

2025 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

COLIN E. FLORA*

This survey period encompasses October 1, 2024, through September 30, 2025. Consistent with prior surveys,¹ the format of this article tracks developments in order of the Indiana Rules of Evidence and then covers additional developments of common-law practices and statutes not included within the Indiana Rules of Evidence. As with the last two surveys, where appropriate, this edition addresses memoranda decisions of the Indiana Court of Appeals.² Practitioners are reminded that citation to memoranda decisions of the Indiana Court of Appeals is generally permitted only for opinions issued after January 1, 2023.³

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

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

Rule 101(b) makes the Indiana Rules of Evidence generally applicable to “all proceedings in the courts of the State of Indiana.”⁴ There are, however, exceptions, in which the rules do not strictly apply.⁵ The survey period provided examples of three of those exceptions, but also reminded that the lack of strict application does not leave those proceedings wholly lawless. In *Mayberry v. Indiana Dep’t of Correction*, the Indiana Court of Appeals reminded that the Indiana Small Claims Rules, though removing strict adherence to the rules of evidence, still require adherence to Rule 408’s limitation on evidence of settlement communications.⁶

Other common proceedings in which the rules of evidence are relaxed are post-judgment criminal proceedings, such as sentencing hearings,⁷ community corrections placement revocation hearings,⁸ and probation revocation hearings.⁹ The rationale for obviating the need to strictly adhere to the rules of evidence is

* 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., Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049 (1997).

2. See Colin E. Flora, *2024 Developments in Indiana Evidentiary Practice*, 58 IND. L. REV. 841, 841 (2025) [hereinafter *2024 Survey*]; Colin E. Flora, *2023 Developments in Indiana Evidentiary Practice*, 57 IND. L. REV. 917, 917 (2024) [hereinafter *2023 Survey*].

3. See IND. R. APP. P. 65(D)(2); Tidd v. Tidd, 257 N.E.3d 846, 851 n.1 (Ind. Ct. App. 2025).

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

5. See IND. R. EVID. 101(d).

6. No. 25A-SC-1483, 2025 LX 465816, at *10 (Ind. Ct. App. Sep. 30, 2025) (citing IND. R. SM. CL. 8(A)).

7. See, e.g., Saunders v. State, No. 24A-CR-981, 2024 LX 58415, at *17–18 (Ind. Ct. App. Dec. 30, 2024).

8. See, e.g., Riddle v. State, No. 25A-CR-118, 2025 LX 391119, at *6 (Ind. Ct. App. Aug. 12, 2025).

9. See, e.g., Thomas v. State, No. 24A-CR-2020, 2025 LX 82526, at *5 (Ind. Ct. App. Jan. 28, 2025).

that such matters “are not adversarial criminal proceedings.”¹⁰ Relaxation of evidentiary rules provides flexibility “to permit the court to exercise its inherent power to enforce obedience to its lawful orders.”¹¹ “Judges presiding over such proceedings ‘may consider any relevant evidence bearing some substantial indicia of reliability.’”¹²

As with small-claims proceedings, some evidentiary safeguards remain in the post-judgment criminal setting. The Indiana Court of Appeals reminded that trial courts may not admit hearsay evidence “willy-nilly in a probation revocation hearing.”¹³ Instead, hearsay evidence may only be considered if it “is ‘substantially trustworthy.’”¹⁴ The task of assessing reliability of hearsay is not one to be taken lightly. The Indiana Court of Appeals recognized that “[t]he absence of strict evidentiary rules places particular importance on the fact-finding role of judges in assessing the weight, sufficiency, and reliability of proffered evidence. This assessment, then, carries with it a special level of judicial responsibility and is subject to appellate review.”¹⁵ To facilitate appellate review, trial courts should address reliability of hearsay on the record.¹⁶

A third category of proceedings in which the rules of evidence do not strictly apply are “preliminary juvenile matters.”¹⁷ The survey period presented two cases in which the question of applicability in juvenile matters was addressed. *In re A.H.* permitted consideration of “uncertified medical record[s] for purposes of” a pre-adjudication placement hearing because the hearing constituted “a preliminary juvenile matter to which the rules of evidence do not apply.”¹⁸ *In re A.L.C.*, to the contrary, showed skepticism toward the proposition that the relaxation of evidentiary rules for “preliminary juvenile matters” extends to “a post-adjudication CHINS hearing.”¹⁹

10. *DePalma v. State*, 258 N.E.3d 1081, 1084 (Ind. Ct. App. 2025).

11. *White v. State*, No. 25A-CR-148, 2025 LX 283473, at *7 (Ind. Ct. App. July 17, 2025) (quoting *Terpstra v. State*, 138 N.E.3d 278, 287 (Ind. Ct. App. 2019)).

12. *Brown v. State*, No. 23A-CR-3104, 2024 Ind. App. Unpub. LEXIS 1437, at *5 (Ind. Ct. App. Oct. 31, 2024) (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

13. *McCammon v. State*, No. 24A-CR-336, 2024 Ind. App. Unpub. LEXIS 1318, at *9 (Ind. Ct. App. Oct. 9, 2024) (quoting *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007)), *trans. denied*, 248 N.E.3d 1226 (Ind. 2024).

14. *Id.*; see also *E.A. v. State*, No. 24A-JV-2745, 2025 LX 63401, at *8 (Ind. Ct. App. May 14, 2025).

15. *Riddle v. State*, No. 25A-CR-118, 2025 LX 391119, at *6–7 (Ind. Ct. App. Aug. 12, 2025).

16. *McCammon*, 2024 Ind. App. Unpub. LEXIS 1318, at *9.

17. IND. R. EVID. 101(d)(2).

18. No. 24A-JC-2867, 2025 LX 232940, at *20 n.8 (Ind. Ct. App. July 17, 2025) (quoting *L.H. v. State*, 878 N.E.2d 425, 430 (Ind. Ct. App. 2007)).

19. No. 24A-JT-576, 2024 Ind. App. Unpub. LEXIS 1383, at *34 n.11 (Ind. Ct. App. Oct. 23, 2024).

B. Rule 103: Preserving Evidentiary Rulings for Appeal

One of the great frustrations for appellate advocates is the failure to properly preserve evidentiary rulings for appeal. The procedures for doing so are provided by Evidence Rule 103.²⁰ There are several ways in which trial-level missteps can foreclose meaningful appellate review.²¹ The survey period provided examples of many of the potential missteps, including failures to provide sufficient offers of proof, inadequate objections, and improperly timed objections.

Where the challenge arises from improper exclusion of evidence, the sponsoring party must “inform[] the court of [the evidence’s] substance by an offer of proof, unless the substance was apparent from the context.”²² A wholesale “[f]ailure to make an offer of proof results in waiver of the claim.”²³ Only where the sponsoring party explains the evidence’s substance, relevance, and grounds for admission, is an offer of proof sufficient.²⁴ Where, as in *Fitzwater v. Broadway Methodist Hospital*, an appellate court cannot find an offer showing the substance of the omitted testimony, its relevance, and the basis for its admission, no adequate offer of proof will be found.²⁵

As with offers of proof, a party’s failure to timely object to evidence that is admitted waives an objection on appeal.²⁶ To preserve an objection, it must be made at the time the evidence is offered, and the grounds for objection must be stated.²⁷ Where one basis for objection is stated at trial, a separate basis may not be argued on appeal.²⁸ Once a court rules on the objection, a party may register a continuing objection to preserve the same challenge when it arises again at trial.²⁹

A more nuanced issue is whether pre-trial rulings can play any role in preserving evidentiary rulings for appeal after trial.³⁰ In *Wells v. State*, the

20. IND. R. EVID. 103.

21. Rule 103(e) preserves challenge for fundamental error even absent proper preservation, but it is a considerably higher standard than a properly preserved evidentiary challenge. *Shepard v. State*, No. 24A-CR-567, 2025 LX 40719, at *5 (Ind. Ct. App. Jan. 28, 2025), *trans. denied*, 255 N.E.3d 439 (Ind. 2025).

22. IND. R. EVID. 103(a)(2).

23. *See, e.g.*, *Hodge v. State*, No. 24A-CR-281, 2024 Ind. App. Unpub. LEXIS 1367, at *6 (Ind. Ct. App. Oct. 18, 2024).

24. *See, e.g.*, *Lopez v. State*, No. 24A-CR-1411, 2025 LX 148570, at *3–5 (Ind. Ct. App. June 17, 2025), *trans. denied*, 270 N.E.3d 956 (Ind. 2025).

25. No. 24A-CT-3162, 2025 LX 243260, at *4–6 (Ind. Ct. App. July 11, 2025).

26. IND. R. EVID. 103(a)(1)(A); *see, e.g.*, *Stansel v. State*, No. 24A-CR-554, 2024 Ind. App. Unpub. LEXIS 1438, at *4–6 (Ind. Ct. App. Oct. 31, 2024).

27. IND. R. EVID. 103(a)(1)(B).

28. *See, e.g.*, *McFadden v. State*, No. 24A-CR-1857, 2025 LX 185586, at *8–9 (Ind. Ct. App. June 16, 2025).

29. IND. R. EVID. 103(b).

30. If pursued as interlocutory appeals, pre-trial evidentiary rulings may be addressed prior to trial. *Means v. State*, 201 N.E.3d 1158, 1165–67 (Ind. 2023); *see, e.g.*, *Graff v. State*, 250 N.E.3d 497, 506–07 (Ind. Ct. App. 2025).

Indiana Court of Appeals concluded that a party failed to preserve an objection based on a “standing objection” made in a pre-trial hearing.³¹ It did not matter that the hearing occurred on the same day as the trial.³² That does not, however, mean that what happens in the pre-trial setting stays in the pre-trial setting. In *Brawley v. State*, the Indiana Court of Appeals found that an objection at trial was sufficient to preserve the appellate challenge because the basis for the argument on appeal was stated in pretrial discussions and therefore could be considered, despite a more general objection being lodged at trial.³³

As with many past surveys,³⁴ this survey again bore witness to the trap for the unwary in Indiana Evidence Rule 103(b).³⁵ Contrary to federal procedures, in which motions in limine preserve evidentiary rulings for appeal,³⁶ Indiana’s Rule 103(b) requires objections to be registered “on the record at trial.”³⁷ Under Indiana’s current procedure:

A motion in limine is a preliminary ruling that, in itself, does not result in reversible error. Thus, “[i]n order to preserve an error for appellate review, a party must do more than challenge the ruling on a motion in limine.” Indeed, litigants generally must comply with Indiana Evidence Rule 103, which governs the preservation of evidentiary error. . . . Thus, as our Supreme Court has explained: “Absent either a ruling admitting evidence accompanied by a timely objection or a ruling excluding evidence accompanied by a proper offer of proof, there is no basis for a claim of error.”³⁸

Although the survey period did not see a caselaw shift in the role of motions in limine, it nevertheless witnessed a potential major step in bringing Indiana procedure in line with that of federal courts. Following yet another appellate decision in which a motion in limine was deemed insufficient to preserve error,

31. No. 23A-CR-2387, 2024 LX 52513, at *6–9 (Ind. Ct. App. Nov. 20, 2024), *trans. denied*, 259 N.E.3d 993 (Ind. 2025).

32. *Id.*

33. No. 24A-CR-3051, 2025 LX 319606, at *11–12 (Ind. Ct. App. Aug. 18, 2025), *trans. denied*, 267 N.E.3d 1107 (Ind. 2025).

34. See, e.g., Colin E. Flora, 2018 *Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 716 (2019) [hereinafter 2018 *Survey*]; Colin E. Flora, 2019 *Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 898 n.32 (2021) [hereinafter 2019 *Survey*]; Colin E. Flora, 2022 *Developments in Indiana Evidentiary Practice*, 56 IND. L. REV. 763, 764–66 (2023) [hereinafter 2022 *Survey*]; 2023 *Survey*, *supra* note 2, at 919; 2024 *Survey*, *supra* note 2, at 844.

