2018 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

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2018 marked the twenty-fifth anniversary of adoption of the Indiana Rules of Evidence.[1] Based on the Federal and Uniform Rules of Evidence, the rules were adopted in an attempt to supplant the various evidentiary procedures found only in caselaw and statutes.[2] Still, some common-law and statutory procedures remain to augment the rules. This survey covers developments in all aspects of Indiana's evidence law spanning from October 1, 2017 through September 30, 2018. Consistent with the practice of this survey since its 1996 installment,[3] developments are addressed in the same order as the Indiana Rules of Evidence.

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

A. Rule 101: To What Do the Rules Apply

Rule 101 sets forth the general applicability of the Indiana Rules of Evidence.[4] Although the rules are intended to "apply in all proceedings in the courts of the State of Indiana[,]"[5] they do not apply to every facet of a case.[6] *McGrath v. State* addressed one such stage in criminal litigation: probable-cause affidavits.[7] Looking to guidance from the Supreme Court of the United States, Indiana's highest court recognized that "[a] probable-cause affidavit 'need not reflect the direct personal observations of the affiant' but may instead rely on hearsay information."[8] To hold otherwise, the court reasoned, would leave "'few . . . situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action' toward establishing probable cause."[9] Notably, statute requires the hearsay be supported by "'reliable information establishing the credibility of the source' and 'a factual basis for the information furnished'" or, "[a]lternatively, . . . contain information that, under

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1. Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 IND. L. REV. 1063, 1063 (1994).
2. Gault v. State, 878 N.E.2d 1260, 1262 (Ind. 2008).
3. Edward F. Harney, Jr. & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887 (1996); *see*, *e.g.*, Yvonne M. Dutton, *Recent Developments in Indiana Evidence Law: October 1, 2014 to September 30, 2015*, 49 IND. L. REV. 1053 (2016).
4. *See* IND. R. EVID. 101.
5. IND. R. EVID. 101(b).
6. *See generally* IND. R. EVID. 101(d).
7. 95 N.E.3d 522, 527 (Ind. 2018).
8. *Id.* (quoting Aguilar v. Texas, 378 U.S. 108, 114 (1964), *abrogated on other grounds by* Illinois v. Gates, 462 U.S. 213 (1983)).
9. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 174 (1949)).

the totality of the circumstances, corroborates the hearsay."[10]

B. Rule 103: Preserving Appellate Review of Evidentiary Rulings

Rule 103 establishes the steps to preserve error in admission or denial of evidence.[11] "A claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected."[12] Except in situations involving fundamental error,[13] a party resisting admission must timely object and state the basis for exclusion to preserve the matter for appeal.[14] But a party need not object ad nauseum to the same error. "Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[15] Two decisions from the survey period addressed the need to reassert an objection at a later point to preserve the error.

In *Laird v. State*, the Indiana Court of Appeals ruled that an unsuccessful pre-trial motion in limine coupled with an objection during opening statements was insufficient to preserve a challenge to admission of evidence because the objection was not made contemporaneous to the admission.[16] A continuing objection raised prior to closing arguments also did not act to preserve the issue since "the evidence in question had already been presented to the jury, and it was too late to make a continuing objection."[17] The court found no salvation in Rule 103(b)'s dictate that an objection need not be renewed once the court has ruled definitively at trial specifically because "the court did not rule definitively on the record *at trial* because Laird failed to make an objection at trial *when the evidence was offered*."[18]

The result stands in stark contrast to federal practice, which allows for rulings "either before or at trial" to preserve error.[19] Concurring in the result, Judge Melissa May viewed proper procedure under Indiana's Rule 103(b) as more closely aligned with federal practice.[20] She did not, however, indicate that the mere ruling on a motion in limine would have been sufficient.[21] Instead, she would have found the objection during the opening argument sufficient.[22] The

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10. *Id.* (quoting IND. CODE § 35-33-5-2(b)(1); citing IND. CODE § 35-33-5-2(b)(2)).
11. IND. R. EVID. 103.
12. Thrash v. State, 88 N.E.3d 198, 203 (Ind. Ct. App. 2017) (citing IND. R. EVID. 103(a)).
13. Fundamental error is preserved without objection. IND. R. EVID. 103(e).
14. IND. R. EVID. 103(a).
15. IND. R. EVID. 103(b).
16. 103 N.E.3d 1171, 1175-76 (Ind. Ct. App.), *trans. denied*, 110 N.E.3d 1147 (Ind. 2018).
17. *Id.* at 1176.
18. *Id.* at 1175 n.1 (emphasis in original).
19. FED. R. EVID. 103(b); Carmody v. Bd. of Trs. of the Univ. of Ill., 893 F.3d 397, 407 (7th Cir. 2018), *cert. denied*, 202 L. Ed. 2d 588 (2019).
20. *Laird*, 103 N.E.3d at 1179-80 (May, J., concurring in result).
21. *Id.*
22. *Id.* at 1180.

Indiana Supreme Court denied transfer, leaving Judge May's interpretation for another day.[23]

Two months later, an entirely different panel for the court of appeals addressed a similar issue in *Fairbanks v. State*.[24] Like *Laird*, the question was whether an objection asserted prior to presentation of witnesses was sufficient.[25] "Right before trial started, and as the jury was about ready to enter the courtroom, defense counsel told the trial court that he would like to show a continuing objection."[26] In order for a continuing objection to be effective, "the trial court [must] specifically grant the right to a continuing objection," and if the right is not granted, it remains "counsel's duty to object to the evidence as it is offered in order to preserve the issue for appeal."[27] In this instance, the court majority found the matter preserved.[28] Following the request, "the trial court said, 'Okay,' and asked the State if it had a response. The State's only response was to offer a stipulation on another matter."[29] With no further dialogue on the objection prior to the jury entering the courtroom, the majority "f[ou]nd that the trial court's response was sufficient to preserve this issue for appeal."[30]

Concurring in the result, Judge Rudolph Pyle thought the matter waived for failure to obtain permission to exercise a continuing objection.[31] Judge Pyle emphasized the need for rigid adherence to the procedures for exercising continuing objections.[32] In light of the burden to affirmatively obtain a ruling, Judge Pyle viewed "the trial court's utterance of the word 'Okay'" as "simply acknowledging the request had been made," followed by seeking "a response from the State."[33] Because the court "was interrupted by the entry of the jury into the courtroom before it could make a ruling," he reasoned that there was no ruling permitting a continuing objection, rendering the request insufficient to preserve the issue for appeal.[34]

Unlike *Laird*, transfer has been granted in *Fairbanks*, allowing the Indiana Supreme Court to provide a definitive answer.[35] In light of the grant of transfer, thereby vacating the decision,[36] there may be no need to square it and *Laird*. Nevertheless, the two opinions appear discordant. While they may be

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23. Laird v. State, 110 N.E.3d 1147 (Ind. 2018).

24. 108 N.E.3d 357, 366 (Ind. Ct. App. 2018), *trans. granted and opinion vacated*, 119 N.E.3d 564 (Ind. 2019).

25. *Id.*

26. *Id.*

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

28. *Id.*

29. *Id*. (citation to record omitted).

30. *Id.*

31. *Id.* at 374-76 (Pyle, J., concurring in result).

32. *Id.* at 375.

33. *Id.* at 376.

34. *Id.*

35. Fairbanks v. State, 119 N.E.3d 91 (Ind. 2018).

36. IND. R. APP. P. 58(A).

distinguished on the basis that counsel in *Fairbanks* sought a continuing objection at the start of the case, whereas counsel in *Laird* did not request a continuing objection until after the evidence had been presented, the *Laird* majority's focus on a definitive ruling "at trial *when the evidence was offered*"[37] appears to be at odds with the procedure in *Fairbanks*. The use of the continuing objection in that case predates even opening arguments, let alone lacks simultaneity to the offer of evidence.

Further, as indicated by Judge May's *Laird* concurrence, the role of continuing objections appears supplanted by the 2014 amendment to Rule 103(b), which, she wrote, "eliminated the need for parties to request a continuing objection or to object repeatedly to the same class of evidence after the court has ruled once at trial."[38] The only direct reference to Rule 103 found in *Fairbanks* is passing citation by Judge Pyle, which was provided simply to emphasize the need for a definitive ruling on the record.[39] The role of continuing objections in light of the current language of Rule 103(b) is an issue necessitating clarification.

C. Rule 104: Preliminary Questions

Rule 104 obligates trial courts to resolve preliminary questions of witness qualification, privilege, and admissibility.[40] Hearings on preliminary questions must be conducted outside the presence of the jury if: "(1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires."[41] In *Jones v. State*, the Indiana Court of Appeals reviewed a trial court's resolution of a preliminary question: Whether an officer possessed reasonable suspicion to effectuate a stop that laid the foundation of a conviction for resisting law enforcement.[42] The defendant challenged the court's jury instructions raising the issue of whether the jury must be instructed on finding reasonable suspicion.[43] "In this case, the question of whether the Officers had reasonable suspicion to initiate the stop first arose as a preliminary matter in [the defendant]'s motion to suppress."[44] The appellate court found no error in omitting an instruction on reasonable suspicion.[45] The trial court had appropriately resolved reasonable suspicion as a preliminary question, foregoing the need to instruct the jury on how to make a determination already

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37. Laird v. State, 103 N.E.3d 1171, 1175 n.1 (Ind. Ct. App.), *trans. denied*, 103 N.E.3d 1171 (Ind. 2018).

38. *Id.* at 1179 (May, J., concurring in result).

39. *Fairbanks*, 108 N.E.3d at 375 (Pyle, J., concurring in result), *trans. granted and opinion vacated*, 119 N.E.3d 564 (Ind. 2019).

40. IND. R. EVID. 104(a).

41. IND. R. EVID. 104(c).

42. 101 N.E.3d 249, 256-57 (Ind. Ct. App.), *trans. denied*, 107 N.E.3d 1059 (Ind. 2018).

43. *Id.* at 255-57.

44. *Id.* at 256.

45. *Id.* at 256-57.

properly made by the court.[46]

D. Rule 105: Instructing Jury on Evidence

When evidence is introduced for a limited purpose or scope, Rule 105 requires a court, "on timely request, [to] restrict the evidence to its proper scope and instruct the jury accordingly."[47] It does not, however, require the trial court to act on its own initiative.[48] The Indiana Court of Appeals rejected a challenge to a murder conviction premised solely upon the trial court declining to act *sua sponte* to admonish a jury that it should "not speculate about the reasons [] two witnesses[,]"whose statements from a prior trial were read into the record, "might have been unavailable to testify" in the second trial.[49] The court relied both upon caselaw and the text of Rule 105, which "expressly requires the parties to" make a "timely request."[50] Because there was no obligation to act *sua sponte*, the trial court did not err when it chose to "not interject itself on [the Defendant]'s behalf."[51]

II. JUDICIAL NOTICE: RULE 201

In Indiana state courts, judicial notice is governed by Evidence Rule 201 and the Uniform Judicial Notice of Foreign Law Act.[52] Rule 201(a)(2)(C) permits courts to judicially notice "the existence of . . . records of a court of this state."[53] During the survey period, that power was used to take notice of a 1993 brief to the Indiana Supreme Court,[54] the filing of a petition in a separate paternity action to establish paternity of the same mother's other child,[55] and a petitioner's prior petition for post-conviction relief.[56] Indiana courts may also take judicial notice of orders by federal appellate courts, such as certificates of appealability.[57] It was also reaffirmed that Indiana trial courts may properly take notice of a

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46. *Id.*

47. IND. R. EVID. 105.

48. Merritt v. State, 99 N.E.3d 706, 710 (Ind. Ct. App.), *trans. denied*, 107 N.E.3d 1059 (Ind. 2018).

49. *Id.* at 707, 710.

50. *Id.* at 710 (quoting IND. R. EVID. 105) (emphasis and internal formatting omitted).

51. *Id*.

52. IND. CODE §§ 34-38-4-1 *et seq*. (2018); *In re* Paternity of P.R., 940 N.E.2d 346, 349 (Ind. Ct. App. 2010).

53. IND. R. EVID. 201(a)(2)(C).

54. State v. Stidham, 110 N.E.3d 410, 419 n.3 (Ind. Ct. App. 2018).

55. *In re* Paternity of S.A.M., 85 N.E.3d 879, 885 n.3 (Ind. Ct. App. 2017).

56. Edmonson v. State, 87 N.E.3d 534, 538 n.3 (Ind. Ct. App. 2017).

57. Goodwin v. Deboer, 112 N.E.3d 214, 222 n.2 (Ind. Ct. App. 2018). Although the court did not cite authority in support, it appears the basis likely lies in the Uniform Judicial Notice of Foreign Law Act. IND. CODE § 34-38-4-1 (2018) ("Every court in Indiana shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.").

probationer's guilty plea in another action before the same court as a basis for revoking probation.[58]

Judicial notice is not confined to court records. Notice may also be taken of "a fact that: (A) is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction, or (B) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[59] Under that broad basis, the Indiana Court of Appeals took judicial notice that a litigant's "iPhone 7 Plus is equipped with what Apple refers to as 'Touch ID,' a biometric fingerprint sensor that can be used to unlock the phone, instead of a typed-in password," citing to the manufacturer's website.[60]

Even though a "court *may* take judicial notice at any stage of the proceeding,"[61] courts need not take judicial notice of irrelevant matters.[62] A clear example of when a court will decline to take judicial notice based on relevancy grounds was provided by a civil commitment proceeding. There, the court ruled that pending criminal matters against the person to be committed were not subject to judicial notice because "[t]he alleged crimes took place after the trial court issued its [ruling] and after the initiation of th[e] appeal," making them "irrelevant to [the] review."[63]

III. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

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

"Only relevant evidence is admissible."[64] The scope of evidentiary relevance is established by Rule 401, such that "[e]vidence is relevant when it has any tendency to prove or disprove a consequential fact."[65] Relevance is assessed under a liberal standard with a "low bar."[66] Two decisions from the survey period delved into analyses of relevance under Rules 401 and 402.

