whether it extends to the criminal context.[345] In the later-decided opinion, the appellate panel remarked that it was "unaware of any[] [authority] applying the civil spoliation doctrine in the criminal context."[346]

The Indiana Supreme Court's opinion in *Cahoon v. Cummings*, issued in 2000, signals a contrary perspective.[347] Citing Judge Robert Miller's treatise on Indiana Evidence, the supreme court wrote: "Spoliation evidence arises more commonly in the criminal context, but is also relevant in civil cases."[348] A review of Judge Miller's treatise indicates it may be a semantic distinction. The treatise treats adverse inferences such as a "defendant's departure from the scene of the crime" as a "form[] of 'spoliation.'"[349] Nevertheless, that there may remain an open question is supported by the fact that courts outside of Indiana have reached contradictory views on applying spoliation in criminal

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ipsa loquitur because the doctrine was not invoked by the appealing party. Cholula v. Delta, No. 23A-CT-2456, 2024 Ind. App. Unpub. LEXIS 813, at *5 n.1 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 634 (Ind. 2024); Indianapolis Airport Auth. v. Kennedy, No. 24A-CT-865, 2024 Ind. App. Unpub. LEXIS 1249, at *2 n.1 (Ind. Ct. App. Sept. 25, 2024), *trans. denied*, 2024 Ind. LEXIS 739 (Ind. 2024).

342. Isgrig v. Trs. of Ind. Univ., 235 N.E.3d 134 (Ind. 2024); IND. R. APP. P. 58(A).

343. Aluminum Recovery Techs., Inc. v. ACE Am. Ins. Co., 94 F.4th 561, 562–63 (7th Cir. 2024) (applying Indiana law).

344. Porter v. Irvin's Interstate Brick & Block Co., 691 N.E.2d 1363, 1364–65 (Ind. Ct. App. 1998).

345. Pigott v. State, 219 N.E.3d 808, 811 n.3 (Ind. Ct. App. 2023); Ko v. State, 243 N.E.3d 1153, 1158 n.3 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 721 (Ind. 2024).

346. *Ko*, 243 N.E.3d at 1158 n.3.

347. Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000).

348. *Id.* (citing 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 401.112 (2d ed. 1995)).

349. 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 401.112 (3d ed. 2007).

proceedings.[350]

The second insight arises from the Indiana Supreme Court's resolution of *Safeco Insurance Company of Indiana v. Blue Sky Innovation Group, Inc*.[351] There, looking to the tort component of spoliation, the court limited third-party spoliation claims[352] to those in which "a special relationship exists between the parties."[353] Whether a special relationship exists depends upon the facts of a given case.[354] The court looked to illustrative circumstances in which a sufficient relationship exists but did not specifically define the boundaries for future litigation.[355] Finding that the relationship between a homeowner and fire investigation/remediation company standing alone insufficient to establish a special relationship, the court affirmed dismissal of the third-party spoliation action.[356]

XII. CONCLUSION

Thirty years of rules-based evidentiary practices in Indiana still shows that the only true certainty in the law is its ever-continuing uncertainty.

350. *See* United States v. Fey, 89 F.4th 903, 913–14 (11th Cir. 2023) (analyzing views of federal circuit courts); *compare* Commonwealth v. Kee, 870 N.E.2d 57, 66 n.10 (Mass. 2007) (declining to apply spoliation in criminal context), *and* Palmer v. State, 899 S.E.2d 192, 206 (Ga. 2024) (same), *and* State v. Macias, 469 P.3d 472, 480 (Ariz. Ct. App. 2020), *with* Thyen v. Hubbard Feeds, Inc., 804 N.W.2d 435, 439 (N.D. 2011) (recognizing application to criminal cases); Stuart v. State, 907 P.2d 783, 793 (Idaho 1995) (same).

351. Safeco Ins. Co. v. Blue Sky Innovation Grp., Inc., 230 N.E.3d 898, 901–06 (Ind. 2024).

352. "There are two types of spoliation claims: first-party spoliation and third-party spoliation. First-party spoliation 'refers to spoliation of evidence by a party to the principal litigation,' and third-party spoliation refers to the spoliation of evidence 'by a non-party.'" *Id.* at 902 (citation omitted). "Indiana does not recognize the tort of first-party spoliation of evidence." Kelley v. Patel, 953 N.E.2d 505, 509 (Ind. Ct. App. 2011).

353. *Safeco Ins.*, 230 N.E.3d at 904–06.

354. *Id.* at 904.

355. *Id.* at 904–05 (noting two examples of a special relationship: (i) doctor and patient; and (ii) insurance carrier and third-party claimant).

356. *Id.* at 905–07.