35. See, e.g., *Lakes v. State*, No. 24A-CR-265, 2024 Ind. App. Unpub. LEXIS 1456, at *8–9 (Ind. Ct. App. Nov. 8, 2024).

36. See *Wilson v. Williams*, 182 F.3d 562, 564–67 (7th Cir. 1999) (en banc).

37. IND. R. EVID. 103(b); see, e.g., *Mauricio v. State*, No. 24A-CR-2009, 2025 LX 34655, at *7–8 (Ind. Ct. App. Apr. 21, 2025).

38. *McBride v. State*, 261 N.E.3d 274, 278–79 (Ind. Ct. App. 2025) (alteration in original) (citations omitted), *reh’g denied*, 2025 LX 293826 (Ind. Ct. App. July 3, 2025).

the appellant in *Miller v. Tran*³⁹ filed a petition to transfer to the Indiana Supreme Court. The appellant was joined by the Indiana State Bar Association's Litigation Section as amicus curiae.⁴⁰ The section's amicus brief was a continuation of its past efforts to seek amendment to Indiana Rule 103(b)'s language to bring Indiana's rule into conformity with the language of Federal Rule 103(b).⁴¹ The transfer petition was denied,⁴² but the Indiana Supreme Court directed a letter to the Chair of the Rules Committee,⁴³ stating: "Although the Court ultimately denied transfer, the Justices questioned whether Ind. Ev. R. 103(b) should be amended to match Fed. Ev. R. 103(b), which preserves objections before *and* at trial and is the majority view nationally."⁴⁴

On October 17, 2025, the Indiana Supreme Court published for public comment a proposed amendment to Indiana Evidence Rule 103(b), which would amend the rule to state:

Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The parties may request a definitive ruling be made on the record before trial, including upon consideration of a motion in limine, and a party need not renew an objection to or offer of proof to preserve a claim of error for appeal of that definitive ruling[.]⁴⁵

On March 6, 2026, the amendment was adopted, with an effective date of July 1, 2026.⁴⁶ The amendment finally disarms the perennial trap for the unwary that has been Rule 103(b)'s treatment of pre-trial evidentiary rulings.

C. Rule 105: Limiting Instructions

Even if evidence is properly admitted, it may be confined to a discrete use. "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury

39. 253 N.E.3d 1138, 1144–45 (Ind. Ct. App.) (ruling on motion in limine, the morning of trial), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

40. Brief of the Litig. Section of the Ind. State Bar Ass'n, as Amicus Curiae, in Support of Appellant at 10–15, *Miller v. Tran*, No. 24A-CT-1187 (Ind. Ct. App. Apr. 7, 2025), 2025 IN S. CT. BRIEFS LEXIS 20.

41. See 2022 Survey, *supra* note 34, at 765 n.23.

42. *Miller*, 265 N.E.3d at 991.

43. See IND. R. EVID. 1101.

44. Letter from Elizabeth Daulton, Dir., Ind. Sup. Ct. Servs., to Hon. Marianne Vorhees, Chair Ind. Comm. on Rules and Proc. (July 22, 2025) (on file with author).

45. *Proposed amendment to Indiana Rules of Evidence (October 2025)*, IND. SUP. CT. (Oct. 2025), <https://www.in.gov/courts/files/rules-proposed-2025-october-evidence.pdf> [<https://perma.cc/H35E-SWUR>].

46. *In re Order Amending Rules of Evidence*, No. 26S-MS-8, 2026 LX 146384 (Mar. 6, 2026).

accordingly.”⁴⁷ As shown in *Burks v. State*, Rule 105’s dictate that an instruction must be given only applies “on timely request.”⁴⁸ A party that “fail[s] to request such an instruction” waives any challenge on appeal.⁴⁹ Put simply, “Rule 105 means what it says.”⁵⁰

D. Rule 106: Completeness Rule

Rule 106 “embodies the completeness doctrine.”⁵¹ “Under the doctrine of completeness, when one party seeks to admit a portion of a document or recorded statement into evidence, the opposing party can place the remainder of the statement into evidence.”⁵² “The purpose of this rule is to avoid misleading the jury by presenting statements out of context.”⁵³

It “may be invoked to admit omitted portions of a statement in order to (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact; or (4) insure a fair and impartial understanding of the admitted portion.” “However, a court need not admit the remainder of the statement, or portions thereof, that are neither explanatory of nor relevant to the portions already introduced.”⁵⁴

“[T]he remainder of the writing or recorded statement is still ‘subject to the general rules of admissibility,’ such as the rule against hearsay.”⁵⁵ Accordingly, if the remaining portions are excludable hearsay⁵⁶ or impermissible character evidence,⁵⁷ they should still be excluded.

Two decisions from the survey period merit specific mention. The first is the memorandum decision in *Rand v. State*, in which the Indiana Court of Appeals affirmed admission of a redacted deposition transcript because confusion about the witness’s prior statements was created by cross-examination of the witness, and admission of the deposition was warranted to

47. IND. R. EVID. 105.

48. No. 24A-CR-3144, 2025 LX 335227, at *14–15 n.5 (Ind. Ct. App. Aug. 21, 2025).

49. *Id.*

50. *Humphrey v. State*, 680 N.E.2d 836, 840 (Ind. 1997).

51. *Hall v. State*, No. 24A-PC-1023, 2024 LX 96656, at *17 (Ind. Ct. App. Nov. 20, 2024) (internal quotations omitted), *trans. denied*, 250 N.E.3d 1058 (Ind. 2025).

52. *Rand v. State*, No. 24A-CR-893, 2025 LX 136882, at *11 (Ind. Ct. App. June 23, 2025).

53. *Brawley v. State*, No. 24A-CR-3051, 2025 LX 319606, at *13 (Ind. Ct. App. Aug. 18, 2025), *trans. denied*, 267 N.E.3d 1107 (Ind. 2025).

54. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *37–38 (Ind. Ct. App. May 1, 2025) (quoting *Lieberenz v. State*, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999)), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

55. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *15 (Ind. Ct. App. Apr. 30, 2025) (quoting *Strunk v. State*, 44 N.E.3d 1, 6 (Ind. Ct. App. 2015)).

56. *See, e.g., id.*

57. *See, e.g., Brawley*, 2025 LX 319606, at *14.

allow the jury to understand the prior statements in context.⁵⁸

The other is the published decision in *Graff v. State*, in which the Indiana Court of Appeals found that the circumstances surrounding a polygraph examination prior to a confession fall within the purview of Rule 106's completeness doctrine:

Put another way, evidence that the polygraph examination directly preceded the confession, occurred in the exact same room, and involved the same officer to which the confession was given, easily qualifies as evidence regarding "the physical and psychological environment in which the confession was obtained." Preventing Graff from presenting any evidence regarding the polygraph examination would deny him the chance to show that the circumstances surrounding it cast doubt on the credibility of his confession, which was, as mentioned, given within minutes of the examination's completion.

Our conclusion is consistent with Indiana Rule of Evidence 106 The preliminaries to the polygraph examination, the examination itself, and the subsequent police interview are all part of one recorded statement, and fairness dictates that neither party should be able to decide that the jury will hear only the parts of the statement it deems favorable to its case.⁵⁹

II. JUDICIAL NOTICE: RULE 201

The power to exercise judicial notice in Indiana is embodied through three sources. In appellate proceedings, the Indiana Court of Appeals now routinely looks to Appellate Rule 27 as a basis for taking notice of court records relevant to the appeal.⁶⁰ In all other proceedings subject to evidentiary procedures,⁶¹ judicial notice is governed by Rule 201⁶² and the Uniform Judicial Notice of

58. No. 24A-CR-893, 2025 LX 136882, at *10–13 (Ind. Ct. App. June 23, 2025).

59. 250 N.E.3d 497, 506–07 (Ind. Ct. App. 2025) (footnote omitted) (internal citations omitted). "[I]n Indiana, 'polygraph results are generally inadmissible in criminal trials[.]'" and require meeting certain prerequisites for admissibility. *White v. State*, No. 24A-CR-1402, 2025 LX 94164, at *12–13 (Ind. Ct. App. Apr. 9, 2025) (citation omitted), *trans. denied*, 265 N.E.3d 1011 (Ind. 2025).

60. *See, e.g.*, *Stafford v. Stafford*, 256 N.E.3d 595, 597 n.1 (Ind. Ct. App. 2025); *Rosenbourgh v. State*, 268 N.E.3d 1255, 1260 n.1 (Ind. Ct. App. 2025); *cf.* *Benziger v. Radabaugh*, 267 N.E.3d 1149, 1154 n.4 (Ind. Ct. App. 2025). Invocation of Appellate Rule 27 is a fairly new development. Despite being in effect since 2001, it was not until 2024 that the Indiana Court of Appeals first indicated that it had "taken judicial notice . . . pursuant to Appellate Rule 27." *Haseman v. Peters*, No. 23A-DR-827, 2024 LX 243896, at *5 n.1 (Ind. Ct. App. Jan. 10, 2024).

61. *See* *Thomas v. State*, No. 24A-CR-2020, 2025 LX 82526, at *5 (Ind. Ct. App. Jan. 28, 2025) (Rule 201 inapplicable to probation revocation proceedings).

62. IND. R. EVID. 201(d).

Foreign Laws Act (“UJNFLA”).⁶³ During the survey period, Indiana’s appellate courts addressed both the UJNFLA and Rule 201.

The survey provided numerous examples of Rule 201 used to take judicial notice of records from courts,⁶⁴ ordinances,⁶⁵ and records in “the statewide protective order database maintained by the Indiana Supreme Court.”⁶⁶ As has become common since Indiana courts integrated the Odyssey case management system, one of the most frequent uses for judicial notice remained records of Indiana courts accessible on the Odyssey system.⁶⁷ Notably, Rule 201(b)(5) applies to both records of other courts throughout the state⁶⁸ and records from the same court in other cases.⁶⁹

The Indiana Court of Appeals provided an important reminder that the power of judicial notice is not a substitute for adherence to procedural requirements on appeal. Rule 201(d) permits the taking of judicial notice “at any stage of the proceeding[.]”⁷⁰ and the Indiana Court of Appeals routinely solves deficiencies in the appellate record through judicial notice.⁷¹ Nevertheless, that an appellate court “can sua sponte take judicial notice of the records of a court of this state . . . does not relieve the Appellant from the requirement to submit a complete Appendix on appeal.”⁷² The court of appeals also found that judicial notice cannot be used for the first time on appeal to “retroactively fulfill [an]

63. IND. CODE §§ 34-38-4-1 to -7 (2025).

64. *See, e.g.*, *Starsiak v. Starsiak*, 246 N.E.3d 1229, 1232 n.1 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(a)(2)(C)); *In re E.W.*, No. 24A-JC-1230, 2024 LX 58734, at *6–7 (Ind. Ct. App. Dec. 3, 2024) (same); *Hatch v. Roper*, 247 N.E.3d 1290, 1292 n.3 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(a)).

65. *Jasionowski v. Town of Whitestown*, 268 N.E.3d 288, 297 (Ind. Ct. App. 2025) (citing IND. R. EVID. 201(a)(2)(B), (b)(4), and (c)(1)); *Burbank v. Parsons*, No. 24A-CT-868, 2024 LX 44562, at *12 n.4 (Ind. Ct. App. Dec. 30, 2024) (citing IND. R. EVID. 201(b)(4)).

66. *In re Adoption of K.B.*, 247 N.E.3d 803, 806 n.5 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(b)(5)).

67. *See, e.g.*, *Lopp v. Lopp*, 270 N.E.3d 44, 48 n.2 (Ind. Ct. App. 2025); *A.B. v. State*, No. 24A-JV-2062, 2025 LX 90471, at *2 n.1 (Ind. Ct. App. Feb. 13, 2025), *trans. denied*, 265 N.E.3d 1011 (Ind. 2025); *Payne v. State*, 247 N.E.3d 815, 816 n.1 (Ind. Ct. App. 2024); *Pondo v. Waziri*, No. 25A-DN-632, 2025 LX 451998, at *3 n.1 (Ind. Ct. App. Sep. 22, 2025); *Matson v. State*, No. 24A-PC-2283, 2025 LX 85740, at *2 n.1 (Ind. Ct. App. May 1, 2025).