Poortenga v. State addressed whether evidence that a person's alcohol concentration equivalent ("ACE") was below the legal limit for operating a motor

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58. Moore v. State, 102 N.E.3d 304, 309-10 (Ind. Ct. App. 2018) (adhering to Henderson v. State, 544 N.E.2d 507, 512-13 (Ind. 1989)).

59. IND. R. EVID. 201(a)(1).

60. Seo v. State, 109 N.E.3d 418, 425 n.11 (Ind. Ct. App. 2018).

61. IND. R. EVID. 201(d) (emphasis added).

62. Mizen v. State *ex rel*. Zoeller, 72 N.E.3d 458, 467 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1078 (Ind. 2017).

63. Civil Commitment of J.B. v. Cmty. Hosp. N., 88 N.E.3d 792, 797 n.1 (Ind. Ct. App. 2017).

64. Angleton v. State, 686 N.E.2d 803, 809 (Ind. 1997) (citing IND. R. EVID. 402).

65. 99 N.E.3d 691, 695 (Ind. Ct. App. 2018) (quoting Snow v. State, 77 N.E.3d 173, 177 (Ind. 2017)) (quotation marks omitted).

66. *Id*. (quoting *Snow*, 77 N.E.3d at 177) (quotation marks omitted); *accord* James v. State, 96 N.E.3d 615, 618 (Ind. Ct. App.), *trans. denied*, 107 N.E.3d 1059 (Ind. 2018).

vehicle was relevant in a trial for operating while intoxicated.[67] Pursuant to statute, a person's ACE in excess of the legal limit constitutes prima facie evidence of intoxication.[68] The Indiana Court of Appeals has also recognized that "once an individual has consented to a chemical test, he may not then object to the results of the chemical test being used against him."[69] As a result, "[i]t would seem unjust to limit relevance of one's ACE to only cases when the individual's ACE is found to be 0.08 or more."[70] Accordingly, the court concluded, "the reverse should also be true that the State may not complain if a defendant who tested below the legal limit attempts to introduce that fact in an effort to discredit the State's claim that he was intoxicated."[71] The conclusion means "that evidence of an individual's ACE is relevant to the question of whether the individual was intoxicated, regardless of whether the individual's ACE was more or less than 0.08," even though the mere fact that the ACE was below the legal limit does not "per se prove[] that the individual was not intoxicated."[72]

The other decision, also from the court of appeals, concerned relevance in the context of self-defense.[73] In general, subject to Rule 401, "[w]hen a claim of self-defense is interposed, [a]ny fact which reasonably would place a person in fear or apprehension of death or great bodily injury is admissible."[74] Nevertheless, evidence that the victim allegedly threatened to kill the defendant two years prior was excluded at trial.[75] Finding that the "previous threat was allegedly made during a contentious time for the parties[,] that the parties had since resolved their issues," and that "the parties relationship had improved to the point that the parties were able to interact in a cordial manner on a somewhat frequent basis" afterward, the court of appeals ruled "the alleged threat was too remote in time to be relevant to whether [the defendant] acted in self-defense."[76] Key to the disposition was that "nothing suggest[ed] that the alleged threat . . . was ongoing or that [the defendant] continued to fear for his safety."[77]

B. Rules 403 & 404: Excluding Otherwise Admissible Character Evidence

Rule 404 bars use of prior bad acts and character to show that a person acted

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67. *Poortenga*, 99 N.E.3d at 695-96.

68. *Id*. at 695 (quoting IND. CODE § 9-13-2-131 (2018)).

69. *Id*. (citing Temperly v. State, 933 N.E.2d 558, 566 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1199 (Ind.), *cert. denied*, 565 U.S. 976 (2011)).

70. *Id.*

71. *Id.*

72. *Id.*

73. James v. State, 96 N.E.3d 615, 618-19 (Ind. Ct. App.), *trans. denied*, 107 N.E.3d 1059 (Ind. 2018).

74. *Id*. at 618 (quoting Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998)) (alterations in original; quotation marks omitted).

75. *Id.*

76. *Id.* at 619.

77. *Id.* (distinguishing Littler v. State, 871 N.E.2d 276 (Ind. 2007)).

on a specific instance in accordance with the previous acts or character.[78] Subdivision (a) focuses on evidence of a party's character, while subdivision (b) addresses crimes, wrongs, and other acts.[79] Subdivision (b) acts in conjunction with Rule 403 to prevent evidence that would otherwise be admissible of a person's character or prior bad acts.[80] Application of Rule 404(b) is a two-step process: "(1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403."[81] "The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the 'forbidden inference' that the defendant had a criminal propensity and therefore engaged in the charged conduct."[82]

There are specific circumstances in which evidence otherwise subject to exclusion under Rule 404(b) is still admissible.[83] One such circumstance is the "intent" exception:

> The intent exception in Evid. R. 404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense. The trial court must then determine whether to admit or exclude such evidence depending upon whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence."[84]

The Indiana Court of Appeals issued five published majority opinions during the survey period addressing Rules 403 and 404(b). Transfer to the Indiana Supreme Court was sought in each but granted in just one. In *Curry v. State*, the court found Rule 404(b) violated by use of a defendant's statements from the time of his arrest that he had paid $8,000 for heroin seized during the arrest, that the

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78. IND. R. EVID. 404.

79. *Id.*

80. Hicks v. State, 690 N.E.2d 215, 219 n.4 (Ind. 1997).

81. Curry v. State, 90 N.E.3d 677, 689 (Ind. Ct. App. 2017), *trans. denied*, 97 N.E.3d 235 (Ind. 2018).

82. *Id.* at 689 (quoting Thompson v. State, 690 N.E.2d 224, 233 (Ind. 1997)).

83. IND. R. EVID. 404(b)(2); *see also* Cannon v. State, 99 N.E.3d 274, 281-90 (Ind. Ct. App.) (Robb, J., dissenting) (thoroughly analyzing intent and knowledge exceptions), *trans. denied*, 111 N.E.3d 197 (Ind. 2018).

84. *Curry*, 90 N.E.3d at 690 (quoting Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993)) (formatting omitted).

payment also covered prior shipments, "that he had recently taken twice weekly trips to Chicago to procure heroin," and description of his sales method in his trial relating only to the drugs seized at the time of his arrest.[85] The court reasoned that the portions of the statements "describ[ing] the quantity, price, and character of the seized contraband, and his reason for possession—anticipated sale— . . . did not deal with a prior bad act" so were not subject to the rule.[86] But the statements of "other drug-couriering trips and describ[ing] a method of sales" were barred by Rule 404(b) as other bad acts.[87] They were not subject to Rule 404(b)'s intent exception because the defendant "did not 'affirmatively present a claim of particular contrary intent.'"[88]

Hill v. State posed the question of whether evidence of statements/threats made after the date a criminal defendant was charged with the crime of intimidation should be excluded by Rule 404(b).[89] The trial court found the evidence admissible pursuant to the intent exception because the defendant admitted that he had "threatened [the victim] that he would cut her throat and kill her" and asserted as his defense that "what he said . . . was all talk."[90] On appeal, there was found to be no error because the defendant had put his intent at issue by asserting a defense that "amounted to a claim that although he threatened [the victim], he did not really intend for her to be placed in fear of retaliation."[91]

Rule 404(b) was again at issue in *Laird v. State*.[92] In support of a conviction for child molestation, the prosecutor admitted evidence of the defendant's internet search history that included searches of sexual content relating to minors.[93] Although the defendant "did not assert a contrary intent at trial, . . . his pre-trial statements to the police that, if he touched [the victim] in an inappropriate manner, it was accidental," was sufficient to trigger the intent exception to Rule 404(b)(2).[94] Even if the intent exception had not applied, the court found, the evidence would still have been "admissible under the 'plan' exception in Rule 404(b)(2) because the searches were close in time to when [defendant] committed the acts . . . and because [he] searched the internet for behavior to what he did . . . —young boys manipulating men's penises."[95]

In another decision, the court affirmed a conviction for attempted murder where the trial court admitted a threat made to the victim two months prior to the shooting.[96] The victim was the boyfriend to the mother of the defendant's

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85. *Id.* at 689.
86. *Id.* at 690.
87. *Id.*
88. *Id.* (quoting *Wickizer*, 626 N.E.2d at 799).
89. 91 N.E.3d 1078, 1080-82 (Ind. Ct. App.), *trans. denied*, 98 N.E.3d 71 (Ind. 2018).
90. *Id.* at 1081 (quotation marks omitted).
91. *Id.*
92. 103 N.E.3d 1171, 1175-78 (Ind. Ct. App.), *trans. denied*, 110 N.E.3d 1147 (Ind. 2018).
93. *Id*. at 1174.
94. *Id*. at 1178.
95. *Id*.
96. Jackson v. State, 105 N.E.3d 1142, 1144 (Ind. Ct. App.), *trans. denied*, 111 N.E.3d 197

children.[97] In November 2016, upon learning that the victim had cut the hair of one of the children, the defendant became enraged and said to the victim, "N****, I [will] kill you."[98] In January 2017, the defendant charged toward a minivan carrying the children, their mother, and the victim, then shot the victim numerous times.[99] The court of appeals ruled evidence of the November 2016 threat was admissible to show motive even though there was only a single incident.[100] The court found "the nature of the two separate encounters between the men on November 11, 2016—in particular, [the] explicit threats to kill [the victim] over something as trivial as a child's haircut"—was sufficiently related to be "probative of [defendant's] hostility towards [the victim] and his motive in the shooting only two and a half months later."[101]

The final decision was *Fairbanks v. State*, in which the prosecution admitted evidence that the defendant had, on a prior occasion, placed a pillow over the face of the toddler he was charged with murdering.[102] The state sought admission to show that the "death was not an accident."[103] The defendant responded "that he ha[d] never claimed that [the] death was an accident."[104] Reviewing governing caselaw, the court found "no clear-cut answer under Indiana law whether a defendant must affirmatively claim mistake or accident before the State can admit evidence pursuant to Evidence Rule 404(b) that the act was not a mistake or accident."[105] Needing to answer the issue, the court "conclude[d] that, similar to intent, defendants must affirmatively claim mistake or accident before the State can admit evidence pursuant to Evidence Rule 404(b) that the act was not a mistake or accident."[106] Looking at the record as a whole, the court easily found that the defendant had squarely argued that the death was an accident.[107] The Indiana Supreme Court has granted transfer, and its answer to whether the defendant must affirmatively put the question of accident at issue will be addressed in the survey covering the next survey period.[108]

(Ind. 2018).

97. *Id.*

98. *Id.* (alterations in original).

99. *Id.*

100. *Id.* at 1146-47.

101. *Id.* at 1146.

102. Fairbanks v. State, 108 N.E.3d 357, 366-70 (Ind. Ct. App. 2018), *trans. granted and opinion vacated,* 119 N.E.3d 564 (Ind. 2019).

103. *Id.* at 367.

104. *Id.*

105. *Id.* at 367-68.

106. *Id.* at 369.

107. *Id.* ("If there was any doubt whether Fairbanks claimed accident during trial, that doubt was extinguished when defense counsel argued during closing that what happened to Janna was, in fact, an 'accident.' In particular, defense counsel argued: 'Was it unsafe? People sleep with their kids all the time. This is accidental. It's an accident compounded by [Fairbanks's] stupidity [of discarding Janna's body in a dumpster].'" (citation to record omitted)).

108. *See* Fairbanks v. State, 119 N.E.3d 564 (Ind. 2019).

In addition to the cases decided under Rules 403 & 404(b), one notable opinion addressed Rule 404(a).[109] The question before the Indiana Supreme Court was whether a witness's reference to the defendant's nickname of "Looney the Shooter" and use of that name to argue that the defendant had been the person in a group of people who shot and killed the victim was inadmissible character evidence.[110] Because the defendant's established nickname was "Looney," the court found it would not have been error to refer to the defendant simply as "Looney" in order to prove the defendant's identity.[111] The appendage of "the Shooter" to the nickname, however, was deemed unnecessary for the purpose of identification and "merely ratcheted up the prejudice."[112] Thus, the use of "the nickname in closing to argue that [the defendant] acted in accordance with his 'unsavory or lawless character reputation'" ran afoul of Rule 404(a)(1).[113]

C. Rule 406: Habit & Routine

Pursuant to Rule 406, "[e]vidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice."[114] In this context, "habit" means "evidence of one's regular response to a repeated specific situation."[115] One decision during the survey period addressed habit-and-routine evidence under Rule 406. Although not resolving whether the evidence would be admissible at trial for injuries suffered by a bicyclist who was struck by a motor vehicle, the Indiana Court of Appeals determined that the bicyclist's testimony of her habit to "stop[] and look[] both ways at intersections while riding her bicycle" "*may qualify* for admissibility," such that it was admissible in opposition to a motion for summary judgment.[116]

D. Rule 408: Exclusion of Compromise Offers & Negotiations

Rule 408 permits parties to freely negotiate compromises without concern for the negotiations later being used to establish a party's liability or to quantify damages.[117] It does so by prohibiting evidence of "furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and conduct or a statement made

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109. Taylor v. State, 86 N.E.3d 157, 161-63 (Ind. 2017), *cert. denied*, 139 S. Ct. 591 (2018).

110. *Id.* at 160-61.

111. *Id.* at 161-63.

112. *Id.* at 162.

