

## 2023 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

COLIN E. FLORA\*

This survey covers developments in all aspects of Indiana evidence law between October 1, 2022, and September 30, 2023. Consistent with established practice,<sup>1</sup> the format of this survey tracks developments in the same order as the Indiana Rules of Evidence and then covers additional developments of common-law practices not covered by the Indiana Rules of Evidence.

A notable change to this edition of the survey stems from an amendment to Indiana Appellate Rule 65(D). That rule historically prohibited any citation to memoranda decisions of the Indiana Court of Appeals.<sup>2</sup> The December 2022 amendment, however, permits “a memorandum decision issued on or after January 1, 2023, [to] be cited for persuasive value to any court by any litigant.”<sup>3</sup> Although litigants have “no duty to cite a memorandum decision except to establish *res judicata*, collateral estoppel, or law of the case[.]”<sup>4</sup> they are now permitted to do so. Due to the fact-specific nature of evidentiary determinations coupled with the difficulty of scouring appellate decisions for mirroring factual circumstances, where appropriate, this survey considers now-citable memoranda for their insight into Indiana evidence law and practice. Nevertheless, wise counsel will keep in mind that reliance on such decisions, though now permitted, remains disfavored.<sup>5</sup>

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

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

Although Rule 101 broadly purports to apply the Indiana Rules of Evidence to “all proceedings in the courts of the State of Indiana[.]”<sup>6</sup> there are numerous exceptions to their application.<sup>7</sup> The survey period reminded that the rules of

---

\* Civil Litigation Attorney, Pavlack Law, LLC in Indianapolis, Indiana; J.D., 2011, *cum laude*, Indiana University Robert H. McKinney School of Law; B.A., 2008, *with high distinction*, Indiana University South Bend.

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

2. See Colin E. Flora, *Citing Unpublished Cases in Indiana: Rules & Caselaw*, 61 RES GESTAE 31 (Apr. 2018).

3. *In re Order Amending Rules of Appellate Procedure*, No. 22S-MS-1, 2022 Ind. LEXIS 729 (Ind. Dec. 19, 2022); see also Kyle Gillaspie, *The Newly Persuasive Value of a Memorandum Decision*, 66 RES GESTAE 21 (Apr. 2023).

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

5. Those wishing to cite memoranda decisions to Indiana tribunals should use the citation format set forth in Indiana Appellate Rule 22(A)(2).

6. IND. R. EVID. 101(B).

7. See IND. R. EVID. 101(D).

evidence do not extend to grand-jury proceedings,<sup>8</sup> suppression hearings,<sup>9</sup> criminal sentencing,<sup>10</sup> probation revocation hearings,<sup>11</sup> or small-claims proceedings.<sup>12</sup> There was, however, one notable determination from the Indiana Court of Appeals, which applied the Indiana Rules of Evidence to juvenile delinquency fact-finding hearings.<sup>13</sup>

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

Rule 103 establishes the necessary steps to preserve evidentiary rulings for appellate review.<sup>14</sup> Generally, “a contemporaneous objection is . . . required to preserve an issue for appeal.”<sup>15</sup> “The purpose of such a rule is to promote a fair trial by precluding a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him.”<sup>16</sup> If evidence is excluded, then a party must provide an offer of proof to apprise the court of what the evidence would have provided.<sup>17</sup> Such an offer of proof does not necessarily require introduction of a document, such as a use-of-force policy, so long as the offer of proof provides the substance of what would have been obtained through admission of the evidence.<sup>18</sup>

A contemporaneous objection must also be made to any evidence that a party seeks to later challenge on appeal.<sup>19</sup> A frequent problem is the making of a “general objection” to evidentiary admissions instead of the requisite specific objection.<sup>20</sup> In *J.B. v. State*, the Indiana Court of Appeals rejected reliance on a

---

8. IND. R. EVID. 101(D)(2); *see, e.g.*, *Martinez v. State*, No. 22A-CR-1196, 2023 Ind. App. Unpub. LEXIS 58, at \*12 n.2 (Ind. Ct. App. Jan. 26, 2023), *trans. denied*, 209 N.E.3d 1176 (Ind. 2023).

9. *Tate v. Warden*, No. 3:22-CV-934-MGG, 2023 U.S. Dist. LEXIS 157262, at \*17 (N.D. Ind. Sept. 6, 2023).

10. IND. R. EVID. 101(D)(2); *see, e.g.*, *Monaghan v. State*, No. 22A-CR-2896, 2023 Ind. App. Unpub. LEXIS 607, at \*4 (Ind. Ct. App. May 30, 2023).

11. IND. R. EVID. 101(D)(2); *see, e.g.*, *Doran v. State*, No. 22A-CR-2157, 2023 Ind. App. Unpub. LEXIS 291, at \*6 n.2 (Ind. Ct. App. Mar. 13, 2023).

12. *Wilder v. Hohenberger*, No. 22A-EV-2142, 2023 Ind. App. Unpub. LEXIS 439, at \*10 (Ind. Ct. App. Apr. 20, 2023).

13. *J.B. v. State*, 205 N.E.3d 244, 248 n.3 (Ind. Ct. App. 2023).

14. *See* IND. R. EVID. 103.

15. *Burkins v. State*, No. 22A-CR-1867, 2023 Ind. App. Unpub. LEXIS 941, at \*18 (Ind. Ct. App. Aug. 15, 2023) (quoting *Rembusch v. State*, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005)).

16. *Id.* (quotation marks omitted).

17. IND. R. EVID. 103(a)(2); *see, e.g.*, *Harris v. State*, 211 N.E.3d 929, 935 (Ind. 2023).

18. *Hunter v. State*, No. 22A-CR-2212, 2023 Ind. App. Unpub. LEXIS 730, at \*5 n.4 (Ind. Ct. App. June 28, 2023), *trans. denied*, 220 N.E.3d 57 (Ind. 2023); *see also* *Lewis v. State*, No. 22A-CR-2239, 2023 Ind. App. Unpub. LEXIS 409, at \*7 n.4 (Ind. Ct. App. Apr. 13, 2023) (preserving testimony of excluded witnesses by stating that they “were familiar with the conditions of the prison and would testify as to the ‘horrific conditions’ of the facility and an inmates ‘perceived need to protect themselves by any means necessary’”).

19. *See* IND. R. EVID. 103(a)(1).

20. *See, e.g.*, *Walker v. State*, No. 22A-CR-1441, 2023 Ind. App. Unpub. LEXIS 374, at \*7

“general objection” finding it “wholly inadequate to lodge an effective objection” in light of Rule 103’s requirement of “not just a ‘timely’ objection, but it also demands an objection that ‘states the specific ground, unless it was apparent from the context.’”<sup>21</sup>

Another issue arising in this survey, covered in prior surveys, is the continuing problem that rulings on motions in limine do not, standing alone, preserve challenges for appeal in Indiana state courts.<sup>22</sup> While this survey period did not see the Indiana Supreme Court adopt the rule proposal of the Indiana State Bar Association’s litigation section, which would have brought Indiana Evidence Rule 103(b) in line with Federal Rule of Evidence 103(b) to allow rulings in limine to preserve error for appeal,<sup>23</sup> it did see the Indiana Supreme Court establish that rulings in limine could be presented for review on interlocutory appeal.<sup>24</sup> Nevertheless, because the rule did not change, the survey period again provides examples<sup>25</sup> of trial counsel falling victim to what the Seventh Circuit has described as “a trap for unwary counselors.”<sup>26</sup>

The survey period did, however, provide at least one example of the utility of motions in limine even though they do not serve to preserve error, absent immediate interlocutory appeal. In *Cruz v. State*, trial counsel “asked the court to incorporate its objections from the final pretrial hearing.”<sup>27</sup> Although the method failed to preserve the specific ground that was raised on appeal—because the memorandum provided for argument at the final pretrial conference failed to raise the issue—it stands as a worthwhile example for the utility of seeking to obtain pretrial rulings on disputed evidentiary matters.<sup>28</sup>

## II. JUDICIAL NOTICE: RULE 201

The purpose of judicial notice under Rule 201 is “to facilitate efficiency by bypassing the usual evidentiary requirements for facts that cannot be reasonably disputed and are not subject to interpretation.”<sup>29</sup> Rule 201 is most often used for

---

n.2 (Ind. Ct. App. Apr. 3, 2023), *trans. denied*, 211 N.E.3d 1009 (Ind. 2023); *Howard v. State*, No. 23A-CR-457, 2023 Ind. App. Unpub. LEXIS 1143, at \*7 n.4 (Ind. Ct. App. Sept. 27, 2023).

21. 205 N.E.3d 244, 248 (Ind. Ct. App. 2023) (quoting IND. R. EVID. 103(a)(1)).

22. See Colin E. Flora, *2018 Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 716 (2019); Colin E. Flora, *2019 Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 898 n.32 (2021); Colin E. Flora, *2022 Developments in Indiana Evidentiary Practice*, 56 IND. L. REV. 763, 764-66 (2023) [hereinafter *2022 Survey*].

23. See *2022 Survey*, *supra* note 22, at 765 n.23.

24. *Means v. State*, 201 N.E.3d 1158, 1165-67 (Ind. 2023).

25. *Hornsby v. State*, 202 N.E.3d 1135, 1147-48 (Ind. Ct. App.), *trans. denied*, 208 N.E.3d 1247 (Ind. 2023); *Carter v. State*, No. 22A-CR-2437, 2023 Ind. App. Unpub. LEXIS 756, at \*7 (Ind. Ct. App. June 30, 2023).

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

27. 218 N.E.3d 632, 638 (Ind. Ct. App. 2023).

28. *Id.* at 638.

29. *Henderson v. State*, 206 N.E.3d 447, 451 n.8 (Ind. Ct. App. 2023).

courts to take judicial notice of records of other courts.<sup>30</sup> But, as one memorandum decision from the Indiana Court of Appeals reminded, Rule 201(b)(5)'s allowance for taking judicial notice of court records extends only to courts of Indiana, not of other states.<sup>31</sup> Another important caveat is that "judicial notice of court records is not without limitation."<sup>32</sup> Twice during the survey period, the Indiana Court of Appeals reasserted that judicial notice of a court record "does not provide for notice of all facts contained within a court record."<sup>33</sup> "Unless principles of claim preclusion apply, judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within the record of another case."<sup>34</sup> Nevertheless, it was deemed appropriate to judicially notice "the fact that [a f]ather has been alleged to have committed domestic violence against his current live-in girlfriend and the permissible inference that allegations of this sort make his housing stability 'questionable.'"<sup>35</sup>

During the survey period, judicial notice was also deemed properly used in regard to the Indiana Supreme Court's COVID-19 orders,<sup>36</sup> the dictionary definitions of words,<sup>37</sup> the death of a petitioner's prior trial counsel<sup>38</sup> the sending

---

30. *See, e.g.*, *Wheeler v. State*, No. 22A-CR-1390, 2023 Ind. App. Unpub. LEXIS 59, at \*3 (Ind. Ct. App. Jan. 26, 2023) (separate small claims action); *T.K. v. M.N.*, No. 22A-AD-1421, 2023 Ind. App. Unpub. LEXIS 71, at \*2 n.2 (Ind. Ct. App. Jan. 30, 2023) (adoption decree in paternity case); *Stillwell v. Stillwell (In re S.S.)*, No. 22A-GU-1373, 2023 Ind. App. Unpub. LEXIS 246, at \*14-16 (Ind. Ct. App. Mar. 2, 2023) (dissolution proceedings noticed in companion guardianship action); *Barron v. Gonzalez*, No. 22A-DC-1315, 2023 Ind. App. Unpub. LEXIS 669, at \*2 n.2 (Ind. Ct. App. June 14, 2023) (omitted pages of a divorce decree); *Priest v. State*, 215 N.E.3d 1099, 1101 n.4 (Ind. Ct. App. 2023) (town-court records); *Red Lobster Rests. LLC v. Fricke*, 213 N.E.3d 563, 567 n.6 (Ind. Ct. App. 2023) (a motion to dismiss filed in an Indiana bankruptcy proceeding); *Walden v. State*, 216 N.E.3d 1165, 1177 (Ind. Ct. App. 2023) (defendant's prior child-molesting cases).

31. *Cent. Mkt. of Ind., Inc. v. Hinsdale Bank, N.A.*, No. 22A-MF-870, 2023 Ind. App. Unpub. LEXIS 314, at \*21 n.5 (Ind. Ct. App. Mar. 20, 2023) (not taking judicial notice of Illinois court filings). Admission of records from courts outside Indiana are governed by Indiana Code § 34-39-4-3. *See, e.g.*, *Evans v. State*, 209 N.E.3d 472, 479 (Ind. Ct. App. 2023).

32. *Osadchuk v. Rice*, 203 N.E.3d 493, 503 (Ind. Ct. App. 2023).

33. *Id.* (citation and quotation marks omitted); *see In re P.B.*, 199 N.E.3d 790, 796-97 (Ind. Ct. App. 2022) ("Even if court records may be judicially noticed, 'facts recited within the pleadings and filings that are not capable of ready and accurate determination are not suitable for judicial notice.'" (quoting *In re D.P.*, 72 N.E.3d 976, 983 (Ind. Ct. App. 2017))).

34. *In re P.B.*, 199 N.E.3d at 797 (citation and quotation marks omitted); *accord Osadchuk*, 203 N.E.3d at 503.

35. *In re P.B.*, 199 N.E.3d at 797.

36. *Brugh v. Milestone Contractors*, 202 N.E.3d 1091, 1094-95 (Ind. Ct. App.), *trans. denied*, 209 N.E.3d 1169 (Ind. 2023).