68. *See Hatch*, 247 N.E.3d at 1292 n.3.

69. *See, e.g.*, *Muir Woods Section One Ass’n, Inc. v. Marion Cnty. Assessor*, 254 N.E.3d 1158, 1162 n.1 (Ind. T.C.), *trans. denied*, 270 N.E.3d 960 (Ind. 2025); *In re Paternity of G.S.*, 267 N.E.3d 1061, 1065 (Ind. Ct. App. 2025).

70. IND. R. EVID. 201(d); *see, e.g.*, *Hyser v. State*, No. 24A-CR-2720, 2025 LX 93197, at *10 n.6 (Ind. Ct. App. Mar. 13, 2025), *trans. denied*, 267 N.E.3d 991 (Ind. 2025); *Garcia-Rodriguez v. State*, No. 24A-CR-2868, 2025 LX 73563, at *8 (Ind. Ct. App. Apr. 30, 2025) (requesting judicial notice in appellate reply brief).

71. *See, e.g.*, *In re B.R.*, 262 N.E.3d 169, 173 n.1 (Ind. Ct. App. 2025); *Omije v. Whilby-Omije*, 256 N.E.3d 539, 541 n.1 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 994 (Ind. 2025); *Williams v. State*, No. 24A-PC-2461, 2025 LX 208666, at *7 n.1 (Ind. Ct. App. July 9, 2025).

72. *In re G.S.*, 254 N.E.3d 1071, 1075 n.2 (Ind. Ct. App.), *trans. denied*, 262 N.E.3d 819 (Ind. 2025).

evidentiary burden.”⁷³ As another panel observed: “As an *appellate* court, we cannot open the record to receive additional evidence.”⁷⁴

In addition to examples of where judicial notice under Rule 201 was properly used, the survey period explored important limitations on notice. Rule 201(a) includes two subparts. The first allows judicial notice of a fact that is either “not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction, or [] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”⁷⁵ The second only allows judicial notice of “the existence of: (A) published regulations of governmental agencies; (B) ordinances of municipalities; or (C) records of a court of this state.”⁷⁶ Because “records of a court of this state” falls into the second category for which only notice of the existence may be taken, problems can arise when courts rely upon such records for adjudicative facts. During the survey, the court of appeals highlighted limitations on notice of court records:

This Court has recently held that “[e]ven 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.’” “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.”⁷⁷

Those same concerns were also raised by Justice Derek Molter, joined by Chief Justice Loretta Rush, in dissenting to the denial of transfer in *Vlietstra v. State*.⁷⁸ In *Vlietstra*, Justice Molter examined the problem of mixing judicial notice with doctrines of preclusion.⁷⁹ Specifically, he found that a trial court not only taking notice of proceedings in another court, but issuing rulings “based on the ruling by the [other] court” exceeded the permissible bounds of judicial notice and entered into the territory of preclusion, without first meeting the requisite showings for preclusion to apply.⁸⁰ That is distinct from consulting another trial court’s opinion as authority. As Justice Molter continued:

73. *Jones v. State*, No. 24A-CR-2616, 2025 LX 214331, at *28 n.19 (Ind. Ct. App. July 18, 2025).

74. *Gordon v. State*, No. 25A-CR-23, 2025 LX 380310, at *18 n.6 (Ind. Ct. App. Aug. 22, 2025), *trans. denied*, 272 N.E.3d 955 (Ind. 2025).

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

76. IND. R. EVID. 201(a)(2).

77. *J.I. v. Ja.I.*, 250 N.E.3d 417, 425–26 (Ind. Ct. App. 2024) (alteration in original) (internal citations omitted) (quoting *In re P.B.*, 199 N.E.3d 790, 796–97 (Ind. Ct. App. 2022)), *reh’g denied*, 2025 LX 66791 (Ind. Ct. App. 2025), *trans. denied*, 259 N.E.3d 993 (Ind. 2025).

78. 248 N.E.3d 1227, 1227–30 (Ind. 2025) (Molter, J., dissenting from the denial of transfer).

79. *Id.*

80. *Id.* at 1228–29.

To be clear, there is nothing wrong with one trial court considering another trial court's decision as persuasive. . . . But what a trial court can't do—as the trial court did here—is treat another court's ruling as *conclusive* in a subsequent case on an issue where issue preclusion doesn't apply.⁸¹

In addition to opinions applying Rule 201, the survey also provided two rare opinions applying the UJNFLA. The opinions are the first Indiana appellate decisions to address the UJNFLA since 2019.⁸² Under the UJNFLA, “[e]very court in Indiana shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.”⁸³ “[T]o enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken of the evidence, reasonable notice shall be given to the adverse parties, either in the pleadings or otherwise.”⁸⁴

In the absence of such notice to the adverse party or trial court, the court presumes that the law in the other jurisdiction is substantially the same as the law in Indiana. “In other words, if the adverse party is not given reasonable notice that the issue of another state’s law will be raised, then any choice of law question is waived and the trial court presumes that all law is the same as Indiana’s.”⁸⁵

In both decisions, application of the UNJFLA turned on whether adequate notice was provided. In *Shaling v. Biomet*, the trial court found that invoking Alabama law at summary judgment, four years into litigation, after discovery, and less than six months before trial was not reasonable notice;⁸⁶ the court of appeals affirmed.⁸⁷ In the other, *Poultry & Industrial Suppliers, Inc. v. Incubacol, S.A.S.*, reasonable notice was provided when Florida law was first asserted just five months after the relevant party was added to an otherwise six-year-old case and first made in response to a motion for judgment on the pleadings.⁸⁸

81. *Id.* at 1229 (internal citation omitted); *but see* Ind. Dep’t of Nat. Res. v. United Mins., 686 N.E.2d 851, 857 (Ind. Ct. App. 1997); Popovich v. Ind. Dep’t of State Revenue, 7 N.E.3d 406, 415 n.12 (Ind. T.C. 2014).

82. *Tavake v. State*, 131 N.E.3d 696, 702 (Ind. Ct. App. 2019).

83. IND. CODE § 34-38-4-1 (2025).

84. IND. CODE § 34-38-4-4 (2025).

85. *Poultry & Indus. Suppliers, Inc. v. Incubacol, S.A.S.*, 250 N.E.3d 448, 455 (Ind. Ct. App. 2024) (internal citation omitted) (quoting *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 146 (Ind. 1999)), *trans. denied*, 257 N.E.3d 779 (Ind. 2025).

86. No. 71C01-1906-CT-216, 2024 LX 218518, at *5–7 (Ind. Cir. Ct. Feb. 7, 2024).

87. 254 N.E.3d 1118, 1123–24 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 1004 (Ind. 2025).

88. 250 N.E.3d at 454–56.

III. PRESUMPTIONS IN CIVIL CASES GENERALLY: RULE 301

Under Rule 301, “[i]n a civil case, unless a constitution, statute, judicial decision, or [evidence] rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.”⁸⁹ Although the doctrine of *res ipsa loquitur* may be viewed “not [as] a presumption, but rather [as] an inference of negligence that survives the defendant’s evidence[.]”⁹⁰ the Indiana Supreme Court has viewed presumptions and inferences as both falling within the purview of Rule 301.⁹¹ Traditionally, this survey has addressed developments in *res ipsa loquitur* within the purview of common-law evidentiary procedures.⁹² This survey, however, opts to place the doctrine into the context of Rule 301 because the Indiana Supreme Court hinted at Rule 301’s relationship to *res ipsa loquitur* in *Isgrig v. Trustees of Indiana University*.⁹³

The doctrine of *res ipsa loquitur* is defined literally as “the thing speaks for itself.” Normally . . . negligence itself cannot be presumed from the mere fact that an accident occurs. However, *res ipsa loquitur* is a rule that permits “a qualified exception to the general rule that the mere fact of an injury will not create an inference of negligence.” “[T]his doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence.” It provides a vehicle for plaintiffs to infer that the defendants were negligent when evidence of causation is lacking.⁹⁴

In last year’s survey, the Indiana Court of Appeals’ opinion in *Isgrig* was easily the most notable decision to address *res ipsa loquitur*, “which held that the doctrine, when otherwise satisfied, applies to premises-liability cases.”⁹⁵ But, because transfer was granted for review by the Indiana Supreme Court, the intermediate appellate court’s opinion was supplanted by the supreme court’s opinion.⁹⁶ After a thorough review of the origins and history of the doctrine,⁹⁷ the Indiana Supreme Court also concluded that *res ipsa loquitur* applies to

89. IND. R. EVID. 301.

90. 13B ROBERT L. MILLER, JR., INDIANA PRACTICE: COURTROOM HANDBOOK ON INDIANA EVIDENCE 46 (2025–26 ed.).

91. See *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 296 (Ind. 2009) (quoting *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)) (“Evidence Rule 301 ‘authorizes a court to instruct the jury on permissible inferences that may be drawn from the basic facts that give rise to presumptions.’”).

92. See, e.g., 2024 Survey, *supra* note 2, at 876–77.

93. 256 N.E.3d 1238, 1247 (Ind. 2025).

94. *Id.* at 1246 (second alteration in original) (citations omitted).

95. 2024 Survey, *supra* note 2, at 876.

96. *Isgrig*, 256 N.E.3d at 1244.

97. *Id.* at 1244–51.

premises liability cases.⁹⁸

IV. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

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

“Generally, relevant evidence is admissible but irrelevant evidence is not.”⁹⁹ Under Rule 401, “[e]vidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.”¹⁰⁰ That “liberal standard” “sets a low bar[.]”¹⁰¹ The survey period provided instances in which relevance was fairly straight-forward: a coroner’s testimony in a prior trial that was contrary to the expert witness in a subsequent trial was relevant to the coroner’s “credibility and competence[.]”¹⁰² and that yellow pills were found at a murder scene made the finding of yellow pills on the defendant relevant to show defendant had been at the scene.¹⁰³ In other cases, relevance was less obvious, such as the several where the Indiana Court of Appeals affirmed admission of photographs of weapons subject to the possession of a criminal defendant despite not necessarily being the weapons linked to the charged crimes.¹⁰⁴

The survey period also provided illustrative examples of evidence failing to meet the low bar for relevance. In *Montgomery v. State*, the Indiana Court of Appeals found testimony that the victim “had sought cocaine that night” was irrelevant to the defendant’s charge of rape because cocaine was not found in the victim’s system.¹⁰⁵ Similarly, in *Griffith v. State*, the court of appeals found “that someone somewhere at some time accused [the defendant] of forcing [a child other than the victim] to perform oral sex is not evidence that the [defendant] did, in fact, do so.”¹⁰⁶ Echoing the Indiana Supreme Court, *Griffith* instructed that “[t]he State may not parade past the jury a litany of potentially prejudicial [prior bad acts] that have been established or connected to the

98. *Id.* at 1244.

99. *Lee v. State*, No. 24A-CR-1801, 2025 LX 26804, at *4–5 (Ind. Ct. App. Apr. 8, 2025) (citing IND. R. EVID. 402), *trans. denied*, 265 N.E.3d 522 (Ind. 2025).

100. *Dirig v. State*, 268 N.E.3d 1239, 1245 (Ind. Ct. App. 2025) (citing IND. R. EVID. 401).

101. *Bess v. State*, No. 24A-CR-51, 2024 LX 10936, at *12 (Ind. Ct. App. Nov. 25, 2024) (internal quotations omitted) (quoting *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017)), *trans. denied*, 253 N.E.3d 525 (Ind. 2025).

102. *Redding v. State*, 244 N.E.3d 477, 484 (Ind. Ct. App. 2024).

103. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *14 (Ind. Ct. App. Dec. 10, 2024), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

104. *Hatfield v. State*, No. 23A-CR-2780, 2024 Ind. App. Unpub. LEXIS 1352, at *11 (Ind. Ct. App. Oct. 16, 2024), *trans. denied*, 248 N.E.3d 1225 (Ind. 2024); *Lee*, 2025 LX 26804, at *5; *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *7–11 (Ind. Ct. App. Apr. 30, 2025); *cf.* *Alexander v. State*, No. 24A-CR-2432, 2025 LX 60104, at *10–11 (Ind. Ct. App. Apr. 30, 2025) (defendant’s access to murder weapon admissible).

105. 250 N.E.3d 478, 486–87 (Ind. Ct. App. 2024).

106. 259 N.E.3d 1025, 1033 (Ind. Ct. App. 2025).

defendant only by unsubstantiated innuendo.”¹⁰⁷ And, in *K.M. v. Indiana Dep’t of Child Services*, the court concluded that “[a]ccusations of child abuse that are expressly found by a court to be untrue are not relevant to the falsely accused person’s fitness to be around children.”¹⁰⁸

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

Under Rule 403, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”¹⁰⁹ It is not enough for evidence to be prejudicial—“[a]ll evidence that is relevant to a criminal prosecution is inherently prejudicial”—rather, the prejudicial value must be balanced against the probative value in light of “the issue to be proved by the evidence.”¹¹⁰ To be excluded, evidence must be “unfairly prejudicial.”¹¹¹ The considerations for whether unfair prejudice has occurred include “dangers (1) that the jury will substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury.”¹¹²

Trial courts have “wide” discretion in balancing prejudice and probative value.¹¹³ Numerous decisions from the Indiana Court of Appeals from the survey period highlight this deference. Some of the more notable takeaways were: the prejudicial value of otherwise unrelated criminal conduct may be considered in light of the discrepancy in severity between the uncharged and the charged conduct;¹¹⁴ where a photograph depicted multiple weapons in addition to the one associated with the crime, the prosecution could have “edit[ed] the photograph to remove the other [weapons] or use a stand-in firearm as a demonstrative exhibit[.]”¹¹⁵ playing a stabbing video in slow motion was not unfairly prejudicial because, “[i]n real time, the stabbing seemingly began in the blink of an eye[, b]ut in slow motion, the incident can easily be broken down[.]”¹¹⁶ potentially prejudicial evidence can be tempered by a properly

107. *Id.* (alteration in original) (internal quotations omitted).

108. 255 N.E.3d 1245, 1249 (Ind. Ct. App. 2025).

109. IND. R. EVID. 403.

110. *Redding v. State*, 244 N.E.3d 477, 484 (Ind. Ct. App. 2024).

111. *Jones v. State*, 258 N.E.3d 1063, 1078 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025); *see, e.g., Johnson v. State*, No. 24A-CR-1452, 2025 LX 44839, at *6 (Ind. Ct. App. Apr. 29, 2025).

112. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *10 (Ind. Ct. App. Apr. 30, 2025).

113. *Scott v. State*, No. 25A-CR-193, 2025 LX 481411, at *11 (Ind. Ct. App. Sep. 22, 2025).

114. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *15–16 (Ind. Ct. App. Dec. 10, 2024) (“[P]ossession of a controlled substance is significantly weaker than . . . murder charges.”), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

115. *Saunders v. State*, No. 24A-CR-981, 2024 LX 58415, at *10 (Ind. Ct. App. Dec. 30, 2024).

116. *Muex v. State*, No. 24A-CR-1610, 2025 LX 30589, at *7 (Ind. Ct. App. Apr. 17, 2025).

issued limiting instruction, which the jury is presumed to follow;¹¹⁷ and evidence is not unduly prejudicial simply because a defendant concedes an issue.¹¹⁸

Although Rule 403 is generally spoken of in shorthand as applying to “unfair prejudice,” that is only one of the bases for exclusion. In *Devlin v. Gorter*, the court of appeals affirmed exclusion of a pleading, later superseded by amendment, because it would distract the jury from more important aspects of an otherwise complex case and added little probative value.¹¹⁹

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

Rule 404(b)(1) prohibits “[e]vidence of a crime, wrong, or other act” but only if it is used “to show that on a particular occasion the person acted in accordance with the character.”¹²⁰ “The rule is designed to prevent the jury from assessing a party on the basis of his past propensities, the so called forbidden inference.”¹²¹ For Rule 404(b)(1) to apply, the evidence must be of a crime other than the one charged¹²² and must actually constitute a crime or an otherwise bad act.¹²³

Such evidence, however, may be admissible for other purposes, such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” The test for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its unfair prejudicial effect pursuant to Indiana Evidence Rule 403.¹²⁴

The survey period showed: such evidence is admissible to show “a matter

117. See, e.g., *Perry*, 2025 LX 33657, at *11.

118. *Tate v. State*, No. 24A-CR-3022, 2025 LX 225404, at *8–9 (Ind. Ct. App. July 25, 2025).

119. 257 N.E.3d 807, 818 (Ind. Ct. App. 2025); see also *Allen v. State*, No. 23A-CR-2534, 2024 LX 52301, at *13–14 (Ind. Ct. App. Nov. 14, 2024) (affirming the exclusion of an *ex parte* protective order under IND. R. EVID. 403); *Rosen v. Cmty. Healthcare Sys.*, 257 N.E.3d 6, 16–17 (Ind. Ct. App. 2025) (affirming the exclusion of a hospital’s negligence investigation via a motion in limine prior to a fall), *vacated*, 2026 LX 129887 (Ind. 2026).

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

121. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 249 (Ind. 2025) (internal quotations omitted).

122. See, e.g., *Planck v. State*, No. 24A-CR-2671, 2025 LX 275715, at *22 (Ind. Ct. App. June 27, 2025), *trans. denied*, 267 N.E.3d 990 (Ind. 2025).

123. See, e.g., *Alexander v. State*, No. 24A-CR-2432, 2025 LX 60104, at *11 (Ind. Ct. App. Apr. 30, 2025) (“[P]ossessing a firearm is not, alone, an illegal ‘bad’ act.”); *Jones v. State*, 267 N.E.3d 41, 45 (Ind. Ct. App. 2025); *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *9–10 (Ind. Ct. App. Apr. 30, 2025) (same).

124. *Carr v. State*, 255 N.E.3d 519, 527 (Ind. Ct. App.) (internal citation omitted) (quoting IND. R. EVID. 404(b)(2)), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

at issue other than [defendant]’s propensity to commit the crime[;]”¹²⁵ other uncharged criminal acts “occurring at the same time and under the circumstances as the crimes charged” are not barred by Rule 404(b);¹²⁶ before evidence of a prior act may be admitted, there must be sufficient evidence of its commission and an arrest or charge, standing alone, is insufficient;¹²⁷ and evidence of other crimes committed in the same way was admissible under Rule 404(b)(2) even if they were not committed in a signature way.¹²⁸ One other particularly notable observation was provided by footnote in *Dewitt v. State*: “[T]he trial court did not make a record of its balancing of the probative value and prejudicial effect of this exchange under Rule 403. While such balancing is a necessary step in the Rule 404(b) analysis, the trial court was not required to illustrate this analysis on the record.”¹²⁹

D. Rule 405: Methods of Proving Character

“Rule 405 allows testimony about a person’s character or character trait in the form of an opinion or in testimony about the person’s reputation, and the Rule provides that ‘[o]n cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.’”¹³⁰ In *Griffith v. State*, the Indiana Court of Appeals ruled that a criminal defendant’s assertion that “he would never sexually hurt a child or make a child perform oral sex” did not open the door to evidence of specific instances of conduct, specifically examination regarding unsubstantiated allegations that he molested his stepdaughter.¹³¹

E. Rule 406: Habit; Routine Practice

Whether a person’s habits “may be admitted to prove that on a particular occasion the person . . . acted in accordance with the habit” is governed by Rule 406.¹³² To constitute “habit,” evidence must show a person’s “regular response to a repeated specific situation.”¹³³ It must be “more than a mere tendency to act in a given manner.”¹³⁴ The quintessence of a “habit” for purposes of Rule 406

125. *Kimbrough v. State*, 266 N.E.3d 1288, 1296 (Ind. Ct. App. 2025).

126. *Jones v. State*, 250 N.E.3d 1062, 1081 (Ind. Ct. App. 2024) (quoting *Kyle v. State*, 54 N.E.3d 439, 444 (Ind. Ct. App. 2016)), *trans. denied*, 255 N.E.3d 442 (Ind. 2025).

127. *Griffith v. State*, 259 N.E.3d 1025, 1033–34 (Ind. Ct. App. 2025).

128. *Jones v. State*, 258 N.E.3d 1063, 1078 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025).

129. No. 24A-CR-2789, 2025 LX 352272, at *8 n.3 (Ind. Ct. App. Aug. 21, 2025), *trans. denied*, 271 N.E.3d 1122 (Ind. 2025).

130. *Griffith*, 259 N.E.3d at 1035 n.4 (quoting IND. R. EVID. 405(b)) (alteration in original).

131. *Id.*

132. IND. R. EVID. 406.

133. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 249 (Ind. 2025) (quoting *Lewis v. State*, 34 N.E.3d 240, 247 (Ind. 2015)).

134. *Id.* (internal quotations omitted) (quoting *Lewis*, 34 N.E.3d at 248).

is conduct that is “semi-automatic in nature.”¹³⁵ In *Abbas v. Neter-Nu*, the Indiana Supreme Court deemed evidence that a patient “removed his IVs seven times over the course of four hospitalizations” without evidence of “the total number of times [the patient] had received an IV” was insufficient to satisfy the requisite showing for a “habit” under Rule 406.¹³⁶

F. Rule 407: Subsequent Remedial Measures

Following an injury, evidence of subsequent remedial measures is generally inadmissible “to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction.”¹³⁷ The general prohibition on such evidence is intended to allow dangerous circumstances and conditions to be remedied without fear of adverse use in judicial proceedings.¹³⁸ But, even when Rule 407 would otherwise apply, a party may open the door to evidence of subsequent remedial measures. That was exemplified in *Miller v. Lulinski*, in which examination on post-injury repair to scaffolding by the defendants’ counsel was deemed to have “clearly ‘opened the door’ to” further testimony of the post-injury repairs.¹³⁹

G. Rule 408: Compromise Offers and Negotiations

Indiana judicial policy favors settlements of disputes and, accordingly, “embrace[s] ‘a robust policy of confidentiality of conduct and statements made during negotiation and mediation.’”¹⁴⁰ Rule 408 embodies that policy¹⁴¹ and “bars admission of settlement-offer evidence ‘to prove or disprove the validity or amount of a disputed claim’ or for certain impeachment purposes except when exempted by the rule.”¹⁴² The rule is sufficiently important that it is applied in the otherwise informal setting of Indiana small-claims proceedings.¹⁴³ While the rule is easy to apply in the setting of traditional settlement offers, it can be complicated when something short of a monetary offer to release claims is involved.¹⁴⁴

135. *Id.* (internal quotations omitted) (quoting *Lewis*, 34 N.E.3d at 248).

136. *Id.*

137. IND. R. EVID. 407.

138. *Pennington v. Mem’l Hosp. of South Bend, Inc.*, 223 N.E.3d 1086, 1096 (Ind. 2024); see also G. Alexander Nunn, *The Incoherence of Evidence Law*, 99 NOTRE DAME L. REV. 1255, 1310–11 (2024).

139. No. 24A-CT-1719, 2025 LX 13013, at *13–16 (Ind. Ct. App. Mar. 5, 2025), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

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

141. *Id.*

142. *Mayberry v. Ind. Dep’t of Corr.*, No. 25A-SC-1483, 2025 LX 465816, at *10 (Ind. Ct. App. Sep. 30, 2025) (quoting IND. R. EVID. 408(a)).

143. *Id.* (citing IND. R. SM. CL. 8(A)).