113. *Id.*

114. IND. R. EVID. 406.

115. Lewis v. State, 34 N.E.3d 240, 247 (Ind. 2015) (citation and quotations marks omitted).

116. Gonzalez v. Ritz, 102 N.E.3d 910, 916 (Ind. Ct. App. 2018) (emphasis added).

117. Miller v. Polaris Labs., LLC, No. 1:11-cv-01004-TWP-DML, 2016 U.S. Dist. LEXIS 55112, at *10 (S.D. Ind. Apr. 26, 2016). Indiana Evidence Rule 408 is modeled on and serves the same basic purpose of Federal Rule of Evidence 408. R. R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112, 136 n.13 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 508 (Ind. 2002).

during compromise negotiations about the claim" that would be used "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction,"[118] unless the evidence is used "for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[119]

As echoed by the United States District Court for the Southern District of Indiana, while Indiana Evidence Rule 408 may be a sound basis for excluding witness statements recorded for use as part of settlement negotiations at mediation, it is not a means to constrain the scope of discovery because it only "concerns the admissibility of evidence at trial and has nothing to do with whether something is discoverable."[120] Discovery may, however, be prohibited by other limitations, such as Evidence Rule 502(a), "which governs whether to extend a waiver to undisclosed work product material."[121]

E. Rule 412: Evidence of Molestation by Another

Rule 412, in conjunction with Indiana Code section 35-37-4-4, acts as Indiana's rape-shield protection for victims of sex crimes.[122] The rule "generally prohibits the introduction of evidence of prior sexual conduct of an alleged victim of a sex crime."[123] Evidence may not be "offered to prove that a victim or witness engaged in other sexual behavior; or . . . to prove a victim's or witness's sexual predisposition."[124] It "is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes."[125]

There are exceptions to the prohibition that differ based on whether the underlying action is civil or criminal.[126] "In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy."[127]

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118. IND. R. EVID. 408(a).

119. IND. R. EVID. 408(b).

120. Pinkham v. Coca-Cola Refreshments USA, Inc., No. 1:18-cv-01096-SEB-TAB, 2018 U.S. Dist. LEXIS 136102, at *5 (S.D. Ind. Aug. 13, 2018).

121. *Id.*

122. Oatts v. State, 899 N.E.2d 714, 720 (Ind. Ct. App. 2009). Rule 412 "incorporates the basic principles of [Section] 35-37-4-4," *id.* (citation and quotation marks omitted), and to the extent the rule and statute are inconsistent, the rule controls. *Id.* at 720 n.8.

123. Johnson v. State, 6 N.E.3d 491, 498 (Ind. Ct. App. 2014).

124. IND. R. EVID. 412(a).

125. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

126. IND. R. EVID. 412(b).

127. IND. R. EVID. 412(b)(2).

The exceptions to use in criminal proceedings are more circumscribed.[128] There are three narrow categories for evidence that may be admitted in criminal cases:

> (A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
> (C) evidence whose exclusion would violate the defendant's constitutional rights.[129]

In *Alvarado v. State*, the defendant sought to admit evidence that the minor victim had been molested by another person in order to claim that it "provided [the victim] with the knowledge to fabricate her accusations against" the defendant.[130] Because that purpose did not meet either of the first two circumstances for admission, the defendant turned to the third, arguing that exclusion violated his Sixth Amendment right-to-cross-examination.[131] He "relie[d] on the so-called 'sexual innocence inference theory.'"[132]

> The theory is based on the premise that, because young children are generally presumed to be ignorant of sexual matters, a child victim's mere ability to describe sexual conduct may be compelling enough to convince a jury that the charged conduct must have occurred. Consequently, the defense should have the opportunity to offer evidence that the victim had acquired sufficient knowledge from another source to fabricate a charge against the defendant, including evidence that the child had acquired sexual experience with someone else before he or she accused the defendant.[133]

The theory has been criticized as improper "based on unsubstantiated assumptions and fears about what a jury may infer from the complaining witness's testimony."[134] Nevertheless, Indiana has adopted an approach based in part on the theory known as "the 'compromise approach' to questions involving the sexual innocence inference theory."[135] The so-called "compromise approach"

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128. IND. R. EVID. 412(b)(1).

129. *Id.*

130. 89 N.E.3d 442, 443 (Ind. Ct. App. 2017), *trans. denied*, 96 N.E.3d 576 (Ind. 2018).

131. *Id.* at 445-47.

132. *Id.* at 446.

133. *Id.* (citation omitted).

134. *Id.* at 446 n.3 (quoting State v. Clarke, 343 N.W.2d 158, 163 (Iowa 1984)) (quotation marks omitted).

135. *Id.* at 446 (citing Oatts v. State, 899 N.E.2d 714, 724-25 (Ind. Ct. App. 2009)).

places the "burden [] on the defendant 'to show that the prior sexual act occurred and that the prior sexual act was sufficiently similar to the present sexual act to give the victim the knowledge to imagine the molestation charge.'"[136] The analysis, however, only matters if the defendant can establish that it is reasonable to "assume that the jury will infer [the victim]'s innocence of sexual matters."[137]

Applying that theory in *Alvarado*, the court of appeals ruled that the defendant failed to establish an abuse of discretion by exclusion.[138] Specifically, he did not establish "that the average juror would assume [the victim] lacked the knowledge to fabricate allegations of molestation."[139] When she first reported the molestation, the victim "was two or three months shy of her tenth birthday" and may have "received 'good touch, bad touch' education while at school".[140] The court concluded the evidence showed that even if the court "assume[d the victim] was young enough to generally support an inference of sexual ignorance . . . that inference was rebutted."[141]

There are two further important takeaways from *Alvarado*. First, the court found it notable, even if not determinative, "that, despite expressing grave concern about being denied the right to present evidence of possible alternate sources of sexual knowledge, [the defendant] did not pursue the issue of [the victim]'s 'good touch, bad touch' education at any length or argue that *it* was the source of [her] sexual knowledge."[142] And second, the court "suggest[ed] that if a defendant is, in fact, genuinely concerned about the jury unduly inferring sexual innocence of a young witness," those concerns might be well "explored in *voir dire*."[143]

IV. PRIVILEGES: RULES 501 & 502

Rules 501 and 502 preserve and incorporate the various privileges recognized beyond the Indiana Rules of Evidence and provide for the scope and applicability of such privileges.[144] Indiana's state and federal courts tackled numerous issues relating to privilege during the survey period.

In the context of proceedings supplemental, an attorney was served with non-party discovery requests seeking documents showing "[c]opies of any and all check and/or wire transfers received from [the client] or from others on behalf of

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136. *Id.* (quoting *Oatts*, 899 N.E.2d at 724).

137. *Id.*

138. *Id.* at 446-47.

139. *Id.* at 446.

140. *Id.*

141. *Id.*

142. *Id.* (emphasis in original).

143. *Id.* at 446 n.3. The court recognized that its research "uncovered not one case nationwide (including this one) in which a defendant in a child molestation case has thought to address such concerns during jury selection." *Id*.

144. 13B ROBERT L. MILLER, JR., INDIANA PRACTICE: COURTROOM HANDBOOK ON INDIANA EVIDENCE 116 (2016-17 ed.).

[the client] for legal fees paid for her representation."[145] The client, turned judgment-defendant, filed a motion to quash the requests, arguing that the documents were protected by both the attorney-client privilege[146] and the client's "Fifth Amendment right against self-incrimination."[147] Both contentions were rejected.[148]

The Indiana Court of Appeals recognized "a general rule [that] information regarding a client's attorney fees is not protected by the attorney-client privilege because the payment of fees is not considered a confidential communication between an attorney and his or her client."[149] There are limited exceptions to the rule, including "where revealing the payee's identity or the fee arrangement would be tantamount to the disclosure of a confidential communication."[150] The judgment-defendant sought to create an "incrimination" exception to the general rule, which she argued would be applicable because there had been criminal charges filed against her that were dismissed without prejudice.[151] Following the Seventh Circuit's lead, the Indiana Court of Appeals declined to recognize such an exception.[152]

The court more easily dispatched the judgment-defendant's resort to the Fifth Amendment.[153] Looking to the Supreme Court of the United States' opinion in *Fisher v. United States*, the Indiana Court of Appeals observed that it was not the judgment-defendant seeking to invoke the privilege on her own behalf; rather, she sought to invoke it to prevent disclosure by a third-party.[154] "[T]he Fifth Amendment [does] not preclude compelled disclosure of information from a third party such as a defendant's attorney."[155] Accordingly, the privilege did not

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145. Boulangger v. Ohio Valley Eye Inst., P.C., 89 N.E.3d 1112, 1115 (Ind. Ct. App. 2017) (quotation marks omitted; first alteration in original).

146. "The elements of the attorney-client privilege are: '(1) where legal advice was sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor; (8) except the protection may be waived.'" Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc., No. 1:14-cv-00006-WCL-SLC, 2018 U.S. Dist. LEXIS 19695, at *19-20 n.4 (N.D. Ind. Feb. 6, 2018) (quoting Long v. Anderson Univ., 204 F.R.D. 129, 134 (S.D. Ind. 2001) (citing in turn United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997); Lahr v. State, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000))).

147. *Boulangger*, 89 N.E.3d at 1115.

148. *Id.* at 1116-18.

149. *Id.* at 1116 (citing Hueck v. State, 590 N.E.2d 581, 585 (Ind. Ct. App.), *trans. denied* (Ind. 1992)).

150. *Id.*

151. *Id.* at 1114-17.

152. *Id.* at 1117-18 (citing *In re* Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489, 492, 494 (7th Cir.1984)).

153. *Id.* at 1118.

154. *Id.* (citing Fisher v. United States, 425 U.S. 391, 398-99 (1976)).

155. *Id.* (citing *Fisher*, 425 U.S. at 399).

apply.[156]

Several other privileges received attention from Indiana's federal courts.[157] Two decisions from the United States District Court for the Southern District of Indiana concerned Indiana's physician-patient privilege. Codified at Indiana Code section 34-46-3-1(2), the privilege dictates that physicians may not be compelled to testify "as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases."[158] The "privilege is not absolute" and may be waived when the plaintiff places his or her physical or mental condition at issue such that it has "direct medical relevance to the claim, counterclaim or defense made."[159]

In *Alerding Castor Hewitt LLP v. Fletcher*, Magistrate Judge Mark Dinsmore ruled the privilege was not waived by an attorney resisting a claim for legal malpractice who, the claimant argued, placed "his health at issue when he checked into substance abuse rehabilitation one week before the trial date of the [client's] lawsuit."[160] Distinguishing the case before him from *Vargas v. Shepherd*, Magistrate Judge Dinsmore found "[t]he mere fact that [the attorney] 'check[ed] into substance abuse rehabilitation one week before [trial]'" was not relevant to the malpractice claim nor had he voluntarily placed his medical condition at issue by filing a claim to recover for the condition.[161] Therefore, the privilege was not waived because the attorney's medical treatment had not been

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156. *Id.*

157. Because, in civil cases, Federal Rule of Evidence 501 incorporates "privilege[s] regarding a claim or defense for which state law supplies the rule of decision," numerous federal decisions addressing Indiana's state-law privileges are addressed herein. For reference, the author provides the following non-exhaustive list of decisions from Indiana's federal courts addressing privileges under federal law not otherwise addressed herein: Hamdan v. Ind. Univ. Health N. Hosp., Inc., 880 F.3d 416, 421 (7th Cir. 2018) ("declin[ing] to recognize a federal peer-review privilege"); Taylor v. Gilbert, No. 2:15-cv-00348-JMS-MJD, 2018 U.S. Dist. LEXIS 42322, at *4-13 (S.D. Ind. Mar. 15, 2018) (federal law-enforcement investigatory and deliberative-process privilege); Wilson v. Allen Cty. Council, No. 1:15-CV-402-TLS, 2018 U.S. Dist. LEXIS 50335, at *3-9 (N.D. Ind. Mar. 27, 2018) (federal deliberative-process privilege); Johnson v. Rogers, No. 1:16-cv-02705-JMS-MPB, 2018 U.S. Dist. LEXIS 86769, at *8-16 2327713 (S.D. Ind. May 23, 2018) (analyzing federal psychotherapist-patient privilege and rejecting application of Indiana's corresponding privilege standard); Pinkham v. Coca-Cola Refreshments USA, Inc., No. 1:18-cv-01096-SEB-TAB, 2018 U.S. Dist. LEXIS 136102 (S.D. Ind. Aug. 13, 2018) (under specific facts of case, showing of video in mediation waived work-product privilege as to the portions of the video actually shown but not to entire video pursuant to Federal Rule 502(a)); United States v. Snyder, No. 2:16-CR-160 JVB, 2018 U.S. Dist. LEXIS 166231 (N.D. Ind. Sep. 27, 2018) (federal attorney-client privilege).

158. IND. CODE § 34-46-3-1(2) (2018).

159. Sheng v. Bissonnette, No. 1:17-cv-03864-JRS-TAB, 2018 U.S. Dist. LEXIS 165816, at *2 (S.D. Ind. Sep. 27, 2018) (citations and quotation marks omitted).

160. No. 1:16-cv-02453-RLY-MJD, 2018 U.S. Dist. LEXIS 110421, at *13-14 (S.D. Ind. Jan. 26, 2018).

161. *Id.* (citing Vargas v. Shepherd, 903 N.E.2d 1026, 1030 (Ind. Ct. App. 2009)) (third and fourth alterations in original).

placed at issue.[162]

Eight months later, the Southern District of Indiana once more addressed the privilege. In an action in which the plaintiff claimed "a brain injury affecting her cognitive functioning," Magistrate Judge Tim Baker found the privilege waived as to the records of a psychologist who treated the plaintiff "for some of the same symptoms [she] claim[ed] were caused by the incident."[163] By placing "the cause of those symptoms at issue," she waived the privilege.[164]

The Southern District of Indiana also confronted another of Indiana's statutory privileges: the accountant-client privilege.[165] Rejecting use of the privilege to protect disclosure of tax returns, Magistrate Judge Dinsmore observed that "tax returns [] fall outside the scope of the accountant-client privilege because those are documents intended to be communicated to a third person—either the IRS or Indiana Department of Revenue."[166] Under Indiana law, "communications intended to be transmitted to a third person are not privileged."[167]

V. WITNESSES: RULES 601 THROUGH 617

A. Rule 601: Dead-Man's Statute

Under Rule 601, "[e]very person is competent to be a witness except as otherwise provided in [the Indiana Rules of Evidence] or by statute."[168] One statute that provides an exception to Rule 601 is Indiana's Dead Man's Statute. The purpose of dead-man's statutes was to strike a compromise between those who sought to continue the draconian common-law procedure of barring all persons with direct pecuniary interests from testifying in litigation and those who sought to see the rule abandoned in total.[169] The resulting statutes sought to maintain the procedure when a party to the transaction was rendered incapable of testifying to his or her interest due to death.[170]

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162. *Id.*

163. *Sheng*, 2018 U.S. Dist. LEXIS 165816, at *1.