37. *Am. Senior Cmty. v. Ind. Fam. & Soc. Servs. Admin.*, 206 N.E.3d 495, 501 n.2 (Ind. Ct. App.), *trans. denied*, 215 N.E.3d 339 (Ind. 2023).

38. *Jones v. State*, No. 22A-PC-2213, 2023 Ind. App. Unpub. LEXIS 145, at \*4 (Ind. Ct. App. Feb. 14, 2023), *trans. denied*, 211 N.E.3d 1005 (Ind. 2023).

of a “threatening letter” to a judge<sup>39</sup> a criminal defendant’s direct appeal record<sup>40</sup> and the failure of a party to present an issue in a direct appeal,<sup>41</sup> and information relating to drugs posted on the United States Drug Enforcement Administration’s website.<sup>42</sup>

In addition to warning against using judicial notice to obtain adjudicative facts from court records, the Indiana Court of Appeals provided a note of caution in using judicial notice in place of evidence produced at trial:

Despite the fact that the trial court may have received evidence and made observations regarding [Defendant]’s mental health at other proceedings, our review is limited to the evidence adduced at trial. Neither the parties nor the trial court signaled on the record that the trial court intended to take judicial notice of any of the occurrences of a prior proceeding. . . . We fear that to allow trial courts to consider, for example, records from a prior competency hearing, or behavior of a criminal defendant in an initial hearing, *when no evidence thereof is produced at trial*, would create an untenable risk. Parties would not be afforded the opportunity to raise objections, confront and cross-examine witnesses, or present rebuttal evidence including evidence regarding alternative interpretations of the prior-proceeding facts.<sup>43</sup>

Although judicial notice did not impact the outcome of that appeal, this note from the court provides important caution for future litigants and courts in exceeding the intended scope of judicial notice.

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

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

As the Indiana Supreme Court explained:

Generally speaking, irrelevant evidence is inadmissible. Relevant evidence is admissible unless otherwise provided. Evidence is relevant if it has “any tendency” to make “more or

---

39. *Finnegan v. State*, No. 22A-CR-1879, 2023 Ind. App. Unpub. LEXIS 202, at \*4 n.2 (Ind. Ct. App. Feb. 23, 2023), *trans. denied*, 209 N.E.3d 1179 (Ind. 2023).

40. *Garrett v. State*, No. 22A-PC-2528, 2023 Ind. App. Unpub. LEXIS 977, at \*12 n.2 (Ind. Ct. App. Aug. 21, 2023).

41. *Skipton v. State*, No. 22A-PC-2481, 2023 Ind. App. Unpub. LEXIS 905, at \*12-13 (Ind. Ct. App. Aug. 4, 2023).

42. *In re C.O.*, No. 22A-JT-2748, 2023 Ind. App. Unpub. LEXIS 670, at \*16 n.6 (Ind. Ct. App. June 14, 2023), *trans. denied*, 215 N.E.3d 344 (Ind. 2023); *In re D.P.*, 213 N.E.3d 552, 561 (Ind. Ct. App.), *trans. denied sub nom. H.P. v. Ind. Dep’t of Child Servs.*, 221 N.E.3d 1209 (Ind. 2023).

43. *Henderson v. State*, 206 N.E.3d 447, 451 n.8 (Ind. Ct. App. 2023).

less probable” a fact that is “of consequence in determining the action.” In other words, evidence must have some probative value that is material to an issue in the case. Materiality “looks to the relation between the proposition that the evidence is offered to prove and the issues in the case.” When “the evidence is offered to help prove a proposition that is not a matter in issue, it is immaterial. What is ‘in issue,’ that is, within the range of the litigated controversy, is determined mainly by the pleadings and the substantive law.”<sup>44</sup>

An important factor in considering the guidance that may be obtained from rulings on relevance is the procedural posture of the appeal because trial courts are afforded substantial deference in the exercise of their discretion in issuing evidentiary rulings.<sup>45</sup> The Indiana “Supreme Court has emphasized that determinations regarding whether evidence is relevant under Evidence Rule 401 or whether its probative value is substantially outweighed by the danger of unfair prejudice under Evidence Rule 403 can often be resolved by a trial court either way.”<sup>46</sup>

In *Harris v. State*, the Indiana Supreme Court addressed relevance in the context of a habitual offender proceeding.<sup>47</sup> In that context, “[r]elevance . . . depends . . . on whether the evidence in question tends to prove or disprove the necessary unrelated convictions as alleged by the State.”<sup>48</sup> Although the case clearly stands for the proposition that the defendant’s proffered evidence seeking to explain the circumstances of his prior convictions was irrelevant,<sup>49</sup> little more can be definitively said of the decision because it split the court into four separate opinions.<sup>50</sup>

There were several cases from the Indiana Court of Appeals that provided more clarity in determining what is and is not relevant. The court found relevance in the following circumstances: a photograph of a parking lot taken

---

44. *Harris v. State*, 211 N.E.3d 929, 939 (Ind. 2023) (citing IND. R. EVID. 402; quoting IND. R. EVID. 401; citing and quoting 1 KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 185 (8th ed. supp. 2022)).

45. *Singh v. State*, 203 N.E.3d 1116, 1121 (Ind. Ct. App. 2023).

46. *Moss v. State*, No. 22A-CR-2002, 2023 Ind. App. Unpub. LEXIS 484, at \*18 (Ind. Ct. App. Apr. 28, 2023) (citing *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017)).

47. *Harris*, 211 N.E.3d at 938-41.

48. *Id.* at 939.

49. *Id.* at 942; *id.* at 943-44 (Molter, J., concurring in part and concurring in the judgment).

50. See BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 198 (2016) (“Because a plurality opinion lacks a true ‘opinion of the court’—that is, one in which a majority of judges agree to the reason and result—lower courts and practitioners may have difficulty ascertaining the legal rule that emanates from the opinion.”). The lead opinion was authored by Justice Goff and joined fully by Justice Massa. *Id.* at 932 (majority opinion). Justice Molter concurred in part and concurred in the judgment. *Id.* at 943 (Molter, J., concurring in the part and concurring in the judgment). Chief Justice Rush concurred in part and dissented in part, and was joined in part by Justice Slaughter, who authored a separate dissenting opinion. *Id.* at 947 (Rush, C.J., concurring in part and dissenting in part); *id.* at 956 (Slaughter, J., dissenting).

some time after the plaintiff's alleged slip and fall on ice was relevant despite not being from the day of the fall;<sup>51</sup> evidence of father's criminal history and prior DCS involvement was relevant in proceedings for termination of parental rights;<sup>52</sup> evidence of prior unrelated threat of violence by the defendant against a victim was relevant to explain why victim had not reported the crime at issue earlier;<sup>53</sup> video posted to social media of defendant possessing a firearm was relevant to a theory of constructive possession of a firearm resembling that depicted in the video;<sup>54</sup> evidence that, prior to victim's shooting, criminal defendant had sought to acquire a pistol magazine in the same caliber as the ammunition used in the shooting was relevant;<sup>55</sup> evidence of victim's history of self-harm was relevant to whether victim's injury was caused by defendant;<sup>56</sup> defendant's rap videos were relevant because the videos referenced prior history with rival group and furnished motive for shooting of members of that group;<sup>57</sup> and evidence of child victim displaying sexual behavior was relevant to charge of molestation because other testimony established that "children who are the victims of sexual trauma may later act out by displaying sexual behaviors."<sup>58</sup>

The court of appeals found evidence irrelevant under the following circumstances: the general history of neglect of a minor by a third-party was not relevant in a criminal prosecution of a person who was charged for neglect based on the failure to act upon specific knowledge and take the child to obtain medical assistance;<sup>59</sup> testimony offered in support of an invocation of jury nullification was per se irrelevant;<sup>60</sup> a victim's request to lift a protective order was irrelevant since the order was in place at the time defendant broke into victim's room;<sup>61</sup> evidence of victim's prior violent acts was not relevant to a claim of self-defense

---

51. *Menard, Inc. v. Terew*, 210 N.E.3d 833, 837-38 (Ind. Ct. App.), *trans. denied*, 217 N.E.3d 1242 (Ind. 2023).

52. *In re D.M.*, No. 23A-JT-435, 2023 Ind. App. Unpub. LEXIS 1136, at \*14 (Ind. Ct. App. Sept. 28, 2023).

53. *Certain v. State*, No. 22A-CR-1745, 2023 Ind. App. Unpub. LEXIS 522, at \*12 (Ind. Ct. App. May 3, 2023), *trans. denied*, 217 N.E.3d 1241 (Ind. 2023).

54. *Cowherd v. State*, No. 23A-CR-208, 2023 Ind. App. Unpub. LEXIS 860, \*5-6 (Ind. Ct. App. July 27, 2023).

55. *Britton v. State*, No. 22A-CR-1802, 2023 Ind. App. Unpub. LEXIS 192, at \*9 (Ind. Ct. App. Feb. 23, 2023).

56. *Humphrey v. State*, No. 22A-CR-1389, 2023 Ind. App. Unpub. LEXIS 69, at \*3-4 (Ind. Ct. App. Jan. 30, 2023).

57. *Moody v. State*, No. 22A-CR-2672, 2023 Ind. App. Unpub. LEXIS 823, at \*13-16 (Ind. Ct. App. July 21, 2023).

58. *Fulk v. State*, No. 22A-CR-1606, 2023 Ind. App. Unpub. LEXIS 718, at \*4-5 (Ind. Ct. App. June 26, 2023).

59. *Dunn v. State*, 202 N.E.3d 1158, 1162 (Ind. Ct. App.), *trans. denied*, 208 N.E.3d 1251 (Ind. 2023).

60. *Lewis v. State*, No. 22A-CR-2239, 2023 Ind. App. Unpub. LEXIS 409, at \*9 (Ind. Ct. App. Apr. 13, 2023).

61. *Cardwell v. State*, No. 22A-CR-1855, 2023 Ind. App. Unpub. LEXIS 208, at \*5 (Ind. Ct. App. Feb. 23, 2023), *trans. denied*, 209 N.E.3d 1182 (Ind. 2023); *see also Galateanu v. State*, No. 22A-CR-1842, 2023 Ind. App. Unpub. LEXIS 134, at \*7-9 (Ind. Ct. App. Feb. 13, 2023), *trans. denied*, 209 N.E.3d 1183 (Ind. 2023).

absent a showing that the defendant had knowledge of the victim's prior acts;<sup>62</sup> and law enforcement policy for use of force was irrelevant to charge of resisting lawful arrest because force had not been used prior to the act of resisting.<sup>63</sup>

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

Even if evidence is relevant and otherwise admissible under Rule 402, it may still be excluded under Rule 403 “if the prejudicial nature of the evidence substantially outweighs its probative value.”<sup>64</sup> To perform the balancing required by Rule 403, “courts will look for the dangers that the jury will (1) substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury.”<sup>65</sup> Three published opinions from Indiana's appellate courts substantively addressed Rule 403.

In *Means v. State*, the Indiana Supreme Court affirmed exclusion of an order from a child in need of services (“CHINS”) proceeding.<sup>66</sup> The intended use of the order was for the proponent to rely upon its conclusion that another was the source of the child's injuries.<sup>67</sup> The court reasoned:

To begin with, the CHINS order presents a great risk that the jury will be too deferential to a judge's assessment of the facts. If the juvenile court judge had concluded [Defendant] was in fact the perpetrator, [Defendant] would rightly argue it would be unfairly prejudicial to his defense for the State to introduce into evidence that conclusion. It is no less unduly prejudicial to the State's case to allow Means to introduce evidence that another judge exonerated him.

Moreover, introducing the CHINS order is misleading in the criminal proceeding. The juvenile court judge reached her conclusion in the CHINS order based on DCS's evidentiary presentation in a civil proceeding following its own investigation, not the prosecutor's evidence in this criminal proceeding based on additional police investigation. That is especially problematic because the juvenile court reached its conclusion in the CHINS case before the State completed its

---

62. *Shotts v. State*, No. 22A-CR-338, 2023 Ind. App. Unpub. LEXIS 29, at \*11-14 (Ind. Ct. App. Jan. 18, 2023), *trans. denied*, 209 N.E.3d 1176 (Ind. 2023).

63. *Hunter v. State*, No. 22A-CR-2212, 2023 Ind. App. Unpub. LEXIS 730, at \*5-8 (Ind. Ct. App. June 28, 2023), *trans. denied*, 220 N.E.3d 57 (Ind. 2023).

64. *Birk v. State*, 215 N.E.3d 1090, 1094 (Ind. Ct. App. 2023).

65. *Id.* at 1094-95 (citation and quotation marks omitted).

66. *Means v. State*, 201 N.E.3d 1158, 1167-68 (Ind. 2023).

67. *Id.* at 1167.

investigation in the criminal case.<sup>68</sup>

Because the evidence presented a substantial risk of confusing the issues and misleading the jury, it fit squarely within Rule 403 for exclusion.<sup>69</sup>

The Indiana Court of Appeals also took on Rule 403 in its published opinions in *Birk v. State*<sup>70</sup> and *Singh v. State*.<sup>71</sup> In *Birk*, the court affirmed the exclusion of testimony of racial animus relating to a witness.<sup>72</sup> What made *Birk* different from other cases in which racial-bias evidence has been admitted<sup>73</sup> is that the evidence of bias did not pertain directly to the witness, but rather her father and the de facto father of her children.<sup>74</sup> The court deemed the evidence highly prejudicial—inviting jurors to conflate the racial prejudice of the two men to that of the witness—and too remote from the issue presented by the witness to warrant reversal.<sup>75</sup>

Unlike *Birk*, *Singh* resulted in a reversal and remand following erroneous application of Rule 403.<sup>76</sup> The case followed a criminal conviction for reckless homicide arising from a truck driver parking his rig on the side of a road, which contributed to a fatal collision with an SUV.<sup>77</sup> The evidence that was excluded tended to show that the SUV driver had sent a Snapchat message in close proximity to her colliding with the parked tractor trailer.<sup>78</sup> In light of the “incredibly fact-sensitive” nature of “[r]eckless-homicide-via-vehicle cases[,]” the evidence of distracted driving was highly probative and it was deemed error for it to be excluded under Rule 403.<sup>79</sup>

The survey period also produced two notable observations from memoranda decisions. The first is that the Court of Appeals suggested that a factor in a Rule 403 analysis might be the difficulty in editing a recording to redact something said therein.<sup>80</sup> The other was the observation that the risk of prejudice from an image depicting a criminal defendant in handcuffs is low because “it would be

---

68. *Id.* (citations omitted).