144. See, e.g., *Thomas v. Valpo Motors, Inc.*, 258 N.E.3d 236, 245 n.5 (Ind. 2025) (dispute

In *Mayberry v. Indiana Dep't of Correction*, the Indiana Court of Appeals found that Rule 408 was not violated when the Indiana Department of Correction mentioned that the plaintiff had declined to “to discuss potential resolution of [claimed overcharges.]”¹⁴⁵ The appellate court reasoned that the Department of Correction had already conceded the overcharge and all that remained in dispute was that the plaintiff disagreed with the amount of the overcharge.¹⁴⁶ That the plaintiff declined to discuss resolution was not, therefore, offered “to prove or disprove the validity or amount of a disputed claim[.]”¹⁴⁷ The conclusion is essentially the inverse of finding that Rule 408 does not bar evidence of a defendant’s refusal to make any offer of compromise.¹⁴⁸ In either instance, the only additional information is that the parties have a dispute, a fact already made known to a court by the existence of the litigation pending before it.

H. Rule 412: Victim’s or Witness’s Sexual Behavior or Predisposition

“The admission of evidence pertaining to a victim’s past sexual conduct is governed by Indiana Evidence Rule 412.”¹⁴⁹ The rule embodies “the insight of Indiana’s Rape Shield Statute—codified at Indiana Code § 35-37-4-4—that inquiry into a victim’s prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense.”¹⁵⁰ The rule acts to shield the alleged victim “from being placed on trial and to remove impediments to reporting sex crimes.”¹⁵¹ As the survey period showed, Rule 412 sometimes turns on context and language. In *Hunter v. State*, the Indiana Court of Appeals agreed with a trial court’s conclusion that “dating implied a sexual relationship,”¹⁵² which drew the evidence into Rule 412(a)(2)’s prohibition of “evidence offered to prove a victim’s or witness’s sexual predisposition.”¹⁵³

over whether “offer of a partial refund amounts to ‘inadmissible settlement correspondence’” under Rule 408).

145. 2025 LX 465816, at *9–11.

146. *Id.* at *10.

147. *Id.* (quoting IND. R. EVID. 408(a)).

148. See *Chopra v. Pendyala*, No. 03A01-1305-SC-00191, 2013 Ind. App. Unpub. LEXIS 1544, at *14 (Ind. Ct. App. Dec. 20, 2013) (“[T]he letter contained no offer of compromise, but rather, contained a firm statement that GEICO would not pay for any diminished value of Chopra’s car.”).

149. *Hunter v. State*, No. 23A-CR-2313, 2025 LX 279740, at *12 (Ind. Ct. App. July 7, 2025).

150. *Hartzburg v. State*, No. 24A-CR-1784, 2025 LX 218627, at *15–16 (Ind. Ct. App. July 3, 2025) (quoting *Johnson v. State*, 6 N.E.3d 491, 498 (Ind. Ct. App. 2014)), *trans. denied*, 267 N.E.3d 986 (Ind. 2025). “[T]o the extent there are any differences between the [statute and Rule 412], the Rule controls.” *Lopez v. State*, No. 24A-CR-1411, 2025 LX 148570, at *7 (Ind. Ct. App. June 17, 2025), *trans. denied*, 270 N.E.3d 956 (Ind. 2025).

151. *Hunter*, 2025 LX 279740, at *13 (quoting *Smith v. State*, 140 N.E.3d 363, 370 (Ind. Ct. App. 2020)).

152. *Id.*

153. IND. R. EVID. 412(a)(2).

Highlighting that certain language may be context specific was the conclusion in *Hamby v. State* that “in the abstract—‘inappropriate’ is not exclusively a synonym of ‘sexual.’”¹⁵⁴ But in *Hamby*, the witness used the word “inappropriate” to describe molestation by the defendant, which the court concluded strongly implied sexual touching.¹⁵⁵

V. PRIVILEGES: RULES 501 & 502

Rules 501 and 502 generally provide the mechanisms for preserving and handling privileges.¹⁵⁶ State-law privileges are not confined to state courts. In federal court proceedings under diversity jurisdiction, “where state law provides the substantive rule of decision, privileges are determined in accordance with the applicable state law.”¹⁵⁷ In a diversity case, the Southern District of Indiana examined Indiana’s insurer-insured privilege.¹⁵⁸ The court found the privilege did not apply because the documents were “not communications with an insurance company[,]” but rather were “forms completed by Defendant’s employees” and were not “completed at the request of an insurance company[.]”¹⁵⁹ Importantly, “the fact that those forms might later have been forwarded to an insurance company does not cloak them with privilege.”¹⁶⁰

VI. WITNESSES: RULES 601 THROUGH 617

A. Rule 602: Requirement of Personal Knowledge

“Evidence Rule 602 provides that ‘[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter’ and that ‘[e]vidence to prove personal knowledge may consist of the witness’s own testimony.’”¹⁶¹ The survey period highlighted the high degree of deference shown by Indiana appellate courts to trial courts in assessing personal knowledge. In four memoranda decisions, the Indiana Court of Appeals affirmed findings of personal knowledge where: a witness needed her recollection refreshed but had previously known what

154. No. 23A-CR-2017, 2025 LX 15184, at *14 (Ind. Ct. App. Mar. 28, 2025), *trans. denied*, 265 N.E.3d 987 (Ind. 2025).

155. *Id.* at *14–15.

156. IND. R. EVID. 501, 502.

157. *Compton v. Allstate Prop. & Cas. Ins. Co.*, 278 F.R.D. 193, 196–97 (S.D. Ind. 2011) (citing FED. R. EVID. 501).

158. *Daskalakis v. CP Indy DT, LLC*, No. 1:24-cv-00271-JPH-MJD, 2025 LX 112254, at *11–14 (S.D. Ind. May 30, 2025).

159. *Id.* at *12.

160. *Id.* at *13.

161. *Mullis v. State*, 256 N.E.3d 567, 581 (Ind. Ct. App.) (alterations in original) (quoting IND. R. EVID. 602), *trans. denied*, 259 N.E.3d 1002 (Ind. 2025).

occurred through personal knowledge;¹⁶² a criminal defendant “was asked if, within his personal knowledge, he might know of any such reason” the children victims might have had to lie, “and he answered accordingly”;¹⁶³ an employee with access to a facility’s systems testified that a person was not present at the facility on a day when the witness was also not present, based upon the witness seeing entries the following day on the facility’s record system;¹⁶⁴ and a witness who was shot by a criminal defendant “and just seconds later heard additional gunfire and [another victim]’s cries from the home” identified the defendant as the shooter, despite not specifically seeing the defendant shoot the other victim.¹⁶⁵

B. Rule 609: Impeachment by Evidence of a Criminal Conviction

Rule 609 governs use of a witness’s prior criminal convictions for impeachment.¹⁶⁶ The rule limits the requisite convictions for attacking credibility to convictions of “(1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.”¹⁶⁷ Where a prior conviction does not meet the confines of Rule 609, it is not admissible for impeachment.¹⁶⁸ Rule 609(b) also generally limits the use of “stale” convictions after ten years have passed since the later of the conviction or release from confinement for the conviction.¹⁶⁹ In *Miller v. Tran*, the Indiana Court of Appeals held that the trial court had erred in instructing the jury that it could consider a witness’s prior criminal convictions because the convictions were both more than ten years in the past and not among the enumerated criminal offenses of Rule 609(a).¹⁷⁰

*C. Rule 611: Mode and Order of Examining Witnesses
and Presenting Evidence*

Rule 611 sets out three basic parameters for controlling the examination of witnesses.¹⁷¹ The first is that it gives the trial court broad authority to “exercise

162. *Flowers v. State*, No. 25A-CR-647, 2025 LX 307421, at *7–8 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

163. *Clark v. State*, No. 25A-CR-354, 2025 LX 338320, at *5 (Ind. Ct. App. Sep. 3, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

164. *Littlepage v. State*, No. 24A-CR-2595, 2025 LX 63991, at *4–7 (Ind. Ct. App. Apr. 17, 2025), *trans. denied*, 262 N.E.3d 820 (Ind. 2025).

165. *Day v. State*, No. 24A-CR-1273, 2025 LX 62199, at *9–11 (Ind. Ct. App. Feb. 11, 2025), *trans. denied*, 259 N.E.3d 990 (Ind. 2025).

166. IND. R. EVID. 609.

167. IND. R. EVID. 609(a).

168. *See, e.g., Myers v. State*, No. 25A-CR-212, 2025 LX 363263, at *13–14 (Ind. Ct. App. Sep. 9, 2025), *trans. denied*, 272 N.E.3d 968 (Ind. 2025).

169. IND. R. EVID. 609(b).

170. 253 N.E.3d 1138, 1147 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

171. IND. R. EVID. 611.

reasonable control over the mode and order of examining witnesses and presenting evidence[.]”¹⁷² The Indiana Court of Appeals found this provision appropriately followed when a trial court intervened to terminate repeated examination on essentially the same questions, only rephrased.¹⁷³ The second guiding parameter of Rule 611 governs the scope of cross-examination.¹⁷⁴ Although the scope of cross-examination is quite broad, it is still limited to those matters “put in dispute by the direct examination[.]”¹⁷⁵ As the Indiana Court of Appeals demonstrated in *Streeter v. State*, even if a trial court oversteps in limiting cross-examination, it may still be a difficult task to overturn on appeal because it must also have “affect[ed] the substantial rights of the defendant.”¹⁷⁶

The third parameter of Rule 611 pertains to when leading questions are permitted.¹⁷⁷ In *Tercero-Pacheco v. State*, the Indiana Court of Appeals addressed the nuances of what constitutes a leading question.¹⁷⁸ A common fallacy is that a leading question is any question which may be answered “yes” or “no.”¹⁷⁹ That is not, however, the definition of a leading question; rather, it is “one that suggests the desired answer to the witness.”¹⁸⁰ Applying the correct test for ascertaining leading questions, the Indiana Court of Appeals concluded that the question to a witness of “when [the defendant] took your clothes off, did he put his penis inside of you?” was not a leading question, despite calling “for a yes or no response.”¹⁸¹

D. Rule 612: Writing or Object Used to Refresh Memory

“When a witness is unable to recall information, Evidence Rule 612 authorizes a party to attempt to ‘refresh’ the witness’s memory using a ‘writing

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

173. *Blanchard v. HRC Hotels, LLC*, 269 N.E.3d 1234, 1241–43 (Ind. Ct. App. 2025), *trans. denied*, 2026 LX 76950 (Ind. 2026).

174. IND. R. EVID. 611(b).

175. *Streeter v. State*, No. 24A-CR-821, 2024 LX 64692, at *15 (Ind. Ct. App. Nov. 21, 2024) (citation omitted), *trans. denied*, 253 N.E.3d 517 (Ind. 2025).

176. *Id.*

177. IND. R. EVID. 611(c).

178. No. 24A-CR-1363, 2025 LX 44684, at *4–8 (Ind. Ct. App. Jan. 15, 2025), *trans. denied*, 255 N.E.3d 437 (Ind. 2025).

179. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 6 (5th ed. 1999) (“It is sometimes supposed that any question which can be answered yes or no is ipso facto leading but that the neophyte attorney can always take refuge in neutral, alternative wording (‘State whether or not * * *’) to escape the charge of leading. However, quite frequently the former kind of question is not leading, and equally often the latter kind will be. The real issue is whether an ordinary witness would get the impression that the questioner desired one answer rather than another.”).

180. *Tercero-Pacheco*, 2025 LX 44684, at *7 (quoting *Stinson v. State*, 126 N.E.3d 915, 922 (Ind. Ct. App. 2019)).