164. *Id.* at *1-3.

165. IND. CODE § 25-2.1-14-1 (2018).

166. Order on Motion for Protective Order, Crop Prod. Servs. v. Robinson V., Inc., No. 2:12-cv-00182-MJD-JMS, 2018 U.S. Dist. LEXIS 23767, at *15-16 (S.D. Ind. Feb. 14, 2018) (quotation marks and citation to record omitted).

167. *Id.* at *15-16 (quoting Airgas Mid-Am., Inc. v. Long, 812 N.E.2d 842, 845 n.3 (Ind. Ct. App. 2004)). The court also declined to apply 26. U.S.C. § 6103 (dictating that tax returns "shall be confidential") as a privilege prohibiting discovery and use of tax returns and also rejected resort to a federal common-law "qualified privilege providing added protection to [] tax returns and return information" because the matter arose in the posture of proceedings supplemental, which are governed by state not federal law. *Id*. at *14-18.

168. IND. R. EVID. 601.

169. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 65 (3d ed. 1984).

170. *Id.*

Codified at Indiana Code section 34-45-2-4, Indiana's "Dead Man's Statute establishes, as a matter of legislative policy, that claimants to the estate of a deceased person should not be permitted to present a court with their version of their dealings with the decedent."[171] It applies exclusively to actions that include an estate's executor or administrator, "involv[e] matters that occurred during the lifetime of the decedent," and where judgment is sought against the estate.[172] "[R]ather than excluding evidence, the statute prevents a particular class of witnesses from testifying as to the claims against the estate."[173] It arose in three decisions during the survey period.

Following the death of a farmer, the farmer's supplier of cattle claimed several hundred thousand dollars against the resulting estate for an alleged outstanding balance on an oral contract.[174] The testimony of the supplier regarding conversations with the farmer's widow were disallowed by the trial court pursuant to the Indiana Dead Man's Statute.[175] On appeal, the court found it did not matter whether the discussions were had before or after the death of the farmer; they were barred because "the substance of those conversations involves oral contracts that . . . may have formed during [the farmer]'s lifetime," which "would present the trial court with [the supplier]'s version of its dealings with [the farmer], who cannot testify to his version of any oral contracts because his lips are closed by death. This proposed testimony, therefore, is precisely what the Dead Man's Statute aims to preclude."[176]

In *D.H. v. Whipple*, the Indiana Court of Appeals was able to easily dispense with a challenge to testimony by a police detective advanced in a claim for damages resulting from child molestation.[177] With limited exceptions, the Dead Man's Statute renders a witness incompetent only if he or she has an interest "adverse to the estate."[178] "Because [the detective] would neither gain, nor lose, by the direct legal operation of the judgment, he d[id] not have an interest which renders him incompetent to testify."[179]

The third decision resulted from one year of marriage and five decades of inconclusive proceedings to dissolve that union.[180] While the final in a long line of dissolution proceedings across multiple jurisdictions was pending, the husband passed away.[181] The wife then elected "to take against the will as a surviving

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171. Childress Cattle, LLC v. Estate of Cain, 88 N.E.3d 1121, 1123 (Ind. Ct. App. 2017).

172. IND. CODE § 34-45-2-4(a) (2018); *cf.* D.H. v. Whipple, 103 N.E.3d 1119, 1126 n.2 (Ind. Ct. App.), *trans. denied*, 119 N.E.3d 91 (Ind. 2018).

173. *D.H.*, 103 N.E.3d at 1126 n.2.

174. *Childress Cattle*, 88 N.E.3d at 1122.

175. *Id.* at 1122-23.

176. *Id.* at 1124.

177. 103 N.E.3d at 1126 n.2.

178. *Id.* (quoting IND. CODE § 34-45-2-4(d)) (quotation marks omitted).

179. *Id.* (quoting IND. CODE § 34-45-2-4(d)) (quotation marks omitted).

180. Riggs v. Hill, 84 N.E.3d 699, 700-01 (Ind. Ct. App. 2017), *trans. denied*, 95 N.E.3d 1292 (Ind. 2018).

181. *Id.* at 701.

spouse in the [ensuing] probate action."[182] The probate court barred the election pursuant to the doctrine of laches and the wife appealed, contending that portions of her designation of evidence were improperly struck in accordance with the Dead Man's Statute.[183] Concluding that "the Dead Man's Statute prohibits the testimony of an alleged surviving spouse about her relationship with the decedent where she is seeking to inherit a portion of the decedent's estate," the court of appeals upheld exclusion of the testimony.[184]

B. Rule 606: Post-Trial Testimony of Jurors

"Rule 606 governs the permissible limits of investigation into a juror's service and experience."[185] It generally prohibits impeachment of a verdict through subsequent juror testimony.[186] That general rule yields when any of the four enumerated exceptions of Rule 606(b)(2) apply.[187] One such exception—permitting "[a] juror [to] testify about whether: . . . extraneous prejudicial information was improperly brought to the jury's attention"—was the basis for an unsuccessful challenge to a $1.3 million jury verdict in *Tunstall v. Manning*.[188]

During the course of jury deliberation, the trial court received a note from juror Staton stating, "I don't feel as we are close to a decision. I need to leave to pick up my grandson. Can I be excused?"[189] At that time, the court refused the request.[190] Over an hour later, the court received a second note from the jury room, this one instructing that "the jury cannot reach a verdict at this point due to the award amount."[191] The note continued, "We find for the plaintiff, but can't agree on the award. We are one million dollars apart with one juror unable, or unwilling to budge."[192] In response, the court "instructed the jury to continue deliberating."[193]

Just under an hour after the second note, a third note arrived from the jury

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182. *Id.*

183. *Id.*

184. *Id.* at 703.

185. Green v. State, 994 N.E.2d 1276, 1279 (Ind. Ct. App. 2013) (citations and formatting omitted).

186. IND. R. EVID. 606(b)(1); Tunstall v. Manning, 107 N.E.3d 1093, 1101 (Ind. Ct. App. 2018), *trans. granted and opinion vacated*, 120 N.E.3d 554 (Ind. 2019).

187. The four exceptions are: "(A) any juror's drug or alcohol use; (B) extraneous prejudicial information was improperly brought to the jury's attention; (C) an outside influence was improperly brought to bear on any juror; or (D) a mistake was made in entering the verdict on the verdict form." IND. R. EVID. 606(b)(2)(A-D).

188. IND. R. EVID. 606(b)(2)(B); *Tunstall*, 107 N.E.3d at 1101-02.

189. *Tunstall*, 107 N.E.3d at 1099.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

room.[194] Once again, the note was from juror Staton who, this time, "wrote, 'I would like to be excused due to pain in my legs. Can the alternate take over in my absence? I hate to ask but I'm in pain and can't take it any longer.'"[195] After consulting with counsel for the respective parties, who each indicated no objection, the court agreed to discharge juror Staton.[196] Following her discharge, the jury returned a verdict in the amount of $1.3 million for the plaintiff.[197]

One month after the trial, juror Staton contacted counsel for the defendant to "express[] her disagreement with the amount of the verdict."[198] She executed an affidavit, prepared by defense counsel, explaining that "a juror . . . shared during deliberations that she had been treated by . . . one of [the plaintiff]'s physicians, for similar back injuries. Based on her own experience with that doctor, [the juror] maintained that the doctor would not have 'ordered the MRI or prescribed injections unless he saw something.'"[199] The affidavit was used unsuccessfully in support of a motion to correct error based upon juror misconduct.[200]

On appeal, the court recognized that "[a]lthough a verdict may not normally be impeached by juror testimony, an exception exists [under Rule 606(b)(2)(B)] where 'extraneous prejudicial information was improperly brought to the jury's attention.'"[201] Traditionally, Indiana applies a two-step analysis, which requires the party challenging the verdict to first show "that the jury or a juror was exposed to 'extraneous prejudicial information' or 'outside influence.'"[202] Once that showing has been made, then the burden shifts to the party defending the verdict to show that there was no substantial possibility that it tainted the verdict.[203]

The *Tunstall* court did not, however, provide a considered analysis of whether juror Staton's affidavit sufficiently established evidence that the jury was exposed to extraneous prejudicial information so as to implicate the exception of Rule 606(b)(2)(B).[204] Instead, the court appears to have presumed the evidence was admissible and progressed to determine whether the juror's personal knowledge was sufficiently prejudicial to warrant a new trial, though "not[ing] that the trial court impliedly questioned Staton's credibility."[205] The court determined that it

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194. *Id.*

195. *Id.* at 1099-1100.

196. *Id.* at 1100.

197. *Id.*

198. *Id.* at 1101.

199. *Id.*

200. *Id.*

201. *Id.*

202. MILLER, JR., *supra* note 144, at 167 (citation omitted); *see also* Stephenson v. State, 742 N.E.2d 463, 477 (Ind. 2001).

203. MILLER, JR., *supra* note 144, at 167; *Stephenson*, 742 N.E.2d at 477.

204. *Tunstall*, 107 N.E.3d at 1101.

205. *Id.* at 1101 n.7 ("At the hearing on the motion to correct error, the court noted that Staton 'didn't have the courage to stay in that room and fight for her beliefs and wanted out' and then returned after the verdict to try to 'nullify' it." (citation to record omitted)).

could not "say that there was a substantial possibility that [the] statements prejudiced the verdict. Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial on this ground."[206] After the close of the survey period, the Indiana Supreme Court granted transfer, vacating the decision.[207] The Indiana Supreme Court's ultimate decision will be addressed in the next survey period.[208]

C. Rule 611: Courts' Authority to Control Examination of Witnesses

Rule 611 establishes the authority of courts to control and intercede into examination of witnesses.[209] Courts are to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment."[210] To further those purposes, a "trial judge is provided wide latitude to control the flow of the trial proceedings."[211]

The breadth of that latitude was tested in *Woods v. State*, wherein a criminal conviction was assailed on the basis of alleged judicial bias due to the judge's *sua sponte* interjections to prohibit a criminal defendant from repeatedly testifying in violation of hearsay rules.[212] The court of appeals ruled that there was no showing of bias because the defendant-witness "had demonstrated a propensity to utter hearsay testimony, and the trial court had repeatedly informed counsel to ask direct questions to avoid the issue. . . . The court properly interceded to ensure that counsel followed the Rules of Evidence."[213]

D. Rule 616: Witness's Bias

In addition to the bases for impeachment of witnesses enshrined in Rules 608, 609, and 613, Rule 616 provides a catchall provision preserving common-law practices to attack a witness's credibility by evidence showing "bias, prejudice, or interest for or against any party."[214] Traditionally, "[c]redibility of a witness may be attacked by showing that he may have an ulterior motive or may be under coercion to testify."[215] Nevertheless, not every conceivable argument for what ulterior motive a witness may possess is admissible. Such a circumstance was

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206. *Id.* at 1102 (internal citations omitted).

207. Tunstall v. Manning, 120 N.E.3d 554 (Ind. 2019).

208. Tunstall v. Manning, 124 N.E.3d 1193 (Ind. 2019).

209. IND. R. EVID. 611.

210. IND. R. EVID. 611(a).

211. Isaacs v. State, 659 N.E.2d 1036, 1042 (Ind. 1995).

212. 98 N.E.3d 656, 664-65 (Ind. Ct. App.), *trans. denied*, 107 N.E.3d 1060 (Ind. 2018).

213. *Id.* at 65.

214. IND. R. EVID. 616; Pickett v. Kolb, 250 Ind. 449, 451, 237 N.E.2d 105, 107 (1968); MILLER, JR., *supra* note 144, at 217.

215. Hall v. State, 267 Ind. 512, 514, 371 N.E.2d 700, 701 (1978).

presented in *Hinkle v. State*.[216] Seeking to undermine the credibility of a minor victim of sexual misconduct, the criminal defendant sought to admit evidence of the victim's drug use.[217] The rationale for admission was that the "drug use was relevant to [the defendant]'s theory that [the victim] had fabricated the molestation allegations in order to avoid facing consequences from his family for his drug use."[218] The trial court excluded the evidence, determining that the defendant "had not demonstrated a connection between [the victim]'s family discussion on his drug use and a motive . . . to falsely accuse [the defendant] of molestation."[219]

On appeal, the defendant contended that the 2013 decision *Hyser v. State* required reversal.[220] *Hyser* was an appeal of convictions for child molestation in which the defendant sought to introduce evidence that the alleged victim fabricated his testimony "as a retaliatory act in response to the report [Hyser] made to DCS that he believed [the alleged victim] was being abused."[221] Finding the evidence relevant because it "had, at a minimum, the tendency to show that the molestation allegations against Hyser were untrue and were made, or caused to be made by [the alleged victim] . . . in retaliation or in response to Hyser's action of making a child abuse report," the Indiana Court of Appeals reversed the conviction.[222]

The *Hinkle* court found *Hyser* distinguishable because, the court reasoned, the *Hyser* "defendant established a foundation for his theory that the witnesses against him may have acted in retaliation."[223] But, "unlike in *Hyser*, there [wa]s no question of retaliation and Hinkle did not present any basis, other than speculation, to support his assumption that [the victim] had invented the allegations of molestation against Hinkle."[224] Further distinguishing *Hinkle* from *Hyser* was that evidence indicated the *Hinkle* victim did not know he was facing consequences with his family for his drug use, thereby undercutting his motivation to fabricate his testimony.[225]

E. Rule 617: "Places of Detention"

It "is not a constitutional requirement or a prophylactic rule meant to enforce

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216. 97 N.E.3d 654, 662-64, *modified on reh'g*, 2018 Ind. App. LEXIS 202 (Ind. Ct. App. 2018).

217. *Id.*

218. *Id.* at 662.

219. *Id.* at 662-63.

220. *Id.* at 663 (citing Hyser v. State, 996 N.E.2d 443 (Ind. Ct. App. 2013)).

221. *Id.* (quoting *Hyser*, 996 N.E.2d at 448) (internal formatting omitted; first alteration in original).