69. *Id.* at 1167-68.

70. *Birk v. State*, 215 N.E.3d 1090, 1094-96 (Ind. Ct. App. 2023).

71. *Singh v. State*, 203 N.E.3d 1116, 1120-24 (Ind. Ct. App. 2023).

72. *Birk*, 215 N.E.3d at 1094-96.

73. *See, e.g.*, *Tompkins v. State*, 669 N.E.2d 394, 396-98 (Ind. 1996); *Kimble v. State*, 659 N.E.2d 182, 183-85 (Ind. Ct. App. 1995).

74. *Birk*, 215 N.E.3d at 1092-94.

75. *Id.* at 1096.

76. *Singh*, 203 N.E.3d at 1120-24.

77. *Id.* at 1118-20.

78. *Id.* at 1119-20.

79. *Id.* at 1123.

80. *Camden v. State*, No. 22A-CR-1398, 2023 Ind. App. Unpub. LEXIS 597, at \*14-15 (Ind. Ct. App. May 25, 2023) (“Here, the mention of DCS is comparatively brief, lasting less than a second. Indeed, the State claimed it was uncertain whether it would even be possible to redact the recording to exclude the mention of DCS without altering the rest of the statement in the recording. The trial court could properly find probative value in the entirety of Camden’s recorded statement that he had just heard of the event from an outside source two days after the event occurred.”).

common sense for the jury to presume that Defendant would have been detained by police at the scene of the felony traffic stop.”<sup>81</sup>

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

Rule 404 covers admission of both character evidence in general and evidence of crimes, wrongs, or other bad acts in particular.<sup>82</sup> Subdivision (a) generally renders character evidence “inadmissible to prove that a person acted in conformity with that character on a particular occasion, in a criminal case[.]”<sup>83</sup> Nevertheless, the rule preserves exceptional circumstances in which character evidence may be used, including a criminal defendant’s ability to “offer evidence of the victim’s character.”<sup>84</sup> The Indiana Court of Appeals affirmed exclusion of a witness’s testimony that the victim had previously made a threat against the criminal defendant who was asserting a claim of self-defense because the evidence was not that of character; rather, it was evidence of “specific instances in which [the victim] threatened to kill or ‘get’” the defendant.<sup>85</sup> There also was no showing that the threats were ever communicated to the defendant.<sup>86</sup>

Rule 404(b) specifically applies to evidence of prior criminal conduct or other bad acts used to prove character.<sup>87</sup> “[E]vidence is inadmissible under Indiana Evidence Rule 404(b) when its only apparent purpose is to prove that the defendant is a person who commits crime.”<sup>88</sup> Like Rule 404(a), Rule 404(b) includes permissible uses, including an “illustrative but not exhaustive” list.<sup>89</sup> Generally speaking, “if relevant, evidence of other crimes may be admissible for purposes other than to show the defendant’s character or propensity to commit the crime charged.”<sup>90</sup>

During the survey period, the Indiana Court of Appeals had numerous opportunities to address Rule 404(b). In *Hornsby v. State*, the court affirmed admission of evidence pertaining to the defendant’s keeping of a handgun in his truck, even though the handgun was not directly used in the charged offense of stalking because the prior history of the handgun being in the vehicle was

---

81. *Moss v. State*, No. 22A-CR-2002, 2023 Ind. App. Unpub. LEXIS 484, at \*18-19 (Ind. Ct. App. Apr. 28, 2023) (citing *Wheeler v. State*, 749 N.E.2d 1111, 1114 (Ind. 2001) (addressing mug shots)), *trans. denied*, 212 N.E.3d 1233 (Ind. 2023).

82. IND. R. EVID. 404; *Sterling v. State*, 199 N.E.3d 377, 384 (Ind. Ct. App. 2022).

83. *Sterling*, 199 N.E.3d at 384; IND. R. EVID. 404(a)(1).

84. *Sterling*, 199 N.E.3d at 384; IND. R. EVID. 404(a)(2)(B).

85. *Sterling*, 199 N.E.3d at 385.

86. *Id.* at 385 n.6.

87. IND. R. EVID. 404(b).

88. *Richey v. State*, 210 N.E.3d 329, 343 (Ind. Ct. App. 2023) (citation and quotation marks omitted).

89. *Hornsby v. State*, 202 N.E.3d 1135, 1148 (Ind. Ct. App.), *trans. denied*, 208 N.E.3d 1247 (Ind. 2023); IND. R. EVID. 404(b)(2).

90. *Richey*, 210 N.E.3d at 343 (citation and quotation marks omitted).

admissible for a purpose other than to draw the forbidden inference.<sup>91</sup> Because the presence of the vehicle was a factor in the stalking, it “was relevant to showing both that [the victim] was fearful or intimidated by [the defendant] and that her fear was objectively reasonable.”<sup>92</sup>

In *Mills v. State*, the Court of Appeals addressed whether use of a DCS investigation to show lack of an accident was permissible under Rule 404(b)(2).<sup>93</sup> The case touched upon an interesting question of whether the “Rule 404(b) evidence can be admitted only to show lack of accident when the defendant is alleging the charged harm was an accident caused by his own conduct (such as swinging his arm and accidentally striking the victim), rather than by some other source (such as the victim falling).”<sup>94</sup> The opinion did not, however, resolve the question, instead finding that “the record sufficiently show[ed] that [the defendant] made statements giving the State reliable assurance that he would place accident at issue, and that the alleged accident occurred at least in part due to his actions.”<sup>95</sup> Because Rule 404(b)(2) specifically allows such evidence to prove lack of accident, Rule 404(b) did not bar the evidence.<sup>96</sup>

But Rule 404(b) is not boundless. In *Richey v. State*, the Indiana Court of Appeals found that it was error to admit records of prior criminal convictions that included seven convictions unrelated to the conviction needed for the state to prove its case.<sup>97</sup> In memoranda decisions, the Court of Appeals also found Rule 404 prevented evidence of prior unrelated heroin use<sup>98</sup> and that evidence of a victim’s prior theft conviction was not admissible in support of a defendant’s claim for self-defense to show that the victim was perpetrating a robbery at the time.<sup>99</sup>

Additional insights were provided by numerous memoranda decisions from the Indiana Court of Appeals. In *Camden v. State*, the panel ruled that the fact that defendant “spoke with DCS [did] not directly connect [the defendant] to a DCS investigation[,]” such that the evidence did not constitute evidence of a

---

91. *Hornsby*, 202 N.E.3d at 1148-49. The “forbidden inference” at the core of Rule 404(b)’s exclusion is “that prior wrongful conduct suggests present guilt.” *Id.* at 1148 (citation and formatting omitted).

92. *Id.* at 1149.

93. *Mills v. State*, 211 N.E.3d 22, 30-31 (Ind. Ct. App. 2023).

94. *Id.* at 30.

95. *Id.*

96. *Id.* at 30-31.

97. *Richey v. State*, 210 N.E.3d 329, 343-44 (Ind. Ct. App. 2023).

98. *Lothery v. State*, No. 22A-CR-2156, 2023 Ind. App. Unpub. LEXIS 457, at \*20 (Ind. Ct. App. Apr. 24, 2023), *trans. denied*, 211 N.E.3d 1013 (Ind. 2023). Although the Court of Appeals found that Rule 404 prevented evidence of prior unrelated heroin use, it ultimately found the introduction of the evidence was “not reversible error as it was harmless.” *Id.* at \*21.

99. *Shotts v. State*, No. 22A-CR-338, 2023 Ind. App. Unpub. LEXIS 29, at \*14-15 (Ind. Ct. App. Jan. 18, 2023), *trans. denied*, 209 N.E.3d 1176 (Ind. 2023).

prior bad act.<sup>100</sup> In *Bridges v. State*, the panel observed that evidence otherwise prohibited under Rule 404(b) may be admitted at a bench trial because the “judicial-temperance presumption” presumes that “a court renders its decisions solely on the basis of relevant and probative evidence.”<sup>101</sup> In other decisions, the Court of Appeals affirmed admission of evidence under Rule 404 finding: evidence of prior inappropriate touching of a minor victim by the criminal defendant was admissible because it showed preparation for the crime “by seeing if [the victim] would remain silent following the abuse[;]”<sup>102</sup> evidence of drug and alcohol use earlier in the evening of a shooting as well as evidence that the defendant was “on a power trip because he had said multiple times that he was ready to go to jail and was ready to kill someone” was not barred by Rule 404(b),<sup>103</sup> and evidence of unrelated rape allegation was permissible under Rule 404(b)(2) in a child-molestation case to rebut defendant’s assertion “that he ‘would never molest anyone.’”<sup>104</sup>

#### *D. Rule 405: Methods of Proving Character*

Rule 405 functions as a complement to Rule 404, providing the methods for proving character when Rule 404 allows character evidence.<sup>105</sup> Subdivision (a) to Rule 405 establishes the methods for admitting reputation or opinion testimony of a person’s character.<sup>106</sup> When the testimony is not of opinion or reputation, but rather of a specific instance, then it must meet the requirements of Rule 405(b), which applies only “[w]hen a person’s character or character trait is an essential element of a charge, claim, or defense[.]”<sup>107</sup> In *Sterling v. State*, the Indiana Court of Appeals addressed the exclusion of proffered character evidence that the victim told a fellow inmate that he “was going to kill or ‘get’” the criminal defendant.<sup>108</sup> The court determined that it was evidence of a specific instance admissible only if the victim’s character “was an essential

100. *Camden v. State*, No. 22A-CR-1398, 2023 Ind. App. Unpub. LEXIS 597, at \*13 (Ind. Ct. App. May 25, 2023) (emphasis in original).

101. *Bridges v. State*, No. 22A-PC-2858, 2023 Ind. App. Unpub. LEXIS 911, at \*14 (Ind. Ct. App. Aug. 7, 2023) (quoting *Konopasek v. State*, 946 N.E.2d 23, 28 (Ind. 2011)).

102. *Cox v. State*, No. 23A-CR-517, 2023 Ind. App. Unpub. LEXIS 1057, at \*9-10 (Ind. Ct. App. Sept. 5, 2023); see also *Miles v. State*, No. 22A-CR-2318, 2023 Ind. App. Unpub. LEXIS 465, at \*6-9 (Ind. Ct. App. Apr. 26, 2023), *trans. denied*, 215 N.E.3d 335 (Ind. 2023); *Millar v. State*, No. 22A-CR-1015, 2023 Ind. App. Unpub. LEXIS 197, at \*5-8 (Ind. Ct. App. Feb. 24, 2023) (evidence of grooming); *Hankins v. State*, No. 22A-CR-2846, 2023 Ind. App. Unpub. LEXIS 895, at \*7-11 (Ind. Ct. App. July 31, 2023) (evidence of grooming), *trans. denied*, 2023 Ind. LEXIS 693, at 1\* (Ind. 2023).

103. *Burkins v. State*, 219 N.E.3d 735, 743-46 (Ind. Ct. App. 2023).

104. *Todosijejevic v. State*, No. 22A-CR-1965, 2023 Ind. App. Unpub. LEXIS 608, at \*11-14 (Ind. Ct. App. May 30, 2023), *trans. denied*, 217 N.E.3d 1244 (Ind. 2023).

105. *Price v. State*, 765 N.E.2d 1245, 1250 (Ind. 2002); NEIL P. COHEN, ET AL., *TENNESSEE LAW OF EVIDENCE* § 4.04 (6th ed. 2023).

106. IND. R. EVID. 405(a).

107. IND. R. EVID. 405(b).

108. *Sterling v. State*, 199 N.E.3d 377, 383-85 (Ind. Ct. App. 2022).

element of [the defendant]’s claim of self-defense.”<sup>109</sup> In keeping with Indiana precedent “that the assertion of a claim of self-defense does not make the victim’s character an essential element of a defense[.]” the court of appeals affirmed exclusion.<sup>110</sup>

*E. Rule 408: Experts May Not Rely Upon Compromise  
Offers and Negotiations*

Rule 408 generally prohibits use of “evidence of offers of valuable consideration in settlement of disputed claims.”<sup>111</sup> The rationale of the rule “is to promote candor by excluding admissions of fact or law. Interim negotiating concessions are in that category.”<sup>112</sup> Courts interpret the rule expansively to extend not only to communications made during mediations,<sup>113</sup> but also to informal settlement negotiations during the course of litigation.<sup>114</sup> Nevertheless, there are exceptions enumerated within Rule 408<sup>115</sup> and such evidence may be used “in collateral matters unrelated to the dispute”<sup>116</sup> including “when a mediation is ‘not instituted pursuant to judicial action in a pending case[.]’”<sup>117</sup>

In *Indiana GRQ, LLC v. American Guarantee and Liability Insurance Company*, the United States District Court for the Northern District of Indiana provided an important look into application of Indiana Evidence Rule 408.<sup>118</sup> The dilemma was whether testimony of an expert should be excluded because the expert was made privy to and relied upon evidence excludable under Rule 408.<sup>119</sup> Rejecting the “argument that . . . mediation statements should not be treated as confidential” and considering divergent views from other federal district courts, the court was sufficiently “troubled by the disclosure of confidential information to [the expert] and his reliance on that information” to set an evidentiary hearing to determine whether to institute sanctions.<sup>120</sup>

---

109. *Id.* at 385.