181. *Id.*

or object[.]”¹⁸² “To refresh a witness’s recollection, ‘[t]he witness must first state that he does not recall the information sought by the questioner.’”¹⁸³ In *Abbas v. Neter-Nu*, the Indiana Supreme Court concluded that a witness could not be refreshed with a copy of an email because he “testified that he *did* recall the email.”¹⁸⁴

Use of a writing or object to refresh a witness’s recollection does not make the writing or object admissible.¹⁸⁵ In *Salinas v. State*, the Indiana Court of Appeals held that it was error for a trial court to prohibit refreshing of a witness’s recollection simply because the recorded interview sought to be used was not admitted into evidence.¹⁸⁶

“[T]here are few restrictions on the writing or object used to refresh a witness’s recollection.”¹⁸⁷ The writing or object need not have been created by the witness and may be work product.¹⁸⁸ As a result, in *Flowers v. State*, the Indiana Court of Appeals found that a police report could properly be used to refresh the recollection of a witness who did not author the report but did reflect statements made by the witness to the authoring officer.¹⁸⁹

E. Rule 614: Calling and Interrogation of Witnesses by Court and Jury

Rule 614 highly circumscribes the power of a trial court to call witnesses on its own accord.¹⁹⁰ It is most often invoked with respect to court-appointed experts.¹⁹¹ In *Saunders v. State*, the Indiana Court of Appeals found that a trial court did not commit fundamental error by calling a police officer as a witness in a sentencing hearing because Rule 614(a) does not govern sentencing hearings.¹⁹² Nevertheless, the appellate court “caution[ed] trial court judges against calling witnesses based on the Judicial Code of Conduct’s requirement of impartiality.”¹⁹³

182. *Salinas v. State*, 257 N.E.3d 17, 30 (Ind. Ct. App.) (alteration in original) (quoting IND. R. EVID. 612(a)), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

183. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 250 (Ind. 2025) (alteration in original) (citation omitted).

184. *Id.*

185. *Salinas*, 257 N.E.3d at 30.

186. *Id.*

187. *Flowers v. State*, No. 25A-CR-647, 2025 LX 307421, at *6 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

188. *Id.*

189. *Id.*

190. IND. R. EVID. 614(a).

191. *Cf. In re A.H.*, No. 24A-JC-2867, 2025 LX 232940, at *20–23 (Ind. Ct. App. July 17, 2025) (rejecting appeal arguing court should have appointed an expert).

192. No. 24A-CR-981, 2024 LX 58415, at *17–18 (Ind. Ct. App. Dec. 30, 2024).

193. *Id.* at *18 (citing IND. R. JUD. CONDUCT 1.2).

F. Rule 615: Separation of Witnesses

“Rule 615 allows litigants to move for separation of witnesses so they cannot hear each other’s testimony.”¹⁹⁴ “[T]he rule ensures that memories are not ‘tainted by hearing others testify and denies witnesses the opportunity to shape their testimony to match or contradict what others have said.’”¹⁹⁵ Trial courts are afforded broad discretion in addressing and remedying violations of separation orders.¹⁹⁶ Exclusions of witnesses for violating separation orders is deemed an “extreme remedy,”¹⁹⁷ but was upheld on multiple occasions during the survey period.¹⁹⁸

But not every violation was deemed sufficient to warrant extreme sanction. In *Stoudimire v. State*, the court of appeals affirmed denial of a mistrial for violation of a separation order.¹⁹⁹ The panel observed that not every violation of a separation of witness order will warrant mistrial and, indeed, “a separation order does not require witnesses to refrain from all communication with other witnesses.”²⁰⁰ The most notable aspect of the decision was its distinguishing of precedent:

Stoudimire claims prejudice is presumed upon a violation of a witness separation order, citing *Stafford v. State*. We recognize *Stafford* does say that, relying on Justice Boehm’s dissent in *Hernandez v. State*. But *Hernandez* and *Stafford* apply when a trial court improperly determines a witness was an essential witness under Evidence Rule 615; they do not address the remedy for a witness’s violation of a trial court’s separation order. Substantial precedent indicates the party challenging the trial court’s decision in the latter case bears the burden of demonstrating prejudice.²⁰¹

194. *Neal v. State*, No. 24A-CR-820, 2024 Ind. App. Unpub. LEXIS 1303, at *8 (Ind. Ct. App. Oct. 8, 2024).

195. *Dunn v. State*, No. 24A-CR-1855, 2025 LX 11600, at *10 (Ind. Ct. App. Mar. 28, 2025) (quoting *Harris v. State*, 165 N.E.3d 91, 95 (Ind. 2021)), *trans. denied*, 265 N.E.3d 988 (Ind. 2025).

196. *Id.*

197. *Id.* at *12.

198. *See, e.g., id.* at *9–12 (witness present in courtroom during testimony); *Neal*, 2024 Ind. App. Unpub. LEXIS 1303, at *8–10 (defendant violated order by calling his mother, a witness); *Myers v. State*, No. 25A-CR-212, 2025 LX 363263, at *14–15 (Ind. Ct. App. Sep. 9, 2025) (same), *trans. denied*, 272 N.E.3d 968 (Ind. 2025).

199. No. 24A-CR-622, 2025 LX 86826, at *11–14 (Ind. Ct. App. Feb. 18, 2025).

200. *Id.* at *14.

201. *Id.* at *14–15 n.5 (internal citations omitted) (citing *Stafford v. State*, 736 N.E.2d 326, 330–31 (Ind. Ct. App. 2000); *Hernandez v. State*, 716 N.E.2d 948, 955 (Ind. 1999); *Hitt v. State*, 478 N.E.2d 65, 69 (Ind. 1985)).

G. Rule 617: Unrecorded Statements During Custodial Interrogation

Continuing a recent trend,²⁰² this survey again saw a meaningful decision addressing Rule 617.²⁰³ Taking effect in 2011,²⁰⁴ Rule 617 governs “admissibility of statements made during custodial interrogations[.]”²⁰⁵ In general, the rule requires custodial interrogations to be recorded in order to be admissible in felony criminal trials.²⁰⁶ The rule does not, however, require exclusion when “[t]he law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating[.]”²⁰⁷ In *Payton v. State*, the Indiana Court of Appeals affirmed admission of a partial recording where the officer testified that the one-minute portion of missing video “was due to an equipment malfunction.”²⁰⁸ Because there was no showing of bad faith and the criminal defendant was permitted “to cross-examine [the investigator] about the unrecorded portion[.]” admission of the partial recording at trial did not violate Rule 617.²⁰⁹

VII. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Opinion Testimony by Lay Witnesses

Unlike some states and federal courts,²¹⁰ Indiana recognizes an intermediate level of opinion testimony above pure lay opinions and below that of experts:

“The Indiana Rules of Evidence contain two rules for opinion testimony—lay witness opinions under Rule 701 and expert witness opinions under Rule 702.” “A ‘skilled witness’ is a person with a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. Rule 702, but somewhat beyond that possessed by the ordinary jurors.” Evidence Rule 701 “encompasses both ordinary lay witness

202. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1063–65 (2018); *2018 Survey*, *supra* note 34, at 736–38; *2019 Survey*, *supra* note 34, at 921–22; *2022 Survey*, *supra* note 34, at 780–81; *2024 Survey*, *supra* note 2, at 858–59.

203. *Payton v. State*, No. 24A-CR-1175, 2025 LX 65549, at *8–10 (Ind. Ct. App. Mar. 12, 2025).

204. *State v. Zuffante*, 576 P.3d 243, 271 (Haw. 2025) (Ginoza, J., dissenting) (discussing history of IND. R. EVID. 617).

205. *Payton*, 2025 LX 65549, at *8–9.

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

207. IND. R. EVID. 617(a)(3).

208. *Payton*, 2025 LX 65549, at *8–10.

209. *Id.* at *9–10.

210. *See, e.g.,* *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int’l, Inc.*, 533 F.3d 555, 561 (7th Cir. 2008); *Hollingsworth v. Commonwealth*, 718 S.W.3d 738, 751 (Ky. 2025).

opinions and skilled witness opinions. ‘The difference between skilled witnesses and ordinary lay witnesses is their degree of knowledge concerning the subject of their testimony.’” The testimony of a skilled witness “is not a matter of ‘scientific principles’ governed by Indiana Evidence Rule 702(b); rather, it is a matter of the observations of persons with specialized knowledge.” Skilled witnesses may be permitted to testify both about their observations and their “opinions or inferences that are based solely on facts within their own personal knowledge.”²¹¹

During the survey period, the Indiana Court of Appeals upheld as skilled-witness testimony: opinions regarding cell phone location techniques by a detective “certified in analyzing ‘call detail records and geolocation analysis of mobile phones[.]’”²¹² that railing on scaffolding failed due to welding failures by a witness who had worked as a welder for a few years in the 1970s;²¹³ and testimony of a detective “concerning digital evidence, including Facebook Marketplace postings” based on “many hours of training to understand how to obtain and interpret data from electronic service providers, including data from Facebook, Instagram, TikTok, [and] IP addresses[.]”²¹⁴

B. Rule 702: Testimony by Expert Witnesses

“The admissibility of expert testimony is governed by Indiana Evidence Rule 702[.]”²¹⁵ “Any one or a combination of the factors listed in Evidence Rule 702(a) may serve as the basis for a witness qualifying as an expert.”²¹⁶ The touchstone of expert testimony is that it “is based on any ‘peculiar knowledge or experience not common to the world’ that may aid the finder of fact.”²¹⁷ Thus, an expert is a person who knows “more than the average person” on a topic at issue in the proceedings.²¹⁸ To fall under Rule 702, the testimony must constitute

211. *Jamerson v. State*, No. 24A-CR-2090, 2025 LX 229987, at *8–9 (Ind. Ct. App. July 9, 2025) (citations omitted); *accord* *Reed v. State*, No. 24A-CR-1313, 2025 LX 307100, at *8–9 (Ind. Ct. App. Aug. 28, 2025).

212. *Quail v. State*, No. 24A-CR-1501, 2025 LX 34668, at *3, 11–13 (Ind. Ct. App. Jan. 30, 2025), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

213. *Miller v. Lulinski*, No. 24A-CT-1719, 2025 LX 13013, at *10–13 (Ind. Ct. App. Mar. 5, 2025), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

214. *Jamerson*, 2025 LX 229987, at *7–11.

215. *Hallett v. State*, No. 24A-CR-1665, 2025 LX 85509, at *7 (Ind. Ct. App. Mar. 28, 2025).

216. *T.G. v. Cmty. Health Network*, 250 N.E.3d 490, 495 (Ind. Ct. App. 2025); *see* IND. R. EVID. 702(a) (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”).

217. *T.G.*, 250 N.E.3d at 495 (citation omitted).

218. *Id.*

an “opinion.”²¹⁹

When the expert seeks to offer scientific testimony, it must “rest[] upon reliable scientific principles.”²²⁰ During the survey period, the Indiana Court of Appeals rejected the assertion that there needed to be a consensus to a certain scientific methodology, finding a specific technique “universally accepted as a reliable scientific method” and the existence of “some variances among scholars” was insufficient to prevent satisfaction of Rule 702(b).²²¹ But, where a proffered expert both “admitted that he was not an expert in many, if not all, of the relevant fields and he largely, if not completely, failed to back up his opinions with citations to any reliable scientific principles[,]” his opinion was properly excluded.²²²

“Non-scientific expert evidence . . . is governed by Rule 702(a) and need not be proven reliable by means of ‘scientific principles’ under Rule 702(b).”²²³ In *Johnson v. State*, the Indiana Court of Appeals determined that expert “testimony to explain to the trier of fact the behavior of coaches and athletes, the complex social dynamics of that relationship, how that relationship might become abusive, and reasons why an athlete might delay reporting abuse” was non-scientific testimony subject only to Rule 702(a).²²⁴

The most notable Rule 702(a) decision in the survey period was *T.G. v. Community Health Network*, in which the Indiana Court of Appeals declined to provide a minimum threshold of work experience for a psychiatry resident who had not yet obtained board certification to offer psychiatric expertise.²²⁵ Looking to *K.K. v. Community Health Network, Inc.*, in which the expert had six months of residential experience, the defendant in *T.G.* argued that the expert’s sixteen days of experience was insufficient.²²⁶ The *T.G.* court, affirming the expert’s admission, found that *K.K.* “did not establish six months of residency as the minimum standard for qualifying a doctor as an expert in their field[.]”²²⁷

219. See *Salinas v. State*, 257 N.E.3d 17, 29 (Ind. Ct. App.) (“[S]tatistical evidence does not constitute ‘opinion[.]’”) (alteration in original)), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

220. IND. R. EVID. 702(b).

221. *Hallett v. State*, No. 24A-CR-1665, 2025 LX 85509, at *10–11 (Ind. Ct. App. Mar. 28, 2025).