222. *Id.* (quoting *Hyser*, 996 N.E.2d at 448-49) (internal formatting marks omitted; first alteration in original).

223. *Id.*

224. *Id.* at 663-64.

225. *Id.* at 664.

the Constitution; rather, it is a rule of judicial administration."[226]

> Rule 617 heightens the requirements for admissibility of statements in certain circumstances by specifically providing that, "[i]n a felony prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial . . . ."[227]

Last year's survey addressed the court of appeals' decision in *Fansler v. State*, which was only the second appellate decision interpreting the meaning of "Place of Detention."[228] After the close of the previous survey period, the Indiana Supreme Court granted transfer to construe Rule 617 for the first time.[229] The specific question presented was whether a motel room used to conduct a sting and interrogation constituted a "Place of Detention."[230] Rule 617(b) defines "Place of Detention" as "a jail, law enforcement agency station house, or any other stationary or mobile building owned or operated by a law enforcement agency at which persons are detained in connection with criminal investigations."[231] The open-ended nature of the definition led the court of appeals to conclude that the hotel room was a "Place of Detention."[232] On transfer, the Indiana Supreme Court found the particular circumstances in the case did not transform the room into a "Place of Detention."[233]

Because the motel room was not a jail, law enforcement agency, or facility owned by law enforcement, the analysis turned on whether the room was transformed into a "Place of Detention" by its operation.[234] Based on the common meaning of "operate," the court established three factors to determine whether a space has been transformed into a "Place of Detention": "1) the control that law enforcement has over the premises, 2) the frequency of use to conduct custodial interrogations, and 3) the purpose for which law enforcement uses the space."[235] Finding that the room was used only temporarily by law enforcement, without

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226. Fansler v. State, 100 N.E.3d 250, 253 (Ind. 2018).

227. *Id.* (quoting IND. R. EVID. 617(a)) (alteration in original)

228. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1063-65 (2018).

229. *Fansler*, 100 N.E.3d at 253 ("Since our Court has yet to construe Rule 617, we elect to address whether the trial court erred in admitting Fansler's incriminating statements without an electronic recording.").

230. *Id.* at 251-52.

231. IND. R. EVID. 617(b).

232. Fansler v. State, 81 N.E.3d 671, 675 (Ind. Ct. App. 2017). Interestingly, the court of appeals called the location a "hotel room," while the Indiana Supreme Court clarified that the facility was actually a "motel" (though the court noted that the classification did not the outcome). *See Fansler*, 100 N.E.3d at 251 n.1.

233. *Fansler*, 100 N.E.3d at 254-55.

234. *Id.* at 254.

235. *Id.*

significant alteration, that the "police did not exercise the type of long-term control that is ordinarily associated with operating a space," having used it only sporadically over the course of three sting operations in the span of a year, and that the primary use was for surveillance not interrogation, the court concluded that the motel room was not a "Place of Detention" for purposes of Rule 617.[236]

That does not mean a hotel room may never constitute a "Place of Detention."[237] As the court emphasized in leaving the door open for future cases, "[h]ad the degree of control over the motel room, frequency of use, and the purpose of the use indicated that law enforcement was operating the motel room as the functional equivalent of a station house, then perhaps we would have a different outcome."[238]

Even where a space constitutes a "Place of Detention," there are exceptions set forth in subdivision (a). One such exception is the booking exception of Rule 617(a)(1).[239] The now-vacated decision of the court of appeals specifically addressed the exception, deciding that "the language of Rule 617 plainly evokes the formal, administrative setting of the routine-booking exception to the warning requirement of *Miranda v. Arizona* and related Fourth Amendment contexts."[240] The Indiana Supreme Court's opinion, however, passes on the argument without offering any guidance.[241] Although the court of appeals' analysis on the matter is persuasive, future litigants are well to remember that the effect of transfer renders the intermediate *Fansler* decision vacated and not citable in future cases.[242] That leaves no citable published Indiana decision interpreting the booking exception.[243]

VI. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Opinion Testimony by Lay Witnesses

Even if a witness is unable to satisfy the rigors of Rule 702 to provide expert testimony, he or she may still provide opinion testimony under Rule 701 "that is: (a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in

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236. *Id.* at 254-55.

237. *Id.* at 255.

238. *Id.*

239. IND. R. EVID. 617(a)(1) ("In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following: (1) The statement was part of a routine processing or 'booking' of the person . . . .").

240. Fansler v. State, 81 N.E.3d 671, 675 (Ind. Ct. App. 2017) (citations omitted).

241. *Fansler*, 100 N.E.3d at 255-56.

242. *Id.* at 253 (citing IND. R. APP. P. 58(A)); Hubbard v. Hubbard, 690 N.E.2d 1219, 1221 n.2 (Ind. Ct. App. 1998) (applying predecessor to IND. R. APP. P. 58(A)).

243. *Fansler*, 81 N.E.3d at 675.

issue."[244] Such testimony must be "rationally based on some combination of the witness's own personal observation, knowledge, and past experience" and cannot be mere "speculation or [] based on improper inferences."[245] "[A] statement is rational if a reasonable person could form the opinion from the perceived facts."[246]

In *D.H. v. Whipple*, a police detective testified that it was his impression a child's step-grandfather had admitted to his wife that he had molested the child prior to a specific date.[247] The impression was based upon the step-grandfather informing the detective "that he had told his wife [] that he had molested a girl in the past."[248] On review, the Indiana Court of Appeals concluded that the detective's testimony was "both rationally based on his perception and helpful to a clear understanding of his testimony."[249] The court further opined that "even absent an express statement, there are countless context clues in the course of a conversation from which the recipient of information can determine, or at least opine, the order in which events occurred."[250]

Carter v. State presented the question of whether a statute fixing a quantity of heroine as presumptively sufficient to establish intent to deliver the drug foreclosed skilled-witness testimony that a lesser amount could constitute a "dealer quantity."[251] The court of appeals rejected the argument, "conclud[ing] that the statute does not operate to bar admission of probative evidence related to the defendant's intent to deal the drug. Rather, the statute eliminates the State's burden of presenting additional intent evidence when there is evidence that the drug weighed at least twenty-eight grams."[252] Therefore, the statute does not exclude otherwise admissible opinion evidence of intent to distribute an amount beneath the threshold at which the presumption attaches.[253]

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244. IND. R. EVID. 701; Satterfield v. State, 33 N.E.3d 344, 352 (Ind. 2015) ("Helpful opinions are not exclusive to experts or skilled witnesses.").

245. D.H. v. Whipple, 103 N.E.3d 1119, 1127 (Ind. Ct. App.) (citation and quotation marks omitted), *trans. denied*, 119 N.E.3d 91 (Ind. 2018).

246. *Id.* at 1128.

247. *Id.* at 1126-28.

248. *Id.* at 1127.

249. *Id.* at 1128.

250. *Id.*

251. 105 N.E.3d 1121, 1131-32 (Ind. Ct. App.) (citing IND. CODE § 35-48-4-1 (2018)), *trans. denied*, 110 N.E.3d 1146, (Ind. 2018). "A skilled witness is a person with a degree of knowledge short of that sufficient to be declared an expert under Indiana Evidence Rule 702, but somewhat beyond that possessed by the ordinary jurors" who is permitted to testify under Rule 701. Haycraft v. State, 760 N.E.2d 203, 211 (Ind. Ct. App. 2001) (citations and quotation marks omitted), *trans. denied*, 774 N.E.2d 514 (Ind. 2002).

252. *Carter*, 105 N.E.3d at 1132.

253. *Id.*

B. Rule 702: Expert Witnesses

Rule 702 permits admission of testimony from a witness "who is qualified as an expert by knowledge, skill, experience, training, or education [to] testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[254] One of the most notable evidentiary rulings of the survey period addressed the ability to assail the credibility of an expert based upon prior professional discipline. Despite not specifically addressing Rule 702, the decision provided important insight into expert testimony.

At issue in *Tunstall v. Manning* was whether "the trial court abused its discretion by refusing to admit evidence regarding [a medical expert]'s disciplinary history with the Indiana Medical Licensing Board."[255] The expert was twice disciplined by the Medical Licensing Board (the "Board"); first in 2009, resulting in a $500 fine, and again in 2016, yielding a $1,000 fine with "his license [] placed on indefinite probation for a minimum of 1 year with certain terms and conditions."[256] At the time of trial, the expert was no longer under probation, having returned to "good standing."[257]

In resolving the issue, the Indiana Court of Appeals looked to its 2008 decision *Linton v. Davis*.[258] "In *Linton*, th[e] court held that 'the licensure status of a physician who gives an expert opinion is admissible to impeach the doctor's opinion.'"[259] The majority opinion found *Linton* distinguishable and emphasized that *Linton* ruled "[o]nly the final action taken by the Board [] was admissible."[260] While the license of the *Linton* expert was on probation at the time of testifying, the expert in *Tunstall* "was in good standing (i.e., not on probation) at the time he testified."[261] Rejecting the appellant's contention that it was "a distinction without a difference," the court, applying an abuse of discretion standard, emphasized that "an expert's past disciplinary history is, if at all, not as relevant as the expert's current probationary status."[262] Further, the majority thought the minimal portion of the expert's deposition that was excluded would not have had a significant impact on the jury's verdict, rendering any error harmless.[263]

The court's majority opinion drew a dissent from Judge John Baker.[264] Unlike

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

255. Tunstall v. Manning, 107 N.E.3d 1093, 1098 (Ind. Ct. App. 2018), *trans. granted and opinion vacated*, 120 N.E.3d 554 (Ind. 2019).

256. *Id.*

257. *Id.*

258. *Id.* (citing Linton v. Davis, 887 N.E.2d 960 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008)).

259. *Id.* at 1098-99 (quoting *Linton*, 887 N.E.2d at 969).

260. *Id.* at 1099 (quoting *Linton*, 887 N.E.2d at 969).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 1102-03 (Baker, J., dissenting).

his colleagues, Judge Baker agreed with the appellant that the distinction between an expert who was currently as opposed to formerly subject to discipline was immaterial.[265] He further looked for guidance in *Sneed v. Stovall*, in which the Court of Appeals of Tennessee "found that evidence regarding the expert's past disciplinary history—not just his licensure status at the time of trial—was admissible."[266] The majority dismissed "the dissent's reliance on *Sneed*" as "curious" because the *Sneed* expert was still subject to license restrictions at the time of trial and had testified untruthfully in his deposition, answering that he had not been subject to professional discipline.[267]

Further departing from the majority, Judge Baker thought that erroneous exclusion was not harmless because the doctor was the appellee's only medical expert "and his testimony squarely and profoundly disagreed with the" appellant's experts.[268] The dissent further recognized that there was a motion to compel that was denied on the first day of the trial, which, if granted, would have permitted the appellant to probe more deeply into the expert's disciplinary history than the limited portion preserved in the deposition used at trial.[269]

The majority rebutted that point as well:

> During the deposition, rather than address the timing of Dr. Paschall's one instance of probation, defense counsel attempted to ask a series of questions exploring the reasons for the discipline. Dr. Paschall refused to answer these questions. [Appellant] openly acknowledges on appeal that testimony regarding the reasons for the discipline would not have been admissible at trial. Despite this, the dissent references the last-minute motion to compel that [Appellant] filed on the eve of trial and eleven days after the deposition. In the motion, which was denied, [Appellant] asked the trial court to compel Dr. Paschall to answer the unanswered questions from the deposition, as well as reasonable follow-up. [Appellant] did not submit additional questions for the witness or request another deposition. A review of the unanswered questions reveals that the answers *to these questions* would not have been admissible, and the questions themselves were permeated with inadmissible references to criminal convictions.[270]

Although a broad reading of *Tunstall* suggests evidence of past suspensions of an expert's license is necessarily inadmissible, such an interpretation may be ill-advised. In addition to Judge Baker's dissent, there is another reason to be cautious: shortly after the close of the survey period, another panel of the court

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265. *Id.* at 1102.

266. *Id.* (citing Sneed v. Stovall, 22 S.W.3d 277, 282 (Tenn. Ct. App. 1999), *appeal denied* (Tenn. May 22, 2000)).

267. *Id.* at 1099 n.4 (citing *Sneed*, 22 S.W.3d at 278, 281).

268. *Id.* at 1103.

269. *Id.*; *see also* Appellant's Brief at 14-15, Tunstall v. Manning, 107 N.E.3d 1093 (Ind. Ct. App. 2018) (No. 49A04-1711-CT-02572).

270. *Tunstall*, 107 N.E.3d at 1099 n.4 (emphasis in original).

of appeals issued an unpublished memorandum opinion addressing a similar circumstance.[271] Writing for the unanimous panel, Judge James Kirsch made no reference to *Tunstall* and instead relied on *Linton* and *Fridono v. Chuman* to find that an expert "could [] be impeached with the status of his medical license and the fact that it had been previously [] suspended" by mere virtue of the fact "he was a testifying expert witness."[272]

Typically, a memorandum opinion failing to even mention new, controlling precedent would not merit caution—the decision not only lacks precedential value, it cannot even be cited to Indiana courts.[273] What adds note, however, is that Judge Kirsch was part of the panel that decided *Tunstall*, concurring in Judge Robert Altice's majority opinion. To the degree that the law is "[t]he prophecies of what the courts will do in fact, and nothing more pretentious,"[274] on this issue, prognostication of future appellate treatment seems a difficult task, with a substantial possibility that subsequent appellate panels may confine *Tunstall* to its facts. Further complicating matters is that the Indiana Supreme Court has granted transfer in *Tunstall*, vacating the underlying opinion.[275]

Another decision from the survey period, *Taylor v. State*, provided important guidance for sufficiency in establishing the predicate for expert testimony on forensic investigations based on the expert's technical expertise despite the expert having no knowledge of the science behind the technological tools used.[276] There, a detective testified regarding the contents of the defendant's cellular telephone based on what the detective recovered "using the 'Chip-Off' forensic technique."[277] The technique "involves first de-soldering and removing a phone's memory chip from the phone's circuit board, primarily by heating the board until the solder and epoxy connecting the chip to the board loosens . . . then plac[ing] the memory chip into a standalone memory chip reader and retriev[ing] the data from the chip."[278] The defendant challenged the testimony claiming the state failed to lay sufficient foundation for the opinion.[279]

The foundation for scientific testimony may be laid either through "judicial notice or by sufficient foundation to convince the court that the relevant scientific principles are reliable."[280]

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271. Seidenstucker v. Ferguson, No. 18A-CT-962, 2018 Ind. App. Unpub. LEXIS 1375, at *6-11 (Ind. Ct. App. Nov. 20, 2018).