110. *Id.* (citing *Guillen v. State*, 829 N.E.2d 142, 147 (Ind. Ct. App. 2005); 12 ROBERT LOWELL MILLER, JR., *INDIANA PRACTICE: INDIANA EVIDENCE* § 405.201 (4th ed. 2023)).

111. *Bridges v. Metromedia Steakhouse Co.*, 807 N.E.2d 162, 166 (Ind. Ct. App. 2004).

112. *See, e.g., Stratford Ins. Co. v. Shorewood Forest Utils., Inc.*, No. 2:20-CV-372-PPS-JEM, 2023 U.S. Dist. LEXIS 75159, at \*16-17 (N.D. Ind. May 1, 2023).

113. *Worman Enters. v. Boone Cnty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 376-77 (Ind. 2004).

114. *Berg v. Berg*, 170 N.E.3d 224, 228 (Ind. 2021).

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

116. *Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013).

117. *Berg*, 170 N.E.3d at 228 (quoting *Vernon v. Acton*, 732 N.E.2d 805, 808 n.5 (Ind. 2000)).

118. *Ind. GRQ, LLC v. Am. Guarantee & Liab. Ins. Co.*, No. 3:21-cv-227 DRL, 2023 U.S. Dist. LEXIS 83674, at \*4-11 (N.D. Ind. May 12, 2023).

119. *Id.*

120. *Id.* at \*5, \*9-11 (citing *Irwin Seating Co. v. IBM*, No. 1:04-CV-568, 2006 U.S. Dist. LEXIS 86988, at \*2-11 (W.D. Mich. Nov. 29, 2006); *U.S. Iron Fla., LLC v. GMA Garnett USA Corp.*, No. 3:21cv943-TKW-ZCB, 2023 U.S. Dist. LEXIS 60538, at \*5-6 (N.D. Fla. Feb. 21,

Following that evidentiary hearing, the expert was excluded from testifying at trial.<sup>121</sup>

#### *F. Rule 411: Liability Insurance*

Rule 411 “exclud[es] evidence of insurance offered to show that a party acted negligently or wrongfully so that a jury is not induced to decide a case on improper grounds.”<sup>122</sup> “The rationale for not allowing evidence regarding insurance is that if the jury becomes aware of the fact that the defendant carries liability insurance and will not bear the brunt of a judgment, the jury may be prejudiced in favor of an excessive verdict.”<sup>123</sup> In the memorandum decision in *Ripley v. Braun*, the Indiana Court of Appeals recognized that Rule 411 and the attending risk of prejudice by admission of insurance evidence is not applicable in a bench trial.<sup>124</sup> That conclusion is consistent with the long-standing presumption that trial judges “know the intricacies of the rules of evidence, and [ ] base [their] decision[s] only upon consideration of competent evidence.”<sup>125</sup>

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

“Evidence Rule 412 controls the admission of evidence regarding sexual behavior or sexual predisposition[.]”<sup>126</sup> “Rule 412 precludes introduction of evidence of any prior sexual conduct of an alleged victim of a sex crime or a witness in a sex crime prosecution unless the evidence would establish evidence of prior sexual conduct with the defendant, would bring into question the identity of the defendant as the assailant, or would be admissible as a prior offense under Rule 609.”<sup>127</sup> The rule works in conjunction with Indiana’s Rape Shield Statute, but the rule is not a verbatim adoption of the statute.<sup>128</sup>

The survey period provided two useful insights from memoranda decisions. The first is that a civil action challenging the constitutionality of the rape-shield rule, which is premised on the application of the rule in a prior criminal

---

2023); *McLean v. Air Methods Corp.*, No. 1:12-cv-241-jgm, 2014 U.S. Dist. LEXIS 9145, at \*17-20 (D. Vt. Jan. 24, 2014); *Kuithe v. Gulf Caribe Mar., Inc.*, No. 08-0458-WS-C, 2009 U.S. Dist. LEXIS 106445, at \*1-3 (S.D. Ala. Nov. 13, 2009)).

121. *Ind. GRQ, LLC v. Am. Guar. & Liab. Ins. Co.*, No. 3:21-cv-227 DRL, ECF No. 220 (N.D. Ind. May 24, 2023).

122. *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548, 551 (Ind. Ct. App. 2009).

123. *Ripley v. Braun*, No., 22A-CC-2603, 2023 Ind. App. Unpub. LEXIS 431, at \*6 n.2 (Ind. Ct. App. Apr. 19, 2023) (citing *Rust v. Watson*, 215 N.E.2d 42, 51 (Ind. App. 1966)).

124. *Id.*

125. *Jochem v. Kerstiens*, 498 N.E.2d 1241, 1244 (Ind. Ct. App. 1986); *see also Utilimaster Corp. v. Ind. Dep’t of State Revenue*, 967 N.E.2d 92, 95-96 (Ind. Tax Ct. 2012).

126. *Sterling v. State*, 199 N.E.3d 377, 384 n.4 (Ind. Ct. App. 2022).

127. *Beeman v. State*, No. 22A-CR-1669, 2023 Ind. App. Unpub. LEXIS 951, at \*3 n.2 (Ind. Ct. App. Aug. 16, 2023) (quoting *Conrad v. State*, 938 N.E.2d 852, 855 (Ind. Ct. App. 2010)).

128. *Hicks v. State*, No. 22A-CR-2941, 2023 Ind. App. Unpub. LEXIS 986, at \*9 (Ind. Ct. App. Aug. 24, 2023); IND. CODE § 35-37-4-4 (2023).

proceeding that resulted in a conviction is the functional equivalent of a collateral attack on a criminal judgment and impermissible.<sup>129</sup> The second is that evidence that an alleged victim had participated in “a game in which participants were awarded points for participating in various sexual activities” is evidence covered by the rape-shield rule and not “admissible pursuant to [the exception of ] Evidence Rule 412(b)(1)(B) to prove consent.”<sup>130</sup>

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

Rule 101(c) ensures that “[t]he rules and laws with respect to privileges apply at all stages of all actions, cases, and proceedings.”<sup>131</sup> “Indiana generally recognizes that privileges are statutory in nature and that it is within the power of the legislature to create them[.]” though they may also arise under the common law.<sup>132</sup> The Indiana Evidence Rules incorporate privileges through Rule 501(a) and establish procedures for finding waiver of privileges through the remainder of Rules 501 and 502.<sup>133</sup>

The Indiana Court of Appeals, in a memorandum decision, provided an important lesson on application of the physician-patient privilege: the ability to assert the privilege is unique to the patient and may not be asserted on the patient’s behalf by a family member in guardianship proceedings.<sup>134</sup>

The survey period also produced multiple opinions elucidating when a privilege will be deemed waived. In *Akinribade v. State*, the Indiana Court of Appeals addressed whether work-product protections for a consultation summary prepared by an expert in response to a report of a crime-lab DNA analyst were waived when the summary was placed before the DNA analyst during the analyst’s deposition.<sup>135</sup> The majority of the appellate panel deemed only the single page of the summary disclosed during the deposition to have been waived, but not the remaining six pages.<sup>136</sup> In asserting its waiver argument, the State relied upon Rules 501(b) and 502(a).<sup>137</sup> Rule 501(b) creates the general rule that a party may waive a privilege and incorporates Rule 502 as to the methods for doing so.<sup>138</sup> Rule 502(a) establishes the breadth of waiver of

---

129. *Meiggs v. Ind. Gen. Assembly*, No. 23A-PL-21, 2023 Ind. App. Unpub. LEXIS 937, at \*1-2 (Ind. Ct. App. Aug. 14, 2023).

130. *Hicks*, 2023 Ind. App. Unpub. LEXIS 986, at \*2, \*9-14.

131. IND. R. EVID. 101(c).

132. *Terre Haute Reg’l Hosp., Inc. v. Trueblood*, 600 N.E.2d 1358, 1360 (Ind. 1992); *but cf.* Jeffrey O. Cooper, *Recent Developments in Indiana Evidence Law*, 32 IND. L. REV. 811, 825-26 (1999) (discussing reluctance of Indiana Court of Appeals to recognize a non-statutory privilege).

133. IND. R. EVID. 501 & 502.

134. *Hunter v. Hoeller*, No. 22A-GU-908, 2023 Ind. App. Unpub. LEXIS 967, at \*26-27 (Ind. Ct. App. Aug. 21, 2023), *reh’g denied* (Oct. 18, 2023).

135. *Akinribade v. State*, 202 N.E.3d 468, 471-72 (Ind. Ct. App. 2023), *trans. not sought*.

136. *Id.* at 471.

137. *Id.*

138. IND. R. EVID. 501(b) (“Subject to the provisions of Rule 502, a person with a privilege

either attorney-client privilege or work-product protection:

When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.<sup>139</sup>

The majority opinion rejected the reliance on Rule 502(a) by first questioning whether a deposition constituted “a court proceeding” and, second, by distinguishing waiver for purposes of discovery from waiver for purposes of admission at a trial or hearing.<sup>140</sup> In dissent, Judge Melissa May asserted her belief that “it is an accepted fact that a deposition is a court proceeding” followed by a thorough analysis as to why that is so, but did not address the majority’s contention that Rule 502 does not apply for purposes of waiver at discovery.<sup>141</sup>

Indiana’s federal district courts also provided insights into application of Indiana’s privilege rules.<sup>142</sup> In *Doe v. Netflix, Inc.*, the United States District Court for the Southern District of Indiana concluded that the defendants’ desire to simultaneously “inform the jury that they take care to avoid legal issues—such as revealing someone’s identity without authorization—by having clearance counsel conduct a thorough review” and shield the results of such review presented “a classic sword and shield problem[.]”<sup>143</sup> In order to prevent

---

against disclosure waives the privilege if the person or person’s predecessor while holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.”).

139. IND. R. EVID. 502(a).

140. *Akinribade*, 202 N.E.3d at 472 (“We note that the State cites no authority to support its assertion that a deposition is a court proceeding for purposes of Evidence Rule 502(a), and we leave that question for another day. We further note that both the State and the dissent overlook the fact that the issue before us is the discoverability of an expert’s report during discovery, which is governed by the Trial Rules, not the admissibility of the report in a ‘proceeding[] in [a court] of this State[,]’ i.e., a trial or a hearing before a judge, which is governed by the Evidence Rules. Ind. Evidence Rule 101(a). In other words, Evidence Rule 502 is inapplicable here.” (alterations in original)).

141. *Id.* at 473-74 (May, J., dissenting). Though not addressed in Judge May’s dissent, at least one federal district court has interpreted Federal Rule 502 to apply to depositions. *McCullough v. Hanley*, No. 17 CV 50116, 2019 U.S. Dist. LEXIS 135225, at \*25 (N.D. Ill. Aug. 12, 2019).

142. FED. R. EVID. 501 (“[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”); *Stratford Ins. Co. v. Shorewood Forest Utils., Inc.*, No. 2:20-CV-372-PPS-JEM, 2023 U.S. Dist. LEXIS 75159, at \*11 (N.D. Ind. May 1, 2023).

143. *Doe v. Netflix, Inc.*, No. 1:22-cv-01281-TWP-MJD, 2023 U.S. Dist. LEXIS 54755, at \*4-5 (S.D. Ind. Mar. 30, 2023) (quotation marks and formatting omitted).

the defendants from both using the review process as a weapon and hiding behind privilege, the court deemed the attorney-client privilege waived.<sup>144</sup>

The Northern District of Indiana also addressed application of Indiana's attorney-client privilege, but in the expanded context of the common-interest privilege.<sup>145</sup>

Although the presence of a third party typically waives the privilege, “Indiana . . . has adopted the common-interest privilege, which is ‘an extension of the attorney-client privilege’ that ‘permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims.’” “The common interest privilege treats all involved attorneys and clients as a single attorney-client unit,” and applies in insurance relationships: “where the policy of insurance requires the insurer to defend claims against the insured, statements from the insured to the insurer concerning an occurrence which may be made the basis of a claim by a third party are protected from disclosure.”<sup>146</sup>

Applying the common-interest privilege, the court shielded from disclosure communications among an insured, its outside counsel, and its insurer.<sup>147</sup> Notably, the privilege applied despite the potential for it to shield evidence of collusion.<sup>148</sup>

## V. WITNESSES: RULES 601 THROUGH 617

### *A. Rule 608: Establishing Foundation for Opinion of Truthfulness*

Once a “witness’s character for truthfulness has been attacked[.]” Rule 608(a) permits testimony and opinion “about the witness’s reputation for having a character for truthfulness or untruthfulness[.]”<sup>149</sup> One of the most notable opinions covered in last year’s survey was the Court of Appeals’ opinion in *Hayko v. State*, which distinguished the processes for admitting opinion evidence from reputation evidence.<sup>150</sup> Following the close of that survey period, the Indiana Supreme Court granted transfer of the case, thereby vacating the

---

144. *Id.* at \*6-7.

145. *Stratford Ins. Co.*, 2023 U.S. Dist. LEXIS 75159, at \*11-18.

146. *Id.* at \*12 (citations omitted) (alteration in original).

147. *Id.* at \*11-14.

148. *Id.* at \*14-15 (citing *Hartford Fin. Servs. Grp., Inc. v. Lake Cnty. Park & Recreation Bd.*, 717 N.E.2d 1232, 1238 (Ind. Ct. App. 1999); *Bartlett v. State Farm Mut. Auto. Ins.*, 206 F.R.D. 623, 627 (S.D. Ind. 2002)).