222. *City of New Albany v. Ecosystems Connections, LLC*, 268 N.E.3d 1206, 1223 (Ind. Ct. App. 2025); see also *Hathaway v. State*, No. 24A-CR-944, 2024 Ind. App. Unpub. LEXIS 1342, at *9–16 (Ind. Ct. App. Oct. 15, 2024) (person unfamiliar with “Laboratory’s employee qualifications, . . . the Laboratory’s accreditation procedures, and did not know if the instrument used to test the materials had been certified or was regularly maintained” “was not qualified to give expert testimony on the results of the testing conducted”), *trans. denied*, 250 N.E.3d 1054 (Ind. 2025).

223. *Johnson v. State*, No. 24A-CR-2653, 2025 LX 305941, at *15 (Ind. Ct. App. Aug. 29, 2025), *trans. denied*, 272 N.E.3d 967 (Ind. 2025).

224. *Id.*

225. 250 N.E.3d 490, 495 (Ind. Ct. App. 2025).

226. *Id.* (citing *K.K. v. Cmty. Health Network, Inc.*, 215 N.E.3d 382, 385 (Ind. Ct. App. 2023)).

227. *Id.*

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

Rule 703 allows experts to incorporate facts and data from others, including otherwise inadmissible evidence, into their analyses.²²⁸ The leeway afforded to expert witnesses is not, however, a panacea for admitting otherwise inadmissible evidence. In *Abbas v. Neter-Nu*, the Indiana Supreme Court refused an attempt to use Rule 703 to introduce medical records.²²⁹

Second, the Providers argue they could use the medical records as the basis of an expert's opinion testimony under Indiana Evidence Rule 703. . . . We disagree. Rule 703 provides that "[e]xperts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Nothing in the rule explicitly allows the expert to mention the fact that they relied on the records when forming their opinion.²³⁰

Allowing experts to repeat medical records without using the records to form independent opinions also likely violates the proscription on using experts as conduits to admit the opinions of others.²³¹

D. Rule 704: Opinion on an Ultimate Issue

Rule 704(a) was enacted to replace "the once-prevailing common-law practice . . . many States applied . . . known as the 'ultimate issue' rule. That rule categorically barred witnesses from 'stat[ing] their conclusions on' any 'ultimate issue'—*i.e.*, issues that the jury must resolve to decide the case."²³² Still, Rule 704(b) provides some important limitations on opinion testimony: "Witnesses 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."²³³

The survey period provided important decisions on three facets of Rule 704(b). One was the permissible scope of testimony abutting legal conclusions. The Indiana Court of Appeals recognized that lay opinion testimony does not amount to impermissible "legal conclusions" simply because the opinion is

228. IND. R. EVID. 703.

229. 261 N.E.3d 233, 249–50 (Ind. 2025).

230. *Id.* at 249 (second alteration in original) (citations omitted).

231. *See Hathaway v. State*, No. 24A-CR-944, 2024 Ind. App. Unpub. LEXIS 1342, at *12–14 (Ind. Ct. App. Oct. 15, 2024), *trans. denied*, 250 N.E.3d 1054 (Ind. 2025).

232. *Diaz v. United States*, 602 U.S. 526, 531 (2024) (third alteration in original) (quoting *United States v. Spaulding*, 293 U.S. 498, 506 (1935)); *see* IND. R. EVID. 704(a) ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable just because it embraces an ultimate issue.").

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

given using terms that also hold legal significance.²³⁴ In *Hunt v. State*, the court found that even with a “subjective layperson’s statement that she did not believe she was raped, the jury would still have been free to decide whether there was force or imminent threat of force and whether [defendant] acted knowingly.”²³⁵ Looking to federal authority, the court recognized that “there can be a distinction between the colloquial use of a word from its legal meaning.”²³⁶ Though not referenced in *Hunt*, existing Indiana precedent also recognized that lay witnesses may use otherwise legally significant terms in colloquial senses without running afoul of Rule 704(b).²³⁷

The second notable facet of Rule 704(b) was “opinions concerning . . . the truth or falsity of allegations [and] whether a witness has testified truthfully[.]”²³⁸ Under that provision, an expert can opine generally about the frailties of eyewitness testimony, but may not offer the opinion that a specific witness’s testimony—specifically identification of a criminal defendant—was unreliable.²³⁹ More frequently, Rule 704(b) challenges arise to the testimony of one witness bolstering the veracity of another. So-called “[v]ouching testimony is generally prohibited under Indiana Evidence Rule 704(b)” because it “is considered an ‘invasion of the province of the jury in determining what weight they would place upon [a witness’s] testimony.’”²⁴⁰

The most frequent challenges to testimony as vouching occur in the setting of charges for child sexual abuse.²⁴¹ Indiana’s appellate courts “have ‘repeatedly found no Rule 704(b) violation where a witness testified about how child sexual-abuse victims behave in general without making a statement about the specific victim.’”²⁴² Such “cases are one of the rare times where the trial court may allow testimony explaining common reactions of victims or providing context for a

234. *Hunt v. State*, 269 N.E.3d 1223, 1230 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 966 (Ind. 2025).

235. *Id.*

236. *Id.* (citing *United States v. Baskes*, 649 F.2d 471, 478 n.5 (7th Cir. 1980)); *see also* *United States v. Bowling*, 952 F.3d 861, 869 (7th Cir. 2020) (“A witness’s informal use of a term that may also be legal in character does not inexorably turn that testimony into improper lay testimony.”).

237. *See* *Boyd v. State*, 425 N.E.2d 85, 87 (Ind. 1981) (“It is clear from the record that she used the word [‘robbery’] in its popular sense to summarize the entire incident which she had just described in detail. The use of the word did not invade the province of the jury.”).

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

239. *Minor v. State*, 252 N.E.3d 979, 988–90 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

240. *Carr v. State*, 255 N.E.3d 519, 526 (Ind. Ct. App.) (second alteration in original) (citation omitted), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

241. *See, e.g.*, *Frey v. State*, No. 24A-CR-2886, 2025 LX 175385, at *4–9 (Ind. Ct. App. June 23, 2025); *Sawvell v. State*, No. 25A-CR-95, 2025 LX 359918, at *10–15 (Ind. Ct. App. Sep. 2, 2025).

242. *Alamos v. State*, No. 24A-CR-1074, 2024 LX 49167, at *5 (Ind. Ct. App. Dec. 6, 2024) (quoting *Henson v. State*, 237 N.E.3d 1160, 1166 (Ind. Ct. App.), *trans. denied*, 244 N.E.3d 907 (Ind. 2024)), *trans. denied*, 253 N.E.3d 520 (Ind. 2025).

victim's demeanor during their testimony.”²⁴³

Highlighting the reticence of appellate courts to find Rule 704(b) violations in child sexual-abuse cases was *MacKey v. State*, in which the court of appeals found Rule 704(b) was not violated when the aunt of child victims testified that she could tell when the victims were lying about other trivial matters.²⁴⁴ The defendant contended that the obvious “inference the State wanted the trial court to make was that Aunt knew Children were not lying when they said that [the defendant] molested them.”²⁴⁵ The court of appeals deemed the testimony to not be “the functional equivalent of Aunt saying she could tell Children were telling the truth when they disclosed to her Mackey’s sexual abuse” and that “[t]he complained of inference [wa]s too remote.”²⁴⁶

Also in the context of a child sexual-abuse case, but ostensibly having much broader application, was *Salinas v. State*.²⁴⁷ In affirming the introduction of statistical evidence that “less than 10% of children lie about sexual abuse[,]” the Indiana Court of Appeals not only deemed such evidence permissible in child sexual-abuse cases, but explicitly concluded that “[g]eneral statistics are not opinions, so Evidence Rule 704(b) simply does not apply to them.”²⁴⁸

The court of appeals also found no Rule 704(b) violation for admission of a witness’s plea offer, which contained a provision requiring truthful testimony because, “[w]hile the State’s plea offer was contingent on [the witness] testifying truthfully, the letter could not vouch for the truthfulness of her testimony because that determination could only be made after she testified.”²⁴⁹

Also at issue during the survey period was Rule 704(b)’s prohibition on “opinions concerning intent, guilt, or innocence in a criminal case[.]”²⁵⁰ “Witnesses are allowed to give opinion testimony, which may include ‘evidence that leads to an [incriminating] inference, even if no witness could state [an] opinion with respect to that inference.’ However, th[e] opinion must stop short of the question of guilt.”²⁵¹ In *Carr v. State*, the court found the testimony of a detective that “his investigation did not point to any suspect other than [the defendant]” did not violate Rule 704(b) because it was “not a statement regarding every element of the offense”—specifically, it did not address the defendant’s mental state—and the “testimony also focused on his investigation and the evidence collected for prosecution, not on [the defendant]’s guilt or

243. *Henson*, 237 N.E.3d at 1167.

244. No. 23A-CR-3029, 2024 Ind. App. Unpub. LEXIS 1446, at *7–8 (Ind. Ct. App. Nov. 6, 2024), *trans. denied*, 253 N.E.3d 517 (Ind. 2025).

245. *Id.* at *7.

246. *Id.* at *8.

247. 257 N.E.3d 17, 28–29 (Ind. Ct. App.), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

248. *Id.* at 28.

249. *Walter v. State*, No. 24A-CR-1786, 2025 LX 265330, at *10–11 (Ind. Ct. App. July 16, 2025).

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

251. *Carr v. State*, 255 N.E.3d 519, 526 (Ind. Ct. App.) (alterations in original) (citation omitted), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

innocence.”²⁵²

There was, however, an example in which the statements covered all elements of the offense. In *Hatfield v. State*, the court found a mother’s recorded statement, upon finding a body in a pool of blood, “that she was ‘sure [her] son has done it’” violated Rule 704(b) because it “spoke to every element of the offense and did not stop short of the question of guilt[.]”²⁵³

As with any other line of inquiry, testimony that may otherwise run afoul of Rule 704(b) may become admissible if a party opens the door.²⁵⁴ In *Fox-Doerr v. State*, cross-examination of an investigating officer that “was clearly intended to create the impression that [the officer] did not think there was sufficient evidence to convict” opened the door to testimony that the officer believed the evidence sufficient to prove the defendant’s guilt beyond a reasonable doubt.²⁵⁵

*E. Rule 705: Whether an Expert’s Opinion Is Too Conclusory
Is an Issue for the Jury*

Rule 705 permits an expert to “state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross examination.”²⁵⁶ In *Blanchard v. HRC Hotels, LLC*, the Indiana Court of Appeals looked to Rule 705 as guidance for assessing whether the alleged inadequacy of an expert’s opinion admitted at trial can be a basis for judgment on the evidence.²⁵⁷ Based upon the second sentence of Rule 705, the court found “[t]he way to attack the allegedly conclusory nature of an expert’s opinion is through cross-examination.”²⁵⁸ Through cross-examination, a party may “try to convince the jury to assign little or no weight to the expert’s opinion.”²⁵⁹ By trying to challenge an expert’s “opinion as conclusory” the challenge is one of weight of the evidence.²⁶⁰ Such a challenge is not, however, within the scope of a motion for judgment on the evidence because “a court presented with a motion for judgment on the evidence

252. *Id.* at 525–27 (citation omitted); *see also* *Houchin v. State*, No. 24A-CR-1080, 2024 LX 46778, at *9 (Ind. Ct. App. Dec. 23, 2024) (testimony that drug users generally do not carry large quantities of drugs but that drug dealers do “did not address the ultimate question of [] guilt, but rather was focused on the general tendencies of drug users and drug dealers”), *trans. denied*, 255 N.E.3d 433 (Ind. 2025).

253. No. 23A-CR-2780, 2024 Ind. App. Unpub. LEXIS 1352, at *8 (Ind. Ct. App. Oct. 16, 2024) (first alteration in original), *trans. denied*, 248 N.E.3d 1225 (Ind. 2024).