272. *Id.* (citing Fridono v. Chuman, 747 N.E.2d 610, 610, 615, 620 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 418 (Ind. 2001); Linton v. Davis, 887 N.E.2d 960, 965, 968-69 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008)).

273. IND. R. APP. P. 65(D); *see generally* Colin E. Flora, *Citing Unpublished Cases in Indiana: Rules & Caselaw*, 61 RES GESTAE 31 (2018).

274. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

275. Tunstall v. Manning, 120 N.E.3d 554 (Ind. 2019).

276. 101 N.E.3d 865, 869-72 (Ind. Ct. App. 2018).

277. *Id.* at 869-70.

278. *Id.* at 869.

279. *Id.* at 869-72.

280. *Id.* at 870 (citation omitted).

> In determining reliability, courts may consider the following nonexclusive factors: (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community.[281]

Rule 702 "was meant 'to liberalize, rather than to constrict, the admission of reliable scientific evidence.'"[282]

Had the detective attempted to provide expert scientific testimony, then his testimony may not have been admissible.[283] But the court of appeals found the detective did not provide expert *scientific* testimony; rather, he provided testimony based on "'technical' or 'specialized' knowledge" under Rule 702(a).[284] Because the testimony was "not 'scientific,' it need not be proven reliable by means of 'scientific principles' under Evidence Rule 702(b)."[285] And, as testimony under Rule 702(a) instead of Rule 702(b), "any weaknesses or problems in the testimony go only to the weight of the testimony, not to its admissibility, and should be exposed through cross-examination and the presentation of contrary evidence."[286] Accordingly, the court of appeals affirmed admission of the detective's testimony in accordance with Rule 702.

C. Rule 704: Opinion on an Ultimate Issue

Although Rule 704(a) generally allows otherwise admissible opinion testimony to "embrace[] an ultimate issue,"[287] such testimony may not extend "to 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."[288] Even if opinion testimony runs afoul of the specific limitations, it may still be admissible if the opposing party opens the door to it, such that evidence introduced by one party "leave[s] the trier of fact with a false or misleading impression of the facts related."[289] Opening the door allows the opposing party to "introduce otherwise inadmissible evidence if it is a fair response to evidence elicited by the defendant."[290]

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281. *Id.* (citation omitted).

282. *Id.* at 870 (quoting Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001)).

283. *Id.* at 871.

284. *Id.*

285. *Id.* (citation omitted).

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

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

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

289. Wilder v. State, 91 N.E.3d 1016, 1023 (Ind. Ct. App. 2018) (citation and quotation marks omitted).

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

A common form of impermissible opinion testimony arises when a witness offers an opinion as to the veracity of another's testimony, which is often referred to as "vouching evidence."[291] Prior to the Indiana Supreme Court's 2012 ruling in *Hoglund v. State*, there was a limited exception "for cases in which a child was called to testify about sexual conduct, . . . allow[ing] 'some accrediting of the child witness in the form of opinions from parents, teachers, and others having adequate experience with the child, that the child is not prone to exaggerate or fantasize about sexual matters.'"[292] Finding "[t]his indirect vouching testimony [] little different than testimony that the child witness is telling the truth," the *Hoglund* court abandoned the exception as in conflict with Rule 704(b).[293] On habeas review of that decision, the United States District Court for the Northern District of Indiana strongly questioned the Indiana Supreme Court's harmless error analysis, yet left the evidentiary conclusions otherwise undisturbed.[294]

VII. HEARSAY: RULES 801 THROUGH 807

A. Rules 801 & 802: Hearsay Generally Prohibited

"Hearsay is not admissible unless the Rules of Evidence or other law provides otherwise."[295] "Hearsay is an out-of-court statement offered for 'the truth of the matter asserted,' and it is generally not admissible as evidence."[296] The prohibition on hearsay extends both to speech and conduct "when [the conduct] indicates an implied assertion by the declarant."[297] If evidence is offered for a purpose other than the truth of the matter asserted, then it is not hearsay.[298] "Whether a statement is hearsay will most often hinge on the purpose for which it is offered."[299] In *Thrash v. State*, the Indiana Court of Appeals found that an officer's testimony that the defendant's ex-girlfriend said the defendant had outstanding warrants was impermissible hearsay.[300] The exception for "out-of-

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291. *See*, *e.g.*, Hamilton v. State, 49 N.E.3d 554, 556 (Ind. Ct. App. 2015).

292. *See*, *e.g.*, *id.*, *see* Hoglund v. Superintendent, No. 3:16-CV-313-PPS-MGG, 2018 U.S. Dist. LEXIS 142552, at *22 (N.D. Ind. Aug. 22, 2018) (discussing Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012); quoting Lawrence v. State, 464 N.E.2d 923, 925 (Ind. 1984)), *appeal filed*, No. 18-2949 (7th Cir. Sep. 7, 2018).

293. *Hoglund*, 962 N.E.2d at 1237.

294. *Hoglund*, 2018 U.S. Dist. LEXIS 142552, at *21-32.

295. Carr v. State, 106 N.E.3d 546, 554 (Ind. Ct. App.) (citing IND. R. EVID. 802), *trans. denied*, 111 N.E.3d 197 (Ind. 2018).

296. Thrash v. State, 88 N.E.3d 198, 203 (Ind. Ct. App. 2017) (quoting IND. R. EVID. 801(c)(2)).

297. Bates-Smith v. State, 108 N.E.3d 399, 404 (Ind. Ct. App. 2018).

298. *See*, *e.g.*, J.G. v. State, 93 N.E.3d 1112, 1125 n.11 (Ind. Ct. App.), *trans. denied*, 102 N.E.3d 286 (Ind. 2018); *Bates-Smith*, 108 N.E.3d at 405.

299. *Thrash*, 88 N.E.3d at 203 (quoting Blount v. State, 22 N.E.3d 559, 565 (Ind. 2014)).

300. *Id.* at 203-05.

court statements made to law enforcement . . . if introduced primarily to explain why the investigation proceeded as it did" did not apply because the testimony failed the three-part *Craig* test.[301]

The *Craig* test considers: (1) "whether the challenged hearsay statement asserts a fact susceptible of being true or false"; (2) "the evidentiary purpose for the proffered statement"; and (3) if the assertion is "for a purpose other than to prove the truth . . . whether the fact to be proved is relevant to some issue in the case, and whether the danger of unfair prejudice that may result from its admission outweighs its probative value."[302] The statements in *Thrash* were susceptible to being true or false, for the purpose of "document[ing] the course of police investigation," and of only slight relevance.[303] Thus, it was error to admit the testimony.[304]

B. Rule 803: Statements for Medical Diagnoses, Business Records, and Learned Treatises

Rule 803 sets out exceptions to Rule 802's general prohibition on hearsay evidence that apply regardless of whether the declarant is available to testify.[305] Three categories of exceptions drew meaningful attention during the survey period: statements made for medical diagnoses or treatments;[306] records of regularly conducted activities;[307] and statements in learned treatises.[308]

The exception for statements made for medical diagnosis or treatment "requires that the statements must be made by persons who are seeking medical diagnosis or treatment and describing medical history, past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[309] In order to apply, "the declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment."[310] At the heart of the exception is the presumed reliability of the statement based upon "the declarant's self-interest in obtaining proper medical treatment."[311] To invoke the exception, a proponent must show: (1) that "the declarant [was] motivated to

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301. *Id.* at 203-04 (citing Craig v. State 630 N.E.2d 207, 211 (Ind. 1994)).

302. *Id.* at 204.

303. *Id.* at 204-05.

304. *Id.* at 205.

305. IND. R. EVID. 803.

306. IND. R. EVID. 803(4).

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

308. IND. R. EVID. 803(18).

309. Q.J. v. Ind. Dep't of Child Servs., 92 N.E.3d 1092, 1099 (Ind. Ct. App.) (quotation marks and citations omitted), *trans. denied*, 102 N.E.3d 890 (Ind. 2018).

310. Hoglund v. Superintendent, No. 3:16-CV-313-PPS-MGG, 2018 U.S. Dist. LEXIS 142552, at *14-18 (N.D. Ind. Aug. 22, 2018) (quoting McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996)), *appeal filed*, No. 18-2949 (7th Cir. Sep. 7, 2018).

311. *Q.J.*, 92 N.E.3d at 1099 (quotation marks and citation omitted).

provide truthful information in order to promote diagnosis and treatment"; and (2) that "the content of the statement [was] such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[312]

That exception under Rule 803(4) was presented to the Indiana Court of Appeals on review of adjudications of minors as children in need of services.[313] There, a father challenged statements of his fourteen-year-old son, arguing that there was no evidence demonstrating the boy knew he was speaking with a medical professional for the purpose of obtaining a diagnosis and no evidence demonstrating his motivation to tell the truth.[314] Finding that the boy was not a young child and that the statements were made in a hospital—creating an "inference that he knew he was talking to a medical professional and that he was motivated to provide truthful information is obvious"—the appellate court rejected the challenge.[315]

Also arising during the survey period was the business-records exception, embodied in Rule 803(6), which makes admissible records of a regularly conducted activity if:

> the record was made at or near the time by—or from information transmitted by—someone with knowledge; the record was kept in the course of a regularly conducted activity of a business; making the record was a regular practice of that activity; all these conditions are shown by the testimony of the custodian or another qualified witness; and neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.[316]

Holmes v. National Collegiate Student Loan Trust exemplified the difficulty of utilizing the exception in the context of consumer credit. There, the Indiana Court of Appeals reversed summary judgment finding that the affidavit from an employee of a loan subservicer lacked sufficient knowledge of the business practices of the loan originator to admit evidence proving the loan under the business-records exception.[317] Echoing a prior ruling, the court reminded that "one business 'c[an]not lay the proper foundation to admit the records of another business because the requesting business lacked the personal knowledge required to ensure reliability.'"[318]

A third exception also received appellate attention. Although "excerpts from a journal or treatise offered to discredit an expert's testimony [] meet the

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312. *Id.* at 1100 (quotation marks and citation omitted).

313. *Id.*

314. *Id.*

315. *Id.*

316. Holmes v. Nat'l Collegiate Student Loan Tr., 94 N.E.3d 722, 725 (Ind. Ct. App. 2018).

317. *Id.* at 725-26.

318. *Id.* at 725 (quoting Speybroeck v. State, 875 N.E.2d 813, 821 (Ind. Ct. App. 2007)); *see also* Childress Cattle, LLC v. Estate of Cain, 88 N.E.3d 1121, 1125 (Ind. Ct. App. 2017) (finding Rule 803(6) not satisfied due to lack of testimony establishing "the invoices [we]re regularly conducted business records").

definition of hearsay," they are admissible as an exception under Rule 803(13) if: (A) the statement is brought to an expert's attention or relied on by the expert; (B) it "contradicts the expert's testimony on a subject of history, medicine, or other science or art"; and (C) it "is established as a reliable authority."[319] On appellate review, the court found no error in the exclusion of the text of a medical journal because the expert witness was unfamiliar with the article and did not read the journal, making the expert incapable of establishing the authority's reliability.[320] Even though defense counsel "stated he would demonstrate later in the case that the periodical was a reliable authority, [] the court was not obligated to accept that statement."[321] Accordingly, there was no error in exclusion without first authenticating the journal as authoritative.[322]

C. Rule 804: Hearsay Exceptions for Unavailable Declarants

Like Rule 803, Rule 804 creates exceptional circumstances in which the court may still admit hearsay.[323] Rule 804, however, is applicable only when the declarant is unavailable.[324] Whether a witness is unavailable can be a matter subject to debate, the resolution of which is entrusted to the sound discretion of the trial court.[325] Such a debate arose in *Burns v. State* when a deposition was entered into evidence in lieu of the witness's live testimony.[326] The defendant argued that the witness was available and "able to travel from Florida to Indiana to testify at trial" "because [she] testified she was able to do housework."[327] The Indiana Court of Appeals found no abuse of discretion in ruling the witness was unavailable because "[h]er doctor submitted documentation" showing that she "was diagnosed with a malignant brain tumor," "was involved in clinical trials requiring her to have therapy six days per week without interruptions to avoid any detrimental response," "needs to stay close to the Cancer Center so she can be closely followed and observed for any adverse events," and that her immune system was compromised by treatment.[328] Those limitations were within the ambit of Rule 804(a)(4)'s criteria for unavailability.[329]

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319. Lindhorst v. State, 90 N.E.3d 695, 700 (Ind. Ct. App. 2017) (quoting IND. R. EVID. 803(18)) (internal formatting omitted).

320. *Id.* at 700-01.

321. *Id.* at 701.

322. *Id.*

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

324. IND. R. EVID. 804(a).

325. Burns v. State, 91 N.E.3d 635, 639 (Ind. Ct. App. 2018).

326. *Id.* at 638-39. Depositions are admissible as former testimony under IND. R. EVID. 804(b)(1)(A). *Id*. at 639.

327. *Id.*

328. *Id.* at 639.

329. IND. R. EVID. 804(a)(4) ("A declarant is considered to be unavailable as a witness if the declarant: . . . (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness . . . .").