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

150. *2022 Survey*, *supra* note 22, at 775-76 (discussing *Hayko v. State*, 196 N.E.3d 259, 262, 265-68 (Ind. Ct. App. 2022), *vacated*, 201 N.E.3d 603 (Ind. 2023)).

opinion.<sup>151</sup>

On transfer, the Indiana Supreme Court sought to answer a question “of first impression under Rule 608(a): what is required to establish the proper foundation for a witness’s opinion testimony?”<sup>152</sup> As had the Court of Appeals, the Indiana Supreme Court distinguished between opinion and reputation, establishing “that the evidentiary foundation required to admit opinion testimony is less demanding than that required to admit reputation testimony.”<sup>153</sup> The court characterized “reputation testimony [as] reflect[ing] the consensus of *many* close to and familiar with a witness’s character,” whereas “opinion testimony reflects the judgment of a *single* individual.”<sup>154</sup> Adopting what constitutes the majority approach across the nation, the court “[h]eld that, to lay a proper foundation for the admission of opinion testimony under Rule 608(a), the proponent must establish that the witness’s opinion is both rationally based on their personal knowledge and would be helpful to the trier of fact. Yet, even when foundation is established, the trial court retains discretion to exclude the evidence based on other rules of evidence.”<sup>155</sup>

Applying that test, the Indiana Supreme Court determined that a proper foundation was laid for the opinion of the victim’s grandfather, step-grandmother, and aunt because “[e]ach witness testified they had known [the victim] since she was born, had been around her multiple times a year at family gatherings, had directly communicated with her and personally observed her interactions with others, and had last seen her not long before the allegations.”<sup>156</sup> From those experiences, each witness testified in the offer of proof to his or her opinion of the victim’s character for dishonesty.<sup>157</sup> Despite the trial court’s error in excluding that testimony, the criminal defendant’s conviction was upheld, with the court deeming the error harmless.<sup>158</sup>

### *B. Rule 609: Impeachment of Evidence by Criminal Conviction*

Rule 609 mandates the admission of certain criminal convictions as a means for attacking the credibility of a witness.<sup>159</sup> In a memorandum decision, the

151. *Hayko v. State*, 201 N.E.3d 603 (Ind. 2023); IND. R. APP. P. 58(A).

152. *Hayko v. State*, 211 N.E.3d 483, 485 (Ind. 2023).

153. *Id.* at 485. The foundational requirements for admitting reputation testimony are: “That reputation must be a general reputation, held by an identifiable group of people who have an adequate basis upon which to form an opinion, and the witness testifying to reputation must have sufficient contact with that community or society to qualify as knowledgeable of the general reputation of the person whose character is attacked or supported.” *Bowles v. State*, 737 N.E.2d 1150, 1153 (Ind. 2000) (citation and formatting omitted).

154. *Hayko*, 211 N.E.3d at 489 (emphases in original).

155. *Id.* at 490.

156. *Id.* at 490-91.

157. *Id.* at 491.

158. *Id.* at 491-94.

159. IND. R. EVID. 609(a); *see also* *Conley v. State*, No. 22A-CR-1748, 2023 Ind. App.

Indiana Court of Appeals rejected an invitation to interpret Rule 609 to extend to crimes of conspiracy in accordance with a 1987 opinion from Iowa and a 1986 opinion from Alabama.<sup>160</sup> The appellate panel found that “[t]he plain language of Rule 609 does not include crimes of conspiracy” and the invoked precedent antedates Indiana’s adoption of Evidence Rule 609, in 1994.<sup>161</sup> Because that “persuasive authority was available to the drafters of [Indiana’s] rule, yet conspiracy was not included as an impeachable offense[,]” it was presumed that the omission was intentional.<sup>162</sup>

*C. Rule 614(d): Questioning by Juror*

As the survey period neared its end, the Indiana Court of Appeals confronted a novel constitutional challenge to the procedures for questions by jurors to witnesses embodied in Indiana Evidence Rule 614(d).<sup>163</sup> On appeal, the criminal defendant contended that the Indiana Constitution’s guarantee that “[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts[,]”<sup>164</sup> was violated by a preliminary jury instruction that told jurors that the judge would determine whether any question from a juror was permitted by law.<sup>165</sup> Because the text of the instruction tracked the language of Rule 614(d), the court looked to Rule 614(d) caselaw in its analysis.<sup>166</sup> The court of appeals ultimately rejected the challenge, finding that the logic of the argument would shift jurors into the role of determining the admissibility of evidence, a power long recognized as residing solely within the presiding judicial officer.<sup>167</sup>

---

Unpub. LEXIS 586, at \*7 n.7 (Ind. Ct. App. May 22, 2023) (“The language of Rule 609 is not permissive.”), *trans. denied*, 217 N.E.3d 1243 (Ind. 2023).

160. *Cross v. State*, No. 22A-CR-2785, 2023 Ind. App. Unpub. LEXIS 1015, at \*5-6 (Ind. Ct. App. Aug. 28, 2023) (citing *State v. Ruan*, 419 N.W.2d 734, 738 (Iowa Ct. App. 1987); *G.M. Mosley Contractors, Inc. v. Phillips*, 487 So.2d 876, 879 (Ala. 1986)).

161. *Id.*

162. *Id.* at \*6; *cf. Folz v. New Mexico*, 797 P.2d 246, 250 n.3 (N.M. 1990) (“[W]hen the legislature does not provide an express definition of an essential statutory term, it must be assumed that the legislature was aware of the construction given that term in the judicial decisions of other jurisdictions.”).

163. *Johnson v. State*, 218 N.E.3d 585, 587-89 (Ind. Ct. App. 2023).

164. IND. CONST. art. I, § 19.

165. *Johnson*, 218 N.E.3d at 587-88. The instruction tracked Indiana Pattern Criminal Jury Instruction 1.2200. *Id.* at 588 n.1.

166. *Id.* at 588 (citing *Trotter v. State*, 733 N.E.2d 527, 531 (Ind. Ct. App. 2000); *Burks v. State*, 838 N.E.2d 510, 518 (Ind. Ct. App. 2005)).

167. *Id.* at 588-89.

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

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

“Rule 701 . . . limits a lay witness’s testimony in the form of an opinion to one that is both ‘rationally based on the witness’s perception’ and ‘helpful to a clear understanding of the witness’s testimony or to a determination of a fact in issue.’”<sup>168</sup> But Indiana Evidence Rule 701, unlike Federal Evidence Rule 701,<sup>169</sup> permits a middle ground between a truly lay witness and a person who satisfies the rigors for expert testimony under Rule 702.<sup>170</sup> A so-called “skilled witness” or “skilled lay observer” “has a degree of knowledge that falls short of being declared an expert under Rule 702, but somewhat beyond that possessed by ordinary jurors.”<sup>171</sup> Two memoranda decisions from the Indiana Court of Appeals provide further insight into who may offer opinions as a skilled witness. In *Sanders v. State*, an officer with the Indiana Department of Natural Resources, possessing eighteen years of experience as an officer and a quarter-century as a hunter, was deemed a skilled witness capable of offering an opinion that a deer “had been shot by a rifle rather than a bow and arrow.”<sup>172</sup> Similarly, the Court of Appeals found a detective, having been lead investigator on several hundred investigations involving allegations of child abuse, was sufficiently skilled to “generally explain . . . to the jury that it is not uncommon for children to delay disclosure and be unable to recall specific details and dates of molestations.”<sup>173</sup> Importantly, the detective “did not testify why or how trauma causes a child to forget details and dates, and such testimony or evidence could only be presented by an expert witness in the field of neurology or psychology.”<sup>174</sup> Had she attempted to offer such opinion, it may have exceeded the permissible scope of Rule 701.

---

168. Hayko v. State, 211 N.E.3d 483, 489 (Ind. 2023) (quoting IND. R. EVID. 701).

169. Although Federal Evidence Rule 701 may have allowed for skilled witnesses, at one time, *see, e.g.*, United States v. Williams, 212 F.3d 1305, 1309 n.2 (D.C. Cir. 2000); United States v. Roy, No. 88-5178, 1989 U.S. App. LEXIS 22195, at \*14 (4th Cir. July 31, 1989) (unpublished) (per curiam), “Federal Rule of Evidence 701 now contains an additional requirement that the testimony ‘not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.’ Prior to 2000, however, Indiana Rule 701 and Federal Rule 701 were identical.” Cain v. Back, 889 N.E.2d 1253, 1258 n.4 (Ind. Ct. App. 2008), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008). To the extent the Federal Rules still capture the concept of “skilled witnesses” it is most likely through Rule 702, not 701. *Cf.* Walden v. Fernandez (*In re Fernandez*), Nos. 2:18-bk-18159-RK, 2:18-ap-01327-RK, 2021 Bankr. LEXIS 1800, at \*60-61 (Bankr. C.D. Cal. July 7, 2021).

170. Clayton v. Smith, 113 N.E.3d 693, 702-03 (Ind. Ct. App. 2018), *trans. denied*, 123 N.E.3d 142 (Ind. 2019).

171. *Id.*

172. Sanders v. State, No. 22A-CR-1657, 2023 Ind. App. Unpub. LEXIS 68, at \*6-7 (Ind. Ct. App. Jan. 27, 2023), *trans. denied*, 209 N.E.3d 1169 (Ind. 2023).

173. Hernandez v. State, No. 22A-CR-3069, 2023 Ind. App. Unpub. LEXIS 1119, at \*13-15 (Ind. Ct. App. Sept. 26, 2023).

174. *Id.* at 14.

*B. Rule 702: Testimony by Expert Witnesses*

Rule 702 establishes the parameters for admission of expert testimony.<sup>175</sup> In order to meet the requirements of Rule 702, a witness must be qualified through “knowledge, skill, experience, training, or education” and must provide opinions based on those qualifications that “will help the trier of fact to understand the evidence or to determine a fact in issue.”<sup>176</sup> The survey period provided multiple reminders that a person need not possess specific credentials or testify to scientific matters to qualify as an expert. The Indiana Court of Appeals affirmed the designation as an expert of a medical resident with a temporary medical license,<sup>177</sup> a social worker who treated the children at issue to opine that the children suffered from “PTSD and generalized anxiety disorder[,]”<sup>178</sup> a police officer as an expert on child sexual abuse trauma,<sup>179</sup> and a forensic engineering consultant as an expert to testify that a parking lot had ice accumulation.<sup>180</sup> The Court of Appeals also determined that testimony by a physician of the damage inflicted upon a deceased victim’s heart by a bullet was not merely cumulative evidence despite photographs of the heart having already been admitted.<sup>181</sup>

Most notably, the Indiana Court of Appeals again addressed the ability of non-physicians to offer medical causation testimony and whether certain treatments aggravated a patient’s pain.<sup>182</sup> The question of whether a non-physician can offer such testimony has been a complicated one with divergent approaches arising in Indiana caselaw.<sup>183</sup> The appellate panel in *Goodwin v. Toney* made no attempt to address or resolve the divergent approaches within the caselaw, instead utilizing an apparent per se view that non-physicians cannot offer expert opinions on issues of medical causation.<sup>184</sup> Such a per se view was

---

175. IND. R. EVID. 702.

176. IND. R. EVID. 702(a); *see also In re Civil Commitment of K.K.*, 215 N.E.3d 382, 385 (Ind. Ct. App. 2023) (“Two requirements must be met for a witness to qualify as an expert. First, the subject matter must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average layperson; and second, the witness must be shown to have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier of fact.” (citations and internal quotation marks omitted)).

177. *In re Civil Commitment of K.K.*, 215 N.E.3d at 385.

178. *Vanlue v. State*, No. 23A-CR-755, 2023 Ind. App. Unpub. LEXIS 998, at \*12-15 (Ind. Ct. App. Aug. 23, 2023).

179. *Pittman v. State*, 22A-CR-1404, 2023 Ind. App. Unpub. LEXIS 348, at \*9-11 (Ind. Ct. App. Mar. 29, 2023).

180. *Menard, Inc. v. Terew*, 210 N.E.3d 833, 838 (Ind. Ct. App.), *trans. denied*, 217 N.E.3d 1242 (Ind. 2023).

181. *Jackson v. State*, No. 22A-CR-2305, 2023 Ind. App. Unpub. LEXIS 1078, at \*9 (Ind. Ct. App. Sept. 15, 2023).

182. *Goodwin v. Toney*, 203 N.E.3d 481, 485-86 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1248 (Ind. 2023).

183. *See* Colin E. Flora, *2020 Developments in Indiana Evidentiary Practice*, 54 IND. L. REV. 877, 913-15 (2022) (discussing conflicting caselaw) [hereinafter *2020 Survey*].

184. *Goodwin*, 203 N.E.3d at 485-86.

rejected by prior panels in *Aillones v. Minton*,<sup>185</sup> *Totton v. Bukofchan*,<sup>186</sup> and *Riley v. St. Mary's Medical Center of Evansville, Inc.*<sup>187</sup> Arguably the *Goodwin* panel utilized the view adopted in *Totton* and utilized in *Riley* that admission of non-physician opinions turns on complexity of the causation question,<sup>188</sup> but that is not clear from the opinion and the lack of any citation to *Totton* or *Riley* undercuts such an argument.<sup>189</sup> An observation from a prior edition of this survey remains true: “it appears the challenge of harmonizing *Aillones* with *Totton* and now *Riley* remains for another day.”<sup>190</sup>

### C. Rule 703: Bases of an Expert's Opinion Testimony

Rule 703 establishes the scope of materials on which experts may base their opinions: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.”<sup>191</sup> The ability to rely upon otherwise inadmissible evidence is not, however, a license to serve as a conduit for the statements of another.<sup>192</sup> During the survey period, the Indiana Court of Appeals affirmed multiple instances of admission of expert opinions based upon otherwise inadmissible evidence, concluding: a nurse practitioner could base her opinions on the medical history and observations of the patient made by other medical professionals;<sup>193</sup> a forensic engineering consultant could base opinions on weather-related conditions by relying on data from Weather Underground;<sup>194</sup> and a forensic pathologist could rely on an autopsy report compiled by another physician.<sup>195</sup>

---

185. 77 N.E.3d 196, 201 (Ind. Ct. App. 2017).