"A declarant is considered to be unavailable as a witness if the declarant is absent from trial and the proponent of the statement has been unable to procure the declarant's attendance at trial by process or other reasonable means."[330] When the unavailability is due to the wrongful conduct of a party against whom the testimony is offered, hearsay will not prohibit the testimony's admission.[331] To trigger the exception in criminal prosecutions, "the State must only show [by a preponderance of the evidence] that the defendant was motivated at least partially by a desire to silence the witness with his wrongdoing."[332] That exception was found to apply when a cooperating witness became unresponsive to the prosecution after the criminal defendant violated a no-contact order to communicate with the witness "and offered her money, a car, and place to stay."[333] Those actions accompanied with conversations about "not going forward to trial [provided] strong, probative evidence of [] wrongdoing as well as [] intent, at least in part, to prevent [the witness] from appearing at trial."[334] The lack of evidence showing an explicit urging to be absent from trial did not prevent application of the exception.[335]

VIII. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Authenticating Evidence

"To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated."[336] Authentication of evidence is governed by Rule 901,[337] which provides a general rule in subdivision (a) that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is,"[338] and a non-exhaustive list of "examples . . . of evidence that satisfies the requirement" in subdivision (b).[339]

The Indiana Supreme Court's opinion in *McCallister v. State* afforded insight into authentication through three different pieces of evidence.[340] The first question addressed whether the state had sufficiently authenticated video from a hotel-

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330. Carr v. State, 106 N.E.3d 546, 554 (Ind. Ct. App.) (citing IND. R. EVID. 804(a)(5)(A)), *trans. denied*, 111 N.E.3d 197 (Ind. 2018).

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

332. *Carr*, 106 N.E.3d at 554.

333. *Id.*

334. *Id.* at 554-55.

335. *Id.* at 555.

336. Hape v. State, 903 N.E.2d 977, 989 (Ind. Ct. App.) (citing Bartlett v. State, 711 N.E.2d 497, 502 (Ind. 1999)), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

337. Taylor v. State, 943 N.E.2d 414, 418 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1207 (Ind. 2011).

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

339. IND. R. EVID. 901(b); *see also* Richardson v. State, 79 N.E.3d 958, 963 (Ind. Ct. App.) (recognizing Rule 901(b) as a non-exhaustive list), *trans. denied*, 92 N.E.3d 1090 (Ind. 2017).

340. 91 N.E.3d 554, 561-65 (Ind. 2018).

lobby surveillance camera.[341] Despite the hotel manager being unable "to say with certainty that the DVD contained accurate footage of the lobby on" the date in question, sufficient evidence of authenticity was established by "verif[ying] the time-and-date-stamp system was accurate and attuned to 'standard accepted time' and was reset 'in January each year' to ensure accuracy," and the manager's testimony that "[h]e 'recognize[d] every piece of furniture and some of the people working' in the lobby, [a]nd he said the surveillance system is always on, and the videos are backed up to 'the cloud'—meaning they are saved to external servers accessible to the hotel's managers through the internet."[342] Coupled with the chain-of-custody evidence, the manager's testimony was sufficient to admit the surveillance video.[343]

Next was evidence of text messages taken from the phone of someone with whom the defendant had messaged.[344] The state did not introduce the phone,[345] instead offering an FBI report of its contents that included the messages.[346] Concluding that the trial court did not err in admitting the report, the Indiana Supreme Court found authenticity established by a detective's testimony that one of the phone numbers in the report belonged to the defendant, that the detective "obtained the phone number form [the defendant]'s parole officer . . . and matched it to one in the report," and that the "number was labeled in [the] phone as 'MM-C.'"[347] That evidence was sufficient even though the detective "did not try to confirm the number was [the defendant]'s through his service provider. . . ."[348]

The third issue of authenticity arose in the admission of an audio recording from the phone of the defendant's girlfriend.[349] The challenge was premised on lack of evidence to identify the voice of the speaker.[350] Again, the supreme court found sufficient testimony to satisfy Rule 901.[351] "The authentication requirement of Evidence Rule 901(a) is satisfied by testimony identifying a person's voice, 'whether heard firsthand or through mechanical or electronic transmission or recording based on hearing the voice at any time under circumstances that

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341. *Id.* at 561-62.

342. *Id.* at 562 (second alteration in original).

343. *Id.*

344. *Id.* at 564.

345. Even if the state had introduced the phone, the text messages would still have needed to be independently authenticated. *See* Hape v. State, 903 N.E.2d 977, 990 (Ind. Ct. App.) ("Even though we have determined that a text message stored in a cellular telephone is intrinsic to the telephone, a proponent may offer the substance of the text message for an evidentiary purpose unique from the purpose served by the telephone itself. Rather, in such cases, the text message must be separately authenticated pursuant to Indiana Evidence Rule 901(a)."), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

346. *McCallister*, 91 N.E.3d at 564.

347. *Id.*

348. *Id.*

349. *Id.* at 564-65.

350. *Id.* at 564.

351. *Id.* at 565.

connect it with the alleged speaker.'"[352] The detective's testimony identifying the voices "based on familiarity" due to having "listened to hundreds of hours of all of the[] subjects on the phone" provided the requisite foundation for admission under Rule 901(b)(5).[353]

The Indiana Court of Appeals also addressed the application of Rule 901(b). After concluding self-authentication of records from a prior conviction was insufficient to authenticate the signatures therein,[354] the court turned to whether there was sufficient evidence to authenticate the signatures under either 901(b)(2) or 901(b)(3).[355] "Handwriting," such as signatures, "can be identified and authenticated through a non-expert's opinion if the opinion is 'based on familiarity with [the handwriting] that was not acquired for the current litigation.'"[356] Alternatively, it may be accomplished "through the trier of fact or an expert's comparison of the handwriting with an authenticated specimen."[357] Because the defendant did not admit to the signature, and there was neither "expert [n]or non-expert testimony to authenticate the signature[s]," there was no evidence to establish authenticity.[358] Without authenticating the signatures, the state failed to carry its burden to establish the prior conviction to support a charge for "unlawful possession of a firearm by a serious violent felon."[359]

B. Rule 902(1): Self-Authentication of Signed & Sealed Domestic Public Documents

Rule 902 creates twelve categories of documents that need not be authenticated through external evidence because the documents themselves are self-authenticating.[360] *Payne v. State*, from the Indiana Court of Appeals, addressed subdivision (1) of the Rule: signed and sealed domestic public documents.[361] At issue was whether the state sufficiently proved a prior conviction of the defendant to support a charge for "unlawful possession of a firearm by a serious violent felon."[362] The state attempted to prove the prior conviction by only offering "certified records from a 2010 robbery conviction and claimed that the records proved that Payne was the defendant in that cause who had previously been convicted of robbery."[363] Among the records were:

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352. *Id.* (quoting IND. R. EVID. 901(b)(5)).

353. *Id.* at 564-65.

354. Discussed in detail *infra* Section VIII.B., note 366.

355. Payne v. State, 96 N.E.3d 606, 612-13 (Ind. Ct. App.), *trans. granted and opinion vacated*, 102 N.E.3d 287, *trans. vacated and opinion reinstated*, 99 N.E.3d 624 (Ind. 2018).

356. *Id.* at 613 (quoting IND. R. EVID. 901(b)(2)).

357. *Id.* (citing IND. R. EVID. 901(b)(3)).

358. *Id.*

359. *Id.* at 608, 613.

360. IND. R. EVID. 902.

361. *Payne*, 96 N.E.3d at 612-13.

362. *Id.* at 608.

363. *Id.* at 609.

> [T]he charging information, probable cause affidavit, supplemental probable cause affidavit, plea agreement, the trial court's order on plea hearing, and the trial court's sentencing order, which were all labeled with the same cause number. The charging information included the robbery defendant's name and birth date, which matched Payne's name and birth date as listed in the instant cause, as well as the robbery defendant's driver's license number, which did not match the information in the instant cause. The plea agreement included the robbery defendant's name, birth date, and signature. The trial court's order on plea agreement and sentencing order contained only the robbery defendant's name.[364]

The documents were self-authenticating under Rule 902(1).[365] But, standing alone, they were insufficient to prove the prior conviction.[366] The Indiana Court of Appeals "previously held that a matching name and birth date, absent other identifying evidence, are not sufficient to prove identity."[367] Accordingly, the state needed to establish the identity of the person convicted in the prior cause by some additional evidence.[368] For that, the state sought to rely upon the signatures contained within the records.[369]

The problem with the state's reliance arose because the signatures, unlike the documents in which they were contained, were not self-authenticating.[370] That is because "self-authentication of a document merely relieves the proponent of providing foundational testimony for admission of the document as evidence. In other words, because the certified records for [the prior conviction] were self-authenticating, the State did not have to provide foundational testimony to prove that they were official court records."[371] Rule 902(1) "did not[, however,] relieve the State of its burden of authenticating that the signature[s] . . . belonged to Payne."[372]

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

Rule 1002 requires the use of "[a]n original writing, recording, or photograph . . . in order to prove its content unless the[] rules or a statute provides otherwise."[373] The requirement is typically referred to as the "best evidence rule."[374] The "purpose of the rule is to ensure that the best version of a particular

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364. *Id.*
365. *Id.* at 612-13.
366. *Id.*
367. *Id.* at 612 (citing Livingston v. State, 537 N.E.2d 75, 78 (Ind. Ct. App. 1989)).
368. *Id.*
369. *Id.*
370. *Id.* at 612-13.
371. *Id.* at 613 (citation omitted).
372. *Id.*
373. IND. R. EVID. 1002.
374. D.Z. v. State, 100 N.E.3d 246, 249 (Ind. 2018).

item of evidence is presented—not that one item of evidence should be disregarded as being less reliable or somehow not as good as another."[375] The Indiana Supreme Court briefly addressed the best-evidence rule in *D.Z. v. State*.[376] The question before the court was whether photos "pulled from [a] school's surveillance video" were sufficient for admission as substantive evidence under the silent witness theory.[377] The court did not answer the question, instead determining that any error in admission was harmless.[378] Still, the court signaled a willingness to address the issue again in a future challenge by adding a footnote stating:

> D.Z.'s arguments cue interesting questions about silent witness foundation, whether photos pulled from a video are "duplicates," and the interaction between Indiana Rules of Evidence 1003 and 1004. Because the answers would not affect the outcome here, we leave them for another case.[379]

X. COMMON LAW RULES: *CORPUS DELICTI*, *RES IPSA LOQUITUR*, PAROL EVIDENCE & SPOLIATION

Although the Indiana Rules of Evidence largely supplanted common-law and statutory evidentiary practice, "[i]f the[] rules do not cover a specific evidence issue, common or statutory law shall apply."[380] Several evidentiary rules rooted in common-law confronted Indiana courts during the survey period.

A. Corpus Delicti Rule

One common-law doctrine garnering attention was the corpus-delicti rule. "In Indiana, a person may not be convicted of a crime based solely on a nonjudicial confession of guilt. Rather, independent proof of the corpus delicti is required before the defendant may be convicted upon a nonjudicial confession."[381] The doctrine has evolved alongside modern criminal law, with a trend toward supplanting it with a trustworthiness standard such as that applied in federal courts.[382] "[T]he rule applies only to an out-of-court confession in a criminal proceeding" and does not apply in civil matters including civil forfeiture proceedings.[383]

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375. Swihart v. State, 71 N.E.3d 60, 63 n.3 (Ind. Ct. App. 2017).

376. *D.Z.*, 100 N.E.3d at 249.

377. *Id.* For general discussion of the silent-witness theory *see* 8 IND. LAW ENCYC. *Criminal Law* § 174 (2015); Wise v. State, 26 N.E.3d 137, 141-43 (Ind. Ct. App. 2015).

378. *D.Z.*, 100 N.E.3d at 249.

379. *Id.* at 249 n.1.

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

381. Seal v. State, 105 N.E.3d 201, 206 (Ind. Ct. App.) (quoting Shinnock v. State, 76 N.E.3d 841, 843 (Ind. 2017)), *trans. denied*, 110 N.E.3d 1147 (Ind. 2018).

382. *Id.* at 206-08.

383. State v. Timbs, 84 N.E.3d 1179, 1185 (Ind. 2017), *vacated*, 139 S. Ct. 682 (2019)

The doctrine was raised as a challenge to a Level-1 conviction for child molestation stemming from the defendant's admission to digital penetration of a female child's sexual organ because there was no independent evidence of penetration.[384] The defendant conceded, however, that the independent evidence was sufficient to establish a Level-4 conviction, which did not require penetration.[385] The Indiana Court of Appeals rejected the challenge as "improperly focuse[d] on a single element."[386] The court reasoned that "the admission of a confession requires some independent evidence that supports an inference that the crime charged was committed, but the corpus delicti rule does not require the State to 'make out a prima facie case as to each element of the offense charged.'"[387] The child's testimony was sufficient to "justif[y] a reasonable inference that [the defendant] committed the offense of child molesting" and "her testimony include[d] details that match [the] confession."[388] In the court's esteem, a requirement of additional evidence of penetration would "add 'little to the ultimate reliability of the confession.'"[389]

Siding with the trend away from the corpus-delicti rule, the court of appeals stated that the case "may illustrate that it is time for our supreme court to consider updating our approach and adopting some form of the modern trustworthiness standard, as is now used by the federal courts and many states."[390] Whether the Indiana Supreme Court may choose to do so in the future remains an open question. But the court declined this opportunity by denying transfer.[391]

B. Res Ipsa Loquitur

Often viewed as an artifact of tort law, *res ipsa loquitor* is fundamentally "a rule of evidence that permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury."[392] "[T]ranslated from Latin as 'the thing speaks for itself," the inference attaches when "a plaintiff [] establish[es] that (1) the circumstances under which the injury occurred were under the management or exclusive control of the defendant and (2) the occurrence is of the type that does not ordinarily happen if those who have the management and control exercise proper care."[393] The inference, however, is not dispositive and may be weighed against the defendant's evidence.[394] Application

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(emphasis omitted).

384. *Seal*, 105 N.E.3d at 210.

385. *Id.*

386. *Id.*

387. *Id.* (citations omitted).

388. *Id.*

389. *Id.* (quoting Willoughby v. State, 552 N.E.2d 462, 467 (Ind. 1990)).

390. *Id.* at 210 n.6.

391. Seal v. State, 110 N.E.3d 1147 (Ind. 2018).

392. Johnson v. Blue Chip Casino, LLC, 110 N.E.3d 375, 378 (Ind. Ct. App. 2018).

393. *Id.* (emphasis omitted).