186. 80 N.E.3d 891, 894 (Ind. Ct. App. 2017).

187. 135 N.E.3d 946, 950-55 (Ind. Ct. App. 2019), *trans. denied*, 143 N.E.3d 953 (Ind. 2020).

188. *Totton*, 80 N.E.3d at 892 (“A non-physician healthcare provider, such as a chiropractor, may qualify under Indiana Evidence Rule 702 to render an opinion as to medical causation if the causation issue is not complex.”); *Riley*, 135 N.E.3d at 952 (holding the same as *Totton*).

189. *Goodwin*, 203 N.E.3d at 486. In concluding that the physical therapist could not testify that a treatment caused a vertebral fracture, the panel stated, “But we conclude that those are *complex medical questions* requiring expert testimony.” *Id.* (emphasis added). But, in concluding that the physical therapist also could not testify as to causation or aggravation of pain, the panel did not specify that such question was medically complex, only that pain is a subjective condition and, as a non-physician, the physical therapist could not offer opinion on it. *Id.*

190. 2020 Survey, *supra* note 183, at 914-15.

191. IND. R. EVID. 703.

192. *Chatman v. State*, 201 N.E.3d 241, 245 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1251 (Ind. 2023).

193. *Id.* at 244-45.

194. *Menard, Inc. v. Terew*, 210 N.E.3d 833, 838-39 (Ind. Ct. App.), *trans. denied*, 217 N.E.3d 1242 (Ind. 2023).

195. *Buckley v. State*, 22A-CR-873, 2023 Ind. App. Unpub. LEXIS 391, at \*24-26 (Ind. Ct. App. Apr. 11, 2023), *trans. denied*, 212 N.E.3d 1231 (Ind. 2023); *Lillie v. State*, No. 22A-CR-1564, 2023 Ind. App. Unpub. LEXIS 600 (Ind. Ct. App. May 26, 2023).

*D. Rule 704: Vouching Testimony*

Although Rule 704(a) has embodied Indiana's long-standing caselaw allowing opinion testimony to embrace ultimate issues,<sup>196</sup> Rule 704(b) places limitations on the scope of permissible opinions.<sup>197</sup> Under that provision, "[w]itnesses may not testify 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."<sup>198</sup> The most common challenges arising under Rule 704(b) are to opinions concerning a witness's truthfulness, also called "vouching testimony."<sup>199</sup> "Such vouching testimony is considered an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony."<sup>200</sup> "However, Rule 704(b) is not violated by testimony that does not offer an opinion about whether any particular statement by a witness is true or not."<sup>201</sup>

Indiana appellate courts affirmed admission of: a police officer's testimony "that certain behaviors may indicate that a person is not telling the truth and that [the Defendant] exhibited some of those behaviors during [an] interview[;]"<sup>202</sup> a forensic interviewer's answer of "no" to the question of "whether 'delayed disclosure [is] necessarily a sign of deception[;]'"<sup>203</sup> a certified forensic interviewer's "testimony regarding the common nature of delayed disclosure" by child victims of molestation;<sup>204</sup> "expert testimony as 'pattern evidence' regarding the behaviors of victims of sexual abuse;"<sup>205</sup> and a detective's testimony regarding delays in a child reporting sexual abuse where the child's credibility was called into question on cross-examination.<sup>206</sup> The Indiana Court of Appeals found testimony impermissible from a family case manager who testified that she "substantiated" a report and that "substantiation can be

---

196. IND. R. EVID. 704(a); *DeVaney v. State*, 288 N.E.2d 732, 737 (Ind. 1972).

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

198. *Id.*

199. *See Taylor v. State*, No. 22A-CR-1754, 2023 Ind. App. Unpub. LEXIS 317, at \*7-9 (Ind. Ct. App. Mar. 20, 2023) (citing *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 493 (Ind. 2015)); *but see Bauman v. State*, 207 N.E.3d 1249, 1256-57 (Ind. Ct. App.) (addressing challenge to opinion concerning intent), *trans. denied*, 215 N.E.3d 336 (Ind. 2023).

200. *Taylor*, 2023 Ind. App. Unpub. LEXIS 317, at \*8-9 (internal citation omitted).

201. *Ward v. State*, 203 N.E.3d 524, 532 (Ind. Ct. App. 2023).

202. *Stephen v. State*, No. 22A-CR-02392, 2023 Ind. App. Unpub. LEXIS 1080, at \*11-12 (Ind. Ct. App. Sept. 15, 2023).

203. *Hayko v. State*, 211 N.E.3d 483, 487 n.2 (Ind. 2023).

204. *Smith v. State*, No. 23A-CR-128, 2023 Ind. App. Unpub. LEXIS 813, at \*5-10 (Ind. Ct. App. July 18, 2023), *trans. denied*, 221 N.E.3d 1205 (Ind. 2023).

205. *Williams v. State*, No. 22A-CR-2498, 2023 Ind. App. Unpub. LEXIS 1139, at \*8-14 (Ind. Ct. App. Sept. 26, 2023).

206. *Morales v. State*, No. 22A-CR-402, 2023 Ind. App. Unpub. LEXIS 257, at \*4-7 (Ind. Ct. App. Mar. 7, 2023), *trans. denied*, 211 N.E.3d 1005 (Ind. 2023); *see also Ward v. State*, 203 N.E.3d 524, 531-32 (Ind. Ct. App. 2023).

coincided with guilty.”<sup>207</sup>

A panel of the court of appeals also raised an interesting point, though it appears to be *obiter dictum*<sup>208</sup> in an otherwise non-precedential opinion: “We first note that Rule 704(b) ‘prohibits a witness from testifying about whether a witness *has testified* truthfully.’ Here, Detective Rayford’s testimony involved the truthfulness of the witnesses’ out-of-court statements to him, not their testimony.”<sup>209</sup> Notably, three months earlier, a different panel, also in a memorandum decision, found Rule 704(b) violated by vouching testimony regarding out-of-court statements made by a child witness.<sup>210</sup> The question of whether out-of-court statements are covered by Rule 704(b) appears likely to remain for another day.

## VII. HEARSAY: RULES 801 THROUGH 806

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

Rule 802 “presumptively” excludes hearsay “evidence unless its admission is permitted by some other rule or law, such as the exceptions provided” by Rules 803 and 804.<sup>211</sup> A threshold question in application of Rule 802 is whether evidence constitutes “hearsay.” In general terms, “[h]earsay is an out-of-court statement used to prove the truth of the matter asserted.”<sup>212</sup> While that definition works for easy cases, such as an affidavit “based on what [the affiant’s] physician told her,”<sup>213</sup> there are circumstances that need to be more closely parsed.

In *MLS Enterprises, LLC v. Norman*, the Indiana Court of Appeals affirmed admission of testimony that a prior property owner pointed to a fence as the boundary line and the affiant’s own belief that the fence represented the boundary line, finding that the testimony did not meet the definition of “hearsay” under Rule 801.<sup>214</sup> In a separate case, the court ruled that a “database

207. *Ellet v. State*, No. 22A-CR-1253, 2023 Ind. App. Unpub. LEXIS 256, at \*6-7 (Ind. Ct. App. Mar. 7, 2023).

208. “The Latin meaning of the term [*obiter dictum*] is ‘something said in passing,’ and our Supreme Court has stated that in appellate opinions, ‘statements not necessary in determination of the issue presented are *obiter dictum* . . . are not binding and do not become the law.’” *McVey v. Sargent*, 855 N.E.2d 324, 327 (Ind. Ct. App. 2006) (second alteration in original) (citations omitted), *trans. denied*, 869 N.E.2d 447 (Ind. 2007).

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

210. *Taylor v. State*, No. 22A-CR-1754, 2023 Ind. App. Unpub. LEXIS 317, at \*8-9 (Ind. Ct. App. Mar. 20, 2023) (Crone, J.).

211. *J.B. v. State*, 205 N.E.3d 244, 248 (Ind. Ct. App. 2023) (citing IND. R. EVID. 802).

212. *Jaramillo v. State*, 201 N.E.3d 1209, 1212-13 (Ind. Ct. App.) (citing IND. R. EVID. 801(c)), *trans. denied*, 209 N.E.3d 1175 (Ind. 2023).

213. *Diocese of Fort Wayne S. Bend, Inc. v. Gallegos*, 203 N.E.3d 1080, 1085 (Ind. Ct. App. 2023); *see also Sterling v. State*, 199 N.E.3d 377, 384 (Ind. Ct. App. 2022).

214. *MLS Enters., LLC v. Norman*, 209 N.E.3d 30, 34-35 (Ind. Ct. App. 2023).

readout” was not hearsay “because the statements it contains are automatically generated by a machine, and, thus, do not come from a person.”<sup>215</sup> In a memorandum decision, the court of appeals ruled that a victim shouting, “Pedro, stop, no, no[,]” while fleeing from the criminal defendant was not hearsay because it “was a command” and not “a factual assertion[.]”<sup>216</sup> The same panel also found that the victim having said, “[H]e crazy, he crazy, Pedro crazy[.]” was not offered for the truth of the matter asserted because the defendant’s mental state was not at issue in the trial.<sup>217</sup>

There are also circumstances in which the general definition of hearsay applies, but Rule 801(d) excludes the statements from the definition of hearsay.<sup>218</sup> In a published opinion, the Indiana Court of Appeals held that a statement made by a criminal defendant, which was repeated by the victim to a 911 operator, was not hearsay under Rule 801(d)(2).<sup>219</sup> In a separate opinion, the Court found that statements made neither by a party nor by a co-conspirator, but that provide “context” to recorded statements by a party, are admissible as non-hearsay evidence.<sup>220</sup>

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

Where Rule 801 does not create a carveout to the definition of hearsay, evidence may still be admitted pursuant to an exception under Rules 803 or 804.<sup>221</sup> Rule 803 provides twenty-three categories of exclusions in which the proponent of the testimony need not establish the unavailability of the declarant.<sup>222</sup> The survey period provided opinions covering multiple Rule 803 exceptions: present sense impressions under Rule 803(1),<sup>223</sup> excited utterances

---

215. *Priest v. State*, 215 N.E.3d 1099, 1104-05 (Ind. Ct. App.) (adhering to *Cranston v. State*, 936 N.E.2d 342 (Ind. Ct. App. 2010)), *trans. denied*, 222 N.E.3d 931 (Ind. 2023). In so holding, the court of appeals rejected reliance on the statement that “[b]reath-test results as shown by a printout are hearsay—an out-of-court statement offered to prove the truth of the matter asserted by the statement[.]” made by the Indiana Supreme Court in *Mullins v. State*, finding the statement to be dicta. *Id.* at 1105 n.6 (quoting *Mullins v. State*, 646 N.E.2d 40, 48 (Ind. 1995)).

216. *Rivera v. State*, No. 22A-CR-2519, 2023 Ind. App. Unpub. LEXIS 304, at \*7-9 (Ind. Ct. App. Mar. 17, 2023).

217. *Id.*

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

219. *Kirby v. State*, 217 N.E.3d 575, 590 (Ind. Ct. App. 2023).

220. *Higgason v. State*, 210 N.E.3d 867, 881 (Ind. Ct. App.) (applying *McCullum v. State*, 582 N.E.2d 804, 811-12 (Ind. 1991)), *trans. denied*, 215 N.E.3d 341 (Ind. 2023).

221. *J.B. v. State*, 205 N.E.3d 244, 248 (Ind. Ct. App. 2023); *see generally* IND. R. EVID. 803, 804.

222. IND. R. EVID. 803.

223. *Kirby v. State*, 217 N.E.3d 575, 589-90 (Ind. Ct. App. 2023); *In re C.B.*, No. 22A-JC-1185, 2023 Ind. App. Unpub. LEXIS 273, at \*16-17 (Ind. Ct. App. Mar. 13, 2023), *trans. denied*, 211 N.E.3d 1009 (Ind. 2023).

under Rule 803(2),<sup>224</sup> then-existing state of mind under Rule 803(3),<sup>225</sup> statements for medical diagnoses or treatment under Rule 803(4),<sup>226</sup> recorded recollections under Rule 803(5),<sup>227</sup> public records under Rule 803(8),<sup>228</sup> and reputation concerning character under Rule 803(21).<sup>229</sup>

1. *Rule 803(1) – Present Sense Impression.*—Rule 803(1) allows admission of “[a] statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it.”<sup>230</sup> Utilizing that exception, the Indiana Court of Appeals affirmed admission of testimony made on a 911 call by a victim “that she drove by and saw that [the criminal defendant] was shirtless, wearing shorts, and at her house constitute[d] a present sense impression.”<sup>231</sup> In a memorandum decision, the court also affirmed admission of a trooper’s testimony that the victim told the trooper “that ‘a white SUV that was fleeing the scene’ had ‘shot at her vehicle and busted out her back window.’”<sup>232</sup>

2. *Rule 803(2) – Excited Utterances.*—Rule 803(2) provides “[t]he excited utterance exception[, which] applies when the statement relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”<sup>233</sup> The exception requires: “(1) a startling

224. *Kirby*, 217 N.E.3d at 590; *Hawkins v. State*, No. 22A-CR-2058, 2023 Ind. App. Unpub. LEXIS 169, \*5-7 (Ind. Ct. App. Feb. 20, 2023); *Rivera v. State*, No. 22A-CR-2519, 2023 Ind. App. Unpub. LEXIS 304, at \*10-11 (Ind. Ct. App. Mar. 17, 2023); *Hallett v. State*, No. 22A-CR-1859, 2023 Ind. App. Unpub. LEXIS 244, at \*5-6 (Ind. Ct. App. Mar. 3, 2023), *trans. denied*, 209 N.E.3d 1180 (Ind. 2023); *see also* *Scott v. State*, No. 22A-CR-1966, 2023 Ind. App. Unpub. LEXIS 368, at \*8-11 (Ind. Ct. App. Mar. 29, 2023), *trans. denied*, 212 N.E.3d 1229 (Ind. 2023); *Brena v. State*, No. 23A-CR-910, 2023 Ind. App. Unpub. LEXIS 1128, at \*12 (Ind. Ct. App. Sept. 27, 2023).