394. 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 301.106 (3d

depends on "whether the incident more probably resulted from the defendant's negligence as opposed to another cause," which may be established by "common sense and experience or expert testimony."[395]

As the unfortunate small-claims litigant in *Johnson v. Blue Chip Casino, LLC* discovered, it can be a difficult doctrine to utilize.[396] Having suffered bed-bug bites during a hotel stay, the plaintiff sought to establish negligence by the mere presence of bed bugs.[397] Both the trial court and the Indiana Court of Appeals disagreed.[398] The plaintiff's "argument assume[d] that he would not have woken up to bed-bug bites if the housekeepers had done a better job cleaning and/or inspecting his room."[399] But, the appellate court reasoned, the nature of bed bugs make them difficult to locate, leaving a possibility that even reasonable care would not have prevented the infestation.[400] Absent a showing "that the presence of bedbugs . . . more probably resulted from [the hotel]'s negligence as opposed to another cause," the doctrine could not apply.[401]

An additional takeaway from *Johnson* is that the court of appeals took for granted that the doctrine applies to small claims. Small Claims Rule 8(A) renders "rules of . . . evidence except provisions relating to privileged communications and offers of compromise" inapplicable.[402] The strongest justification for applying the evidentiary doctrine in the distinctly informal setting of small claims appears to be that it is a matter of substantive Indiana law.[403] Absent further analysis, it remains dubious whether *res ipsa loquitor* properly applies in such an informal forum.

In the more well-developed setting of medical malpractice, the court of appeals addressed whether the doctrine relieved a plaintiff of the obligation to produce expert testimony to support her claim.[404] Following "cementless total hip replacement" surgery, the plaintiff suffered "a three-part displaced fracture of her right femur" that appears to have occurred when "a nurse and patient care assistant rolled [the plaintiff] onto her side to give them access to remove [an] epidural."[405] Typically, a medical-malpractice plaintiff must produce expert testimony to establish that a medical provider has fallen below the applicable standard of care.[406] But "[e]xpert opinion is not necessary . . . when the case fits

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ed. 2007).

395. *Johnson*, 110 N.E.3d at 378.

396. *Id.* at 378-79.

397. *Id.*

398. *Id.* at 377-79.

399. *Id.* at 378.

400. *Id.* at 378-79.

401. *Id.*

402. IND. SM. CL. R. 8(A).

403. Maroules v. Jumbo, Inc., 452 F.3d 639, 642-45 (7th Cir. 2006).

404. Glon v. Mem'l Hosp. of S. Bend, Inc., 111 N.E.3d 232, 237-39 (Ind. Ct. App. 2018).

405. *Id.* at 234-35.

406. Narducci v. Tedrow, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000).

within the r*es ipsa loquitur* exception."[407] As in all other settings, the doctrine applies to medical-malpractice actions when the plaintiff can show "the incident more probably resulted from the defendant's negligence than from another cause."[408]

> [T]here are some situations in which a physician defendant's allegedly negligent act or omission is so obvious as to allow plaintiffs to rely on the doctrine of res ipsa loquitur. Juries do not need an expert to help them conclude, say, that it is malpractice to operate by mistake on the wrong limb[.][409]

The plaintiff argued that her injury fell within the exception because it "is of the type that does not ordinarily happen if the hospital staff exercised proper care."[410] The flaw in the argument, from the court's perspective, was that it did not account for the medical review panel's conclusion that the evidence did not support finding that the hospital fell below the standard of care.[411] Further, the hospital's expert testified "that it is not physically possible that a nurse's act of rolling [plaintiff] over or grabbing [her] right leg and twisting it caused the three-part displaced fracture of her right femur."[412] The court did not explain precisely how the existence of that evidence impacted the determination of whether the doctrine applied. But it appears to have been factored into the finding that "[r]isks and complications associated with cementless hip replacement surgery are not commonly known to lay people," such that *res ipsa loquitor* did not apply.[413]

C. Parol & Extrinsic Evidence Rule[414]

"In general, '[t]he parol evidence rule provides that extrinsic evidence is inadmissible to add to, vary, or explain the terms of a written instrument if the terms of the instrument are clear and unambiguous.'"[415] Despite its name

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407. *Glon*, 111 N.E.3d at 237.

408. *Id.* at 238.

409. *Id.* (alterations in original; citation and quotation marks omitted).

410. *Id.* (citation to record and formatting omitted).

411. *Id.* at 238-39.

412. *Id.* at 239.

413. *Id.*

414. In a technical sense, the parol evidence rule may be considered as distinct from the extrinsic evidence rule, with parol evidence constituting a class of extrinsic evidence. *See* David G. Epstein et al., *Extrinsic Evidence, Parol Evidence, and the Parol Evidence Rule: A Call for Courts to Use the Reasoning of the Restatements Rather than the Rhetoric of Common Law*, 44 N.M. L. REV. 49, 53-61 (2014). Nevertheless, Indiana and a great many other jurisdictions have not meticulously recognized a distinction, instead using the terms interchangeably. *See id*. at 56; E. ALLAN FARNSWORTH, CONTRACTS, § 7.2, at 416 (4th ed. 2004); Pepka v. Branch, 294 N.E.2d 141, 154 (1973) (referring to the rules as a single "parol and extrinsic evidence rule").

415. Dulworth v. Bermudez, 97 N.E.3d 272, 280 (Ind. Ct. App. 2018) (quoting Cooper v. Cooper, 730 N.E.2d 212, 215 (Ind. Ct. App. 2000)).

indicating that it is a rule of evidence, "[t]he parol evidence rule is a rule of substantive law rather than a rule of evidence."[416] Nevertheless, it is covered here because it is a matter addressed in other works on evidentiary practice[417] and it fundamentally dictates relevance in contract interpretation under Rule 401.[418]

Two decisions from the survey period provide meaningful insight into application of the parol evidence rule. In *Harris v. Davis*, the Indiana Court of Appeals reminded that "[g]enerally, where parties have reduced an agreement to writing and have stated in an integration clause that the written document embodies the complete agreement . . . the parol evidence rule prohibits courts from considering extrinsic evidence for the purpose of varying or adding to the terms of the written contract."[419] The mere absence of an integration clause does not control "whether a writing was intended to be a completely integrated agreement," otherwise rendering parol evidence admissible.[420] Nevertheless, the court found the parol evidence rule inapplicable in that case because the agreement did not contain an integration clause and the parties did not argue that it "was intended to be a completely integrated agreement."[421]

The other noteworthy decision is of vital importance to plaintiffs' attorneys, which addressed the stranger-to-the-contract-rule exception to the parol evidence rule.[422] "[U]nder the stranger to the contract rule, 'the inadmissibility of parol evidence to vary the terms of a written instrument does not apply to a controversy between a third party and one of the parties to the instrument.'"[423] The exception does not allow a court to consider extrinsic evidence to interpret an unambiguous agreement.[424] Accordingly, a release of one tortfeasor stating that it released the

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416. Kruse Classic Auction Co. v. Aetna Cas. & Sur. Co., 511 N.E.2d 326, 329 (Ind. Ct. App. 1987); *accord* Franklin v. White, 493 N.E.2d 161, 165-66 (Ind. 1986) ("The parol evidence rule is not a procedural rule that excludes evidence. It is a rule of preference and is one of substantive law which prohibits both the trial court and appellate court from considering such evidence even though it was admitted to trial without objection."); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 213 (1954) ("[T]he parol evidence doctrine fails to fit into this category of rules of evidence with any comfort."). It is a codified rule under the Uniform Commercial Code. *See* IND. CODE § 26-1-2-202 (2018).

417. *See*, *e.g.*, J. ALEXANDER TANFORD & RICHARD M. QUINLAN, INDIANA TRIAL EVIDENCE MANUAL §§ 44.1-44.5 (2d ed. 1987); J. Alexander Tanford, Indiana Trial Evidence Manual, §§ 67.01-67.07 (7th ed. 2014); MCCORMICK, *supra* note 416, at §§ 210-222.

418. Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 895 (10th Cir. 2006) (Hartz, J., concurring in part and dissenting in part) ("[I]f, under a state parol-evidence rule, the contract between two parties does not incorporate oral agreements that contradict the terms of the written contract, then evidence of the oral agreement is not relevant under Rule 401.").

419. 88 N.E.3d 1081, 1087 n.3 (Ind. Ct. App. 2017).

420. *Id.*

421. *Id.*

422. Dulworth v. Bermudez, 97 N.E.3d 272, 280-81 (Ind. Ct. App. 2018) .

423. *Id.* at 280 (quoting Cooper v. Cooper, 730 N.E.2d 212, 216 (Ind. Ct. App. 2000)).

424. *Id.* at 280 (citing Huffman v. Monroe Cty. Cmty. Sch. Corp., 588 N.E.2d 1264, 1267 (Ind. 1992)).

tortfeasor, her insurer, her "agents, servants, successors, heirs, executors, administrators, and all other persons" was sufficient to release a second tortfeasor and the plaintiff's own insurer because "[t]he location of the clause '[a]ll other persons' in the Release mirror[ed] its location in other releases, which were determined by th[e] court to have released the world."[425]

Presumably, had extrinsic evidence been allowed, it would have shown that the plaintiff and settling defendant did not intend to release the second tortfeasor or plaintiff's own insurer. But such evidence was deemed inadmissible, thereby allowing release of the second tortfeasor and plaintiff's own insurer through apparent inadvertence. The decision stands as an important lesson for attorneys to avoid such unintended traps.[426]

D. Spoliation

Like several remnants of common-law evidentiary practice, the doctrine of spoliation is not directly embodied in the Indiana Rules of Evidence. Nevertheless, it remains an important litigation tool governing use of evidence at trial. "A party raising a claim of spoliation must prove that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence."[427] Among the broad remedies afforded a trial court when spoliation is established, "rules of evidence permit the jury to infer that the missing evidence was unfavorable to that party."[428] Such remedies are only available in first-party spoliation claims in which the spoliator is a party to the action.[429]

In *NIPSCO v. Aqua Environmental Container Corp.*, the Indiana Court of Appeals recognized a duty to preserve a furnace that was the possible source of a fire attached when a fire marshal informed the eventual plaintiffs of the need to preserve it because "at that time, Plaintiffs knew, or at the very least, should have known, that litigation was possible, if not probable."[430] That the plaintiffs did not act intentionally to destroy the evidence did not prevent a finding of spoliation because Indiana recognizes negligent spoliation.[431] Once spoliation was found, the appropriate sanction was to be shaped by "two primary factors: (1) the degree of culpability of the party who lost or destroyed the evidence; and (2) the degree

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425. *Id.* at 276, 280-81 (citing Stemm v. Estate of Dunlap, 717 N.E.2d 971, 976 (Ind. Ct. App. 1999)).

426. Cautious counsel is well advised to not only avoid such language but to also avoid sharing releases with parties outside the agreement unless required to do so, lest they open similar challenges.

427. N. Ind. Pub. Serv. Co. v. Aqua Envtl. Container Corp., 102 N.E.3d 290, 301 (Ind. Ct. App. 2018).

428. *Id.* at 303.

429. Shirey v. Flenar, 89 N.E.3d 1102, 1107 (Ind. Ct. App. 2017) (recognizing viable third-party claim for damages due to spoliation).

430. *N. Ind. Pub. Serv. Co.*, 102 N.E.3d at 301.

431. *Id.* at 302.

of actual prejudice to the other party."[432] The court of appeals determined that the balancing of those factors is best addressed by the trial court.[433] And, since the trial court ended its analysis of spoliation upon the errant conclusion that the lack of intentionality in the evidence's destruction prohibited sanction, the court of appeals remanded the case for further consideration.[434]

While a duty was easily found in *NIPSCO*, another case presented a considerably more-surprising circumstance finding none. "[T]he duty to preserve evidence may be assumed voluntarily or imposed by statute, regulation, contract, or certain other circumstances."[435] But what if "[t]here is no statutory authority or reported case law establishing a duty to maintain 'adequate' records'" such that the records were never created in the first place?[436] That was the issue presented in the "extremely unusual case" *Henderson v. Kleinman*.[437]

The matter arose as a claim for medical malpractice, but the plaintiff encountered difficulty in advancing her claim due to the doctor's failure to maintain adequate records.[438] The medical review panel found that the lack of adequate records fell below the standard of care, but the resulting dearth of information as to the actual surgery prevented the panel from determining whether "the actual surgery [the doctor] performed was within the standard of care."[439] The plaintiff attempted to rely on the panel's finding and did not designate expert evidence supporting the claim that the surgery itself fell below the standard of care.[440] Absent such evidence, the plaintiff was unable to survive summary judgment, which was supported by expert testimony.[441]

Reluctantly concurring in the result, Judge Edward Najam wrote separately to "urge our Legislature to amend the [Indiana Medical Malpractice] Act to provide that health care providers have an affirmative duty to maintain adequate and accurate medical records and that a violation of that duty could support a *prima facie* medical malpractice claim."[442] He further suggested that the "failure to maintain adequate and accurate medical records is the functional equivalent of spoliation of evidence" to which "an inference that the production of the evidence would be against the interest of the party which suppresses it" may attach.[443]

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432. *Id.* at 303.
433. *Id.* at 304.
434. *Id.*
435. *Id.* at 301 (citations omitted).
436. Henderson v. Kleinman, 103 N.E.3d 683, 687 (Ind. Ct. App. 2018).
437. *Id.*
438. *Id.* at 685-86.
439. *Id.*
440. *Id.* at 689.
441. *Id.* at 687-89.
442. *Id.* at 689 (Najam, J., concurring).
443. *Id.* at 689-90 (citation and quotation marks omitted).

XII. CONCLUSION

Just a quarter century into application, the Indiana Rules of Evidence continue to be an area for substantial caselaw development. And, despite Indiana's common-law evidentiary procedure having been largely abandoned by adoption of the rules of evidence, the handful of remaining statutes and doctrine that left undisturbed by the rules persist as integral parts of Indiana evidentiary practice for years to come.