225. *Scott v. State*, No. 22A-CR-1025, 2023 Ind. App. Unpub. LEXIS 66, at \*15-16 (Ind. Ct. App. Jan. 27, 2023), *trans. denied*, 209 N.E.3d 1169 (Ind. 2023); *see also* *Mata v. State*, No. 22A-CR-881, 2023 Ind. App. Unpub. LEXIS 130, at \*13-14 (Ind. Ct. App. Feb. 10, 2023).

226. *Chatman v. State*, 201 N.E.3d 241, 244-45 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1251 (Ind. 2023); *see also* *Duncan v. State*, No. 22A-CR-1689, 2023 Ind. App. Unpub. LEXIS 505, at \*5-10 (Ind. Ct. App. May 1, 2023) (affirming admission of statements made by victim of child molestation because the child understood the role of the healthcare worker “and the trial court could reasonably conclude [the child] had been motivated to provide truthful information for medical treatment under Rule 803(4)”).

227. *Hawkins v. State*, No. 22A-CR-1282, 2023 Ind. App. Unpub. LEXIS 74, at \*10-11 (Ind. Ct. App. Jan. 30, 2023), *trans. denied*, 208 N.E.3d 1250 (Ind. 2023); *Hathaway v. State*, No. 23A-CR-358, 2023 Ind. App. Unpub. LEXIS 979, at \*12-14 (Ind. Ct. App. Aug. 21, 2023).

228. *Jaramillo v. State*, 201 N.E.3d 1209, 1212-13 (Ind. Ct. App.), *trans. denied*, 209 N.E.3d 1175 (Ind. 2023); *Tolliver v. State*, No. 21A-PC-1542, 2023 Ind. App. Unpub. LEXIS 400, at \*19-20 (Ind. Ct. App. Apr. 11, 2023), *trans. denied*, 211 N.E.3d 1011 (Ind. 2023).

229. *Sterling v. State*, 199 N.E.3d 377, 384 n.2 (Ind. Ct. App. 2022).

230. IND. R. EVID. 803(1).

231. *Kirby v. State*, 217 N.E.3d 575, 590 (Ind. Ct. App. 2023).

232. *In re C.B.*, No. 22A-JC-1185, 2023 Ind. App. Unpub. LEXIS 273, at \*16-17 (Ind. Ct. App. Mar. 13, 2023), *trans. denied*, 211 N.E.3d 1009 (Ind. 2023).

233. *Rivera v. State*, No. 22A-CR-2519, 2023 Ind. App. Unpub. LEXIS 304, at \*10 (Ind. Ct. App. Mar. 17, 2023) (quoting *Noojin v. State*, 730 N.E.2d 672, 676 (Ind. 2000)) (quotation marks omitted).

event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event.”<sup>234</sup> The court of appeals found the exception applied to: a victim’s call to 911 asserting that the defendant “was breaking into her house and threatening to burn it down[;]”<sup>235</sup> a victim who spoke with an officer while in an ambulance after being beaten by the defendant;<sup>236</sup> a victim’s statements for the attacker to stop while the attacker was lunging at the victim with an icepick;<sup>237</sup> and a shooting victim’s statements after just having been shot that identified the defendant as the shooter.<sup>238</sup>

*3. Rule 803(3) – Then-Existing Mental, Emotional, or Physical Condition.*— Rule 803(3) allows otherwise hearsay evidence under three circumstances: “(1) to show the intent of the victim to act in a particular way, (2) when the defendant puts the victim’s state of mind in issue, and (3) sometimes to explain physical injuries suffered by the victim.”<sup>239</sup> During the survey period, the exception applied to allow testimony that a victim’s “neck was still sore and that [the criminal defendant] had caused that injury by punching her[.]”<sup>240</sup>

*4. Rule 803(4) – Statement Made for Medical Diagnosis or Treatment.*— “Evidence Rule 803(4) provides an exception for a statement ‘made by a person seeking medical diagnosis or treatment[.]’”<sup>241</sup> The “exception is grounded in a belief that the declarant’s self-interest in obtaining proper medical treatment makes such a statement reliable enough for admission at trial—more simply put, Rule 803(4) reflects the idea that people are unlikely to lie to their doctors because doing so might jeopardize their opportunity to be made well.”<sup>242</sup> In *Chatman v. State*, the Indiana Court of Appeals reminded that the exception of Rule 803(4) extends only to statements by patients about their own medical treatment, not to statements between healthcare providers regarding treatment of patients.<sup>243</sup>

---

234. *Scott v. State*, No. 22A-CR-1966, 2023 Ind. App. Unpub. LEXIS 368, at \*8 (Ind. Ct. App. Mar. 29, 2023) (quoting *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020)) (formatting omitted), *trans. denied*, 212 N.E.3d 1229 (Ind. 2023).

235. *Kirby*, 217 N.E.3d at 579.

236. *Hawkins v. State*, No. 22A-CR-2058, 2023 Ind. App. Unpub. LEXIS 169, \*5-7 (Ind. Ct. App. Feb. 20, 2023).

237. *Rivera*, 2023 Ind. App. Unpub. LEXIS 304, at \*10-11.

238. *Hallett v. State*, No. 22A-CR-1859, 2023 Ind. App. Unpub. LEXIS 244, at \*5-6 (Ind. Ct. App. Mar. 3, 2023), *trans. denied*, 209 N.E.3d 1180 (Ind. 2023).

239. *Mata v. State*, No. 22A-CR-881, 2023 Ind. App. Unpub. LEXIS 130, at \*12-13 (Ind. Ct. App. Feb. 10, 2023) (quoting *Hatcher v. State*, 735 N.E.2d 1155, 1161 (Ind. 2000)) (quotation marks omitted).

240. *Scott v. State*, No. 22A-CR-1025, 2023 Ind. App. Unpub. LEXIS 66, at \*15-16 (Ind. Ct. App. Jan. 27, 2023) (citing *D.R.C. v. State*, 908 N.E.2d 215, 226 (Ind. 2009)), *trans. denied* 209 N.E.3d 1169 (Ind. 2023).

241. *Chatman v. State*, 201 N.E.3d 241, 244 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1251 (Ind. 2023) (quoting IND. R. EVID. 803(4)).

242. *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013).

243. *Chatman*, 201 N.E.3d at 244-45 (citing *Perryman v. State*, 80 N.E.3d 234 (Ind. Ct. App. 2017)).

5. *Rule 803(5) – Recorded Recollections.*—Two memorandum decisions during the survey period appear to provide contradictory guidance on the proper procedure for utilizing the recorded-recollections exception under Rule 803(5). The rule provides that if a party meets the three foundational showings,<sup>244</sup> then “the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.”<sup>245</sup>

In *Hawkins v. State*, a panel for the Indiana Court of Appeals noted that the appellant “was requesting a procedure inconsistent with Evidence Rule 803(5)” because “she was not requesting that a transcript of the telephone call be read into evidence but rather that the recording be played for the jury.”<sup>246</sup> Later in the survey period, however, a separate panel affirmed the playing of a video under Rule 803(5) without comment as to the propriety of using the video instead of a transcript.<sup>247</sup> Given the existence of at least one published case affirming admission via video,<sup>248</sup> it is highly likely that future panels would find no error in playing a recording in lieu of a transcript,<sup>249</sup> but the survey period demonstrates that it is an issue that may be flagged by future appellate panels and should be kept in mind by trial counsel.

6. *Rule 803(8) – Public Records.*—Rule 803(8) allows admission of records and statements of public offices under certain circumstances.<sup>250</sup> The survey period produced two decisions showing that Rule 803(8) is not without its limitations. *Jaramillo v. State* rejected the application of the exception to a toxicology report ordered by a coroner’s office and attached to the autopsy report because the toxicology report was not prepared by the coroner’s office “or any other public agency[.]”<sup>251</sup> In a memorandum decision, the Indiana Court of Appeals also rejected the invocation of the doctrine to use a police report offered in a post-conviction hearing.<sup>252</sup> Although Rule 803(8)(B)(i) allows the use of “investigative reports by police and other law enforcement personnel . . . when offered by an accused in a criminal case[.]”<sup>253</sup> the panel concluded that the post-conviction proceedings were not “a criminal case” for purposes of the

244. The proponent must demonstrate that the record: “(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and (C) accurately reflects the witness’s knowledge.” IND. R. EVID. 803(5).

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

246. *Hawkins v. State*, No. 22A-CR-1282, 2023 Ind. App. Unpub. LEXIS 74, at \*11 n.4 (Ind. Ct. App. Jan. 30, 2023) (Bailey, J.), *trans. denied*, 208 N.E.3d 1250 (Ind. 2023).

247. *Hathaway v. State*, No. 23A-CR-358, 2023 Ind. App. Unpub. LEXIS 979, at \*12-14 (Ind. Ct. App. Aug. 21, 2023) (Crone, J.).

248. *See Gorby v. State*, 152 N.E.3d 649, 651-53 (Ind. Ct. App. 2020) (Crone, J.).

249. For rationale supporting use of a recording instead of a transcript, see *State v. Adams*, 214 A.3d 496, 501 n.6 (Me. 2019) (citing ME. R. EVID. 803(5); ME. R. EVID. 1002).

250. IND. R. EVID. 803(8).

251. *Jaramillo v. State*, 201 N.E.3d 1209, 1212-13 (Ind. Ct. App.), *trans. denied*, 209 N.E.3d 1175 (Ind. 2023).

252. *Tolliver v. State*, No. 21A-PC-1542, 2023 Ind. App. Unpub. LEXIS 400, at \*19-20 (Ind. Ct. App. Apr. 11, 2023), *trans. denied*, 211 N.E.3d 1011 (Ind. 2023).

253. IND. R. EVID. 803(8)(B)(i).

exception.<sup>254</sup>

7. *Rule 803(21) – Reputation Concerning Character.*—For the first time, an Indiana appellate court addressed the exception of Rule 803(21), which allows evidence of “[a] reputation among a person’s associates or in the community concerning the person’s character.”<sup>255</sup> The opinion did not, however, provide a tremendous amount of insight into the rule. In a footnote, the Indiana Court of Appeals stated:

Jones’s statements, as related by Sanders’s proffered testimony, did not refer to Jones’s reputation among his associates or in the community concerning his character. Instead, Jones’s statements were direct threats against Sterling. Although one could infer from these statements that Jones had a violent reputation or character in the community, his statements were not themselves related to his own reputation or character in the community.<sup>256</sup>

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

Unlike Rule 803, in which the declarant’s availability at trial is immaterial,<sup>257</sup> the hearsay exceptions of Rule 804 only apply if the declarant is unavailable to testify at trial.<sup>258</sup> While it is common for parties to seek to introduce otherwise excludable hearsay evidence through depositions or other means,<sup>259</sup> the proponent of such evidence must still lay a foundation establishing both the declarant’s unavailability under Rule 804(a) and application of a relevant exception under Rule 804(b). The Indiana Court of Appeals’ memorandum decision in *Henderson v. State* highlighted that it is not enough that the declarant be physically absent from proceedings; instead, the proponent must attempt to obtain the declarant’s attendance “‘by process or other reasonable means[.]’”<sup>260</sup> There, the efforts of counsel to procure the deponent’s attendance “by visiting [the deponent]’s last known address and by leaving a voicemail message at [her] last known telephone number[.]” after trial had

---

254. *Tolliver*, 2023 Ind. App. Unpub. LEXIS 400, at \*19-20 (“Our supreme court has explained that post-conviction proceedings are collateral, quasi-civil, and ‘totally separate and distinct from the underlying criminal trial.’” (quoting *Hall v. State*, 849 N.E.2d 466, 472 (Ind. 2006))).

255. IND. R. EVID. 803(21).

256. *Sterling v. State*, 199 N.E.3d 377, 384 n.2 (Ind. Ct. App. 2022).

257. IND. R. EVID. 803; *see e.g.*, *State St. Duffy’s, Inc. v. Loyd*, 623 N.E.2d 1099, 1103 (Ind. Ct. App. 1993), *trans. denied* (Ind. Feb. 7, 1994) (unpublished).

258. IND. R. EVID. 804(b); *see e.g.*, *J.B. v. State*, 205 N.E.3d 244, 248 (Ind. Ct. App. 2023).

259. *Cf. Akinribade v. State*, 202 N.E.3d 468, 473-74 (Ind. Ct. App. 2023) (May, J., dissenting) (noting that depositions in criminal matters are considered court proceedings under the Evidence Rules because they follow courtroom procedures, allow entering evidence and objections, are transcribed, and can be admitted at trial).

260. *Henderson v. State*, No. 22A-CR-2259, 2023 Ind. App. Unpub. LEXIS 815, at \*6-7 (Ind. Ct. App. July 19, 2023) (quoting IND. R. EVID. 804(a)(5)).

begun, was insufficient to establish unavailability.<sup>261</sup> Had the same efforts been exerted a month before the trial; it is possible the outcome may have been different.<sup>262</sup>

Once a declarant's unavailability is established, otherwise excludable hearsay may be admitted if the proponent meets an exception under Rule 804(b).<sup>263</sup> Three of the five subdivisions of Rule 804(b) drew the attention of the Indiana Court of Appeals. In the published opinion of *J.B. v. State*, the appellate court rejected a trial court's reliance on Rule 804(b)(1)—the exception for former testimony—as a basis for admitting a recorded interview of a child victim.<sup>264</sup> The interview was recorded prior to the initiation of juvenile-delinquency proceedings, was not made under oath, and was not subject to cross-examination, as would be necessary to trigger the Rule 804(b)(1) former-testimony exception.<sup>265</sup> The court also rejected an attempt on appeal to invoke Rule 804(b)(3), the exception for statements against interest, because even if the victim's statement could be deemed as an admission that would expose her to civil or criminal liability, it would be a statement that implicated both her and the juvenile subject to delinquency proceedings.<sup>266</sup> Rule 804(b)(3) does not extend to statements “made by a codefendant or other person implicating both the declarant and the accused[.]”<sup>267</sup>

In a memorandum decision, the Court of Appeals addressed the exception of Rule 804(b)(5).<sup>268</sup> That exception for “forfeiture by wrongdoing” applies when “a ‘statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying.’”<sup>269</sup> The exception was established by the criminal defendant calling the victim and telling “her to change her story or not appear at his trial[.]” resulting in the victim claiming a lack of recollection and significantly altering her testimony of events to favor the criminal defendant.<sup>270</sup>

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

In order to admit tangible items of evidence, the proponent must establish a

---

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

262. *Id.* at \*7-8 (discussing *Berkman v. State*, 976 N.E.2d 68, 76 (Ind. Ct. App. 2012)).

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

264. *J.B. v. State*, 205 N.E.3d 244, 248 (Ind. Ct. App. 2023).

265. *Id.*

266. *Id.* at 250.

267. IND. R. EVID. 804(b)(3); *J.B.*, 205 N.E.3d at 250.

268. *Tellis v. State*, No. 22A-CR-1159, 2023 Ind. App. Unpub. LEXIS 137, at \*10-12 (Ind. Ct. App. Feb. 13, 2023).

269. *Id.* at \*10-11 (quoting *White v. State*, 978 N.E.2d 475, 479 (Ind. App. 2012)).

270. *Id.* at \*11-12.

basis for authenticating the evidence.<sup>271</sup> To illustrate, when presenting evidence to establish the identity of a speaker in a phone call, it suffices to have a person who can recognize the speaker's voice testify to their identity.<sup>272</sup> But when evidence, such as photographs, is offered for the substance of what it depicts, thereby constituting a “‘silent witness,’ there must be a ‘strong showing of authenticity and competency, including proof that the evidence was not altered.’”<sup>273</sup> “The silent witness theory is an application of Evidence Rule 901.”<sup>274</sup> It allows the use of photographic and video evidence as substantive evidence, even in the absence of a witness to what was captured in the images or recordings.<sup>275</sup> The theory utilizes the authentication mechanism of Rule 901(b)(9), allowing “[e]vidence describing a process or system and showing that it produces an accurate result.”<sup>276</sup>

In order to invoke the silent-witness theory for admission, the proponent must make a “strong showing” of authenticity.<sup>277</sup> That is, the proponent must “lay a stronger foundation regarding the evidence’s authenticity than if the proponent were offering the evidence merely for demonstrative purposes.”<sup>278</sup> Indiana “courts have declined to lay down extensive, absolute foundation requirements, [but], ultimately, the proponent must convince the trial court of the silent witness evidence’s competency and authenticity to relative certainty.”<sup>279</sup> Illustrating what may need to be shown, the Indiana Court of Appeals has explained:

Where [photographic] images were taken by automatic devices, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera.

. . . In order to authenticate videos under the “silent-witness theory,” there must be evidence describing the process or system that produced

---

271. IND. R. EVID. 901(a); *Butler v. State*, No. 22A-CR-51, 2023 Ind. App. Unpub. LEXIS 98, at \*7-8 (Ind. Ct. App. Feb. 3, 2023) (quoting *Pavlovich v. State*, 6 N.E.3d 969, 976 (Ind. Ct. App. 2014)), *trans. denied*, 209 N.E.3d 1174 (Ind. 2023).

272. IND. R. EVID. 901(b)(1); *see, e.g., Butler*, 2023 Ind. App. Unpub. LEXIS 98, at \*7-9.

273. *Bennett v. State*, No. 22A-CR-2274, 2023 Ind. App. Unpub. LEXIS 944, at \*5 (Ind. Ct. App. Aug. 16, 2023) (quoting *Stott v. State*, 174 N.E.3d 236, 245 (Ind. Ct. App. 2021)); *accord Barbee v. State*, No. 22A-CR-2778, 2023 Ind. App. Unpub. LEXIS 768, at \*4 (Ind. Ct. App. July 5, 2023) (quoting *McCallister v. State*, 91 N.E.3d 554, 561-62 (Ind. 2018)), *trans. denied*, 215 N.E.3d 345 (Ind. 2023).

274. *Kirby v. State*, 217 N.E.3d 575, 584 (Ind. Ct. App. 2023).

275. *Id.*; *see also Toney v. State*, 206 N.E.3d 1153, 1155 (Ind. Ct. App.), *trans denied*, 212 N.E.3d 1229 (Ind. 2023).

276. *Kirby*, 217 N.E.3d at 584.

277. *Toney*, 206 N.E.3d at 1155.

278. *Kirby*, 217 N.E.3d at 584.

279. *Id.* (citations and quotation marks omitted).

the videos and showing that the video is an accurate representation of the events in question. The proponent must show that the video was not altered in any significant respect, and the date the video was taken must be established when relevant. That is,

. . . [W]hen automatic cameras are involved, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and changing of custody of the film after its removal from the camera.

. . . The [proponent] must provide testimony identifying the scene that appears in the image sufficient to persuade the trial court . . . of their competency and authenticity to a relative certainty.<sup>280</sup>

During the survey period, the use of the silent-witness theory was successful in supporting the admission of a surveillance system supported by the testimony of a facility's loss-prevention manager<sup>281</sup> and of another surveillance system supported by testimony from the owner of the company that manufactured the system.<sup>282</sup> The survey period also saw an extension of the doctrine to apply not only to admission of video evidence but to testimony of persons who witnessed the video evidence prior to the video's destruction.<sup>283</sup> That conclusion provide another in a series of decisions that have rejected the 2004 opinion from the Indiana Court of Appeals in *Pritchard v. State*, which had deemed "the silent witness theory [ ] inapplicable when the silent witness evidence itself is not admitted[.]"<sup>284</sup>

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

Rule 1002, often called the "best evidence rule,"<sup>285</sup> generally requires "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise."<sup>286</sup> The requirement of an original, though written in Rule 1002 as mandatory, is not so rigid. Rule 1003 makes "[a] duplicate . . . admissible to the same extent as an original unless

---

280. *Toney*, 206 N.E.3d at 1155-56 (citations and quotation marks omitted) (sixth alteration in original).

281. *Id.* at 1155-56.

282. *Barbee v. State*, No. 22A- CR-2778, 2023 Ind. App. Unpub. LEXIS 768, at \*3-7 (Ind. Ct. App. July 5, 2023), *trans. denied*, 215 N.E.3d 345 (Ind. 2023).

283. *Kirby*, 217 N.E.3d at 583-87; *see id.* at 587 ("The silent witness theory's heightened foundation requirements would have certainly been triggered had the video itself been admitted into evidence, and we see no reason why the fact that the video was not admitted relieves the State of the burden of proving the video's reliability under the silent witness theory.")

284. *Id.* at 585-87 (discussing *Pritchard v. State*, 810 N.E.2d 758 (Ind. Ct. App. 2004), *trans. not sought*).

285. *See, e.g., Kirby v. State*, 217 N.E.3d 575, 584 n.4 (Ind. Ct. App. 2023).

286. IND. R. EVID. 1002.

a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."<sup>287</sup> Modern technology and the ubiquitous nature of electronic backups continues to present challenges under Rules 1002 and 1003. In *Higgason v. State*, the Indiana Court of Appeals affirmed admission of digital audio recordings made from original Cassette Tapes in lieu of admitting the original tapes.<sup>288</sup> Similarly, *Russell v. State* upheld admission of phone records that were uploaded to the cloud and downloaded to a second phone, despite the absence of any testimony "by anyone with knowledge about the intricacies of phone accounts and their machinations, about how messages' ended up on two . . . phones."<sup>289</sup> And, in a memorandum decision, the Court of Appeals affirmed the use of a photograph in the place of an original check because the witness easily identified the content of the photograph as the check and because no "genuine question was raised about the original's authenticity[.]"<sup>290</sup>

#### X. COMMON LAW RULES: *RES IPSA LOQUITUR*

Even after the adoption of the Indiana Rules of Evidence, common-law evidentiary practices remain applicable to the extent the rules "do not cover a specific evidence issue[.]"<sup>291</sup> One commonly invoked common-law evidentiary doctrine is *res ipsa loquitur*. "The doctrine of *res ipsa loquitur* recognizes that sometimes an occurrence is so unusual that, absent reasonable justification, the person in control of the situation should be held responsible."<sup>292</sup> The challenge in invoking the doctrine is establishing that "the incident probably resulted from the defendant's negligence rather than from some other cause."<sup>293</sup> A plaintiff can invoke the doctrine by demonstrating: "(1) that the injuring instrumentality was within the exclusive management and control of the defendant, and (2) the accident is of the type that ordinarily does not happen if those who have management or control exercise proper care."<sup>294</sup>

In modern practices, the rule is most frequently invoked as a method to avoid the obligation to produce expert testimony in medical malpractice

---

287. IND. R. EVID. 1003.

288. *Higgason v. State*, 210 N.E.3d 867, 881-82 (Ind. Ct. App.), *trans. denied*, 215 N.E.3d 341 (Ind. 2023).

289. *Russell v. State*, 217 N.E.3d 544, 549 (Ind. Ct. App.), *trans. denied*, 221 N.E.3d 1212 (Ind. 2023).

290. *McDuffee v. State*, No. 22A-CR-2503, 2023 Ind. App. Unpub. LEXIS 548, at \*6-8 (Ind. Ct. App. May 12, 2023).

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

292. *Bell v. Walmart, Inc.*, No. 1:21-CV-368-HAB, 2023 U.S. Dist. LEXIS 173969, at \*10 (N.D. Ind. Sept. 27, 2023) (citing *Cernul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328, 331 (Ind. App. 2003)).

293. *Id.* (citing *Deutch v. Fleming*, 746 N.E.2d 993, 999 (Ind. Ct. App. 2001)).

294. *Id.* (citing *Balfour v. Kimberly Home Health Care, Inc.*, 830 N.E.2d 145, 148 (Ind. Ct. App. 2005)).

actions.<sup>295</sup> In one published opinion from the Indiana Court of Appeals, the doctrine was unsuccessfully invoked in the healthcare context, but not as a means of circumventing a requirement for expert testimony.<sup>296</sup> At issue in *Wireman v. Laporte Hospital Co., LLC* was the allegation that a patient's medical diagnosis had been publicly disclosed.<sup>297</sup> Unable to identify any individual who disclosed his personal information, the patient sought to invoke the doctrine to establish that but for the hospital's negligence his diagnosis could not have been publicly disclosed.<sup>298</sup>

The trial court rejected the attempt to invoke the doctrine and the appellate panel affirmed.<sup>299</sup> Because the patient had shared his diagnosis with his mother, his girlfriend, and his secretary, “[b]y definition, the Hospital did not have *exclusive* control over [his] private medical diagnosis.”<sup>300</sup> Despite the patient's efforts to foreclose the possibility that those sources had disclosed his diagnosis, the mere fact that they were aware of it prevented the requisite showing that “the hospital had exclusive control over [the patient]’s medical diagnosis.”<sup>301</sup>

#### CONCLUSION

If there is one overarching takeaway from this survey period, it is that counsel adept in research will be well served by the dramatic increase in citable authority thanks to the relaxation of Indiana's prohibition on citation to memoranda decisions of the Indiana Court of Appeals. Hopefully, this survey has provided a foot in the door to those in need of such guidance.

---

295. *Ind. Dep't of Ins. v. Doe*, 211 N.E.3d 1014, 1028 n.8 (Ind. Ct. App.) (Robb, J., dissenting) (“In limited instances, however, expert opinion evidence may not be required because the doctrine of *res ipsa loquitur* applies. This doctrine recognizes that the circumstances surrounding an injury may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant, despite the medical review panel's opinion to the contrary.”), *vacated*, 221 N.E.3d 1210 (Ind. 2023); *see, e.g.*, *Cecil v. Park Place Christian Cmty. of St. John*, No. 22A-CT-951, 2023 Ind. App. Unpub. LEXIS 140, at \*5-11 (Ind. Ct. App. Feb. 14, 2023); *Sparkman v. Cmty. Health Network*, No. 23A-CT-146, 2023 Ind. App. Unpub. LEXIS 777, at \*12-18 (Ind. Ct. App. July 7, 2023).

296. *Wireman v. Laporte Hosp. Co., LLC*, 205 N.E.3d 1041, 1045-46 (Ind. Ct. App.), *tans. denied*, 211 N.E.3d 1007 (Ind. 2023).

297. *Id.* at 1043.

298. *Id.* at 1045-46.

299. *Id.* at 1046.

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

301. *Id.*