254. *Alamos v. State*, No. 24A-CR-1074, 2024 LX 49167, at *6 (Ind. Ct. App. Dec. 6, 2024), *trans. denied*, 253 N.E.3d 520 (Ind. 2025).

255. No. 24A-CR-1673, 2025 LX 12947, at *34–37 (Ind. Ct. App. May 1, 2025), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

256. IND. R. EVID. 705.

257. 269 N.E.3d 1234, 1240–42 (Ind. Ct. App. 2025), *trans. denied*, 2026 LX 76950 (Ind. 2026).

258. *Id.* at 1241.

259. *Id.*

260. *Id.*

cannot weigh the evidence.”²⁶¹

VIII. HEARSAY: RULES 801 THROUGH 806

A. Rules 801 & 802: Hearsay Generally Prohibited

Absent an applicable exception, Rule 802 bans all hearsay.²⁶² “Rule 801(c) defines hearsay as an out-of-court statement that ‘is offered in evidence to prove the truth of the matter asserted.’”²⁶³ Some common circumstances easily fit the definition of hearsay, such as probable-cause affidavits.²⁶⁴ Other circumstances may appear on first glance to be hearsay, but are not within the proscription of hearsay under one of two categories of definitional exceptions.

The first category includes statements specifically excluded from the definition of hearsay by Rule 801(d). Two of the subcategories to Rule 801(d) drew meaningful attention during the survey period. Rule 801(d)(2), which applies to statements of party opponents, was shown to: apply to a defendant’s grand jury testimony;²⁶⁵ apply to statements made by the defendant in an arrest video;²⁶⁶ and not apply to allow a party to put its own statement into evidence.²⁶⁷ The other is Rule 801(d)(1)(B), which allows a prior statement of a witness who “testifies and is subject to cross-examination” that “is consistent with the declarant’s testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]”²⁶⁸ In *Rand v. State*, the court recognized that Rule 801(d)(1)(B) is distinct from and operates in addition to the doctrine of completeness.²⁶⁹

The other category of definitional hearsay exceptions is comprised of statements offered for a reason other than “to prove the truth of the matter asserted.”

“If the challenged statement does not assert a fact susceptible of being

261. *Id.*

262. IND. R. EVID. 802; *Eichelburger v. State*, 251 N.E.3d 1106, 1110 n.3 (Ind. Ct. App. 2025).

263. *Eichelburger*, 251 N.E.3d at 1110 n.3 (quoting IND. R. EVID. 801(c)).

264. *McGhee v. State*, No. 24A-CR-1483, 2025 LX 86488, at *7 (Ind. Ct. App. May 15, 2025), *trans. denied*, 267 N.E.3d 979 (Ind. 2025).

265. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *9–11 (Ind. Ct. App. May 1, 2025), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

266. *Delgado v. State*, 246 N.E.3d 1276, 1289 (Ind. Ct. App. 2024), *trans. denied*, 253 N.E.3d 526 (Ind. 2025); *see also* *Black v. Shaffer*, No. 23A-CT-2901, 2025 LX 85538, at *5 n.1 (Ind. Ct. App. Jan. 22, 2025) (statements made to officer following crash admissible).

267. *Castillo v. State*, No. 24A-CR-1616, 2025 LX 72046, at *6–7 (Ind. Ct. App. Feb. 25, 2025), *trans. denied*, 262 N.E.3d 814 (Ind. 2025).

268. IND. R. EVID. 801(d)(1)(B); *see, e.g.*, *Gordon v. State*, No. 25A-CR-23, 2025 LX 380310, at *9–13 (Ind. Ct. App. Aug. 22, 2025), *trans. denied*, 272 N.E.3d 955 (Ind. 2025).

269. No. 24A-CR-893, 2025 LX 136882, at *10–12 (Ind. Ct. App. June 23, 2025).

true or false, ‘it cannot be hearsay.’” “Further, if the statement is ‘offered to prove the fact of the utterance and not offered to prove the truth of the facts asserted, then there is no hearsay problem. . . . It is not hearsay at all.’”²⁷⁰

As to this category, the Indiana Court of Appeals found out-of-court statements to law enforcement are not hearsay when offered to explain why an investigation proceeded the way it did.²⁷¹

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

Rule 803 provides a series of enumerated exceptions to the bar on hearsay.²⁷² This survey period provided noteworthy opinions from the Indiana Court of Appeals on four of Rule 803’s twenty-two exceptions: present-sense impressions, excited utterances, statements made for medical diagnoses or treatment, and recorded recollections.

1. Rule 803(1) – Present-Sense Impression.—Rule 803(1) provides the exception for present-sense impressions.²⁷³ “A present sense impression is a statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it.”²⁷⁴ During the survey period, the Indiana Court of Appeals found the exception applied to a 911 call that described an ongoing physical altercation²⁷⁵ and to a police officer’s listing of items found while searching a vehicle.²⁷⁶

2. Rule 803(2) – Excited Utterances.—“[T]he ‘Excited Utterance’ exception [is] set forth in Indiana Evidence Rule 803(2).”²⁷⁷

An excited utterance is “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” The party seeking admission of hearsay under this exception must show: (1) a startling event; (2) a statement made by the declarant while under the stress of excitement caused by the event; and (3) a relationship between the statement and the event. This “is not a mechanical test” and “turns on whether the statement was inherently

270. *Wynn v. State*, No. 24A-CR-2625, 2025 LX 346927, at *19–20 (Ind. Ct. App. Sep. 15, 2025) (alteration in original) (citations omitted), *trans. denied*, 272 N.E.3d 958 (Ind. 2025).

271. *Stevens v. State*, No. 24A-CR-1198, 2025 LX 50561, at *17–18 (Ind. Ct. App. May 21, 2025).

272. IND. R. EVID. 803.

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

274. *Fisher v. State*, 264 N.E.3d 696, 705 (Ind. Ct. App. 2025) (citation and quotations omitted).

275. *Bloch v. State*, No. 25A-CR-192, 2025 LX 409943, at *9–11 (Ind. Ct. App. Sep. 23, 2025).

276. *Fisher*, 264 N.E.3d at 705.

277. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *11 (Ind. Ct. App. Dec. 10, 2024), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications.” Factors to consider in determining admissibility include the lapse of time between a statement and the startling event and whether a statement was made in response to questioning, though neither factor is dispositive.²⁷⁸

During the survey period, the Indiana Court of Appeals found the exception applied to: body-camera footage of an interview with the victim of physical violence, made upon the arrival of a police officer responding to a 911 call;²⁷⁹ a five-minute 911 call, which started “calmly” but shifted in tone “to anger, then sadness, then defeat, as [the declarant] both screams and whimpers about being pregnant and [the criminal defendant] hitting her in the head with an ashtray[.]”²⁸⁰ and statements of a victim made to police minutes after being punched in the face by the defendant, who “was still visibly upset and bleeding profusely[.]”²⁸¹ The court did not, however, find an abuse of discretion in declining to apply the exception where the declarant “gave his videotaped statement to police in a police interview room one hour after the shooting” and the declarant “appeared calm and unemotional while giving his statement to the detective.”²⁸²

3. *Rule 803(4): Statement Made for Medical Diagnosis or Treatment.*— Rule 803(4) provides an exception for “a statement made for purposes of medical diagnosis or treatment[.]”²⁸³ “This 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.’”²⁸⁴ “A two-step analysis applies . . . : First, ‘is the declarant motivated to provide truthful information in order to promote diagnosis and treatment,’ and second, ‘is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.’”²⁸⁵ In *Wheeler v. State*, the court of appeals deemed statements made to a nurse, reflected in a report, fell within Rule 803(4), but the

278. *Quartier v. State*, 258 N.E.3d 1034, 1039 (Ind. Ct. App.) (alteration in original) (citations omitted), *trans. denied*, 265 N.E.3d 989 (Ind. 2025).

279. *Id.* at 1038–40.

280. *Simpson v. State*, No. 24A-CR-176, 2024 LX 62813, at *5–7 (Ind. Ct. App. Nov. 25, 2024); *see also* *Smith v. State*, No. 24A-CR-2253, 2025 LX 329048, at *8–10 (Ind. Ct. App. Aug. 11, 2025) (911 call that “conveyed shock and exasperation” immediately after a nearby shooting), *trans. denied*, 271 N.E.3d 1098 (Ind. 2025).

281. *Bueno v. State*, No. 24A-CR-3077, 2025 LX 230327, at *6–8 (Ind. Ct. App. June 30, 2025).

282. *Hardin v. State*, No. 24A-PC-579, 2025 LX 27292, at *27–28 (Ind. Ct. App. Feb. 3, 2025), *trans. denied*, 265 N.E.3d 987 (Ind. 2025).

283. *Ragan v. State*, No. 24A-CR-2460, 2025 LX 491903, at *8 (Ind. Ct. App. Sep. 17, 2025).

284. *Id.* at *9 (quoting *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013)).

285. *Bueno*, 2025 LX 230327, at *8 (quoting IND. R. EVID. 803(4)).

report itself did not.²⁸⁶ Under Rule 805, such hearsay within hearsay is needed to meet an exception at each level of hearsay to permit admission.²⁸⁷

4. *Rule 803(5): Recorded Recollections.*—“Rule 803(5) defines the exception to the rule against hearsay for recorded recollections[.]”²⁸⁸ Among the requirements for admission under Rule 803(5) is that the statement “was made or adopted by the witness when the matter was fresh in the witness’s memory[.]”²⁸⁹ In *Griffith v. State*, the Indiana Court of Appeals addressed whether a forensic interview conducted within a week of a minor victim disclosing abuse allegations, but regarding circumstances occurring roughly one year earlier, fell within the exception.²⁹⁰ The court agreed with the prosecution that “[t]he plain language of the rule is not addressed to the timing of the event but rather to the freshness of the declarant’s recollection of the event[.]” and found the substance of the statement “included several details . . . which indicate[d] it was fresh in her mind at that time.”²⁹¹

C. Rule 804: Hearsay Exceptions for Unavailable Declarants

Like Rule 803, Rule 804 provides a series of enumerated hearsay exceptions.²⁹² But, unlike Rule 803, the Rule 804 exceptions only apply if the declarant is unavailable to testify at trial.²⁹³ The survey period shed light both on application of the Rule 804 exceptions and on the question of whether a declarant is unavailable.

Among the bases for deeming a declarant unavailable is that the declarant “testifies to not remembering the subject matter[.]”²⁹⁴ In *Quiroz v. State*, finding no Indiana precedent to resolve the question of “how much memory a witness must lack to be unavailable under Rule 803(a)(3),” the Indiana Court of Appeals looked to federal precedent to determine that “a witness is not available if he will not or cannot testify about the material portion of the subject matter of his out-of-court statement.”²⁹⁵ The survey period also found that a deceased

286. No. 24A-CR-2225, 2025 LX 108490, at *7–8 (Ind. Ct. App. June 5, 2025); *see also id.* at *8 (“Because Nurse Copp was not seeking medical diagnosis or treatment when she prepared her report, the report was not admissible as proffered by the State and argued on appeal.”).

287. *Id.* at *7 (citing IND. R. EVID. 805).

288. *Griffith v. State*, 259 N.E.3d 1025, 1038 (Ind. Ct. App. 2025).

289. IND. R. EVID. 803(5)(B).

290. *Griffith*, 259 N.E.3d at 1038.

291. *Id.* (first alteration in original).

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

293. *Id.*; *see* IND. R. EVID. 804(a) (defining unavailability).

294. IND. R. EVID. 804(a)(3).

295. 265 N.E.3d 574, 579–80 (Ind. Ct. App. 2025) (quotations omitted).

declarant,²⁹⁶ a pregnant declarant deemed by a doctor to be unsafe to travel,²⁹⁷ a declarant who the prosecution has subpoenaed to testify but left the country,²⁹⁸ and a declarant who could not be located after searching a database and providing subpoenas to all listed addresses were each unavailable.²⁹⁹

Once a declarant is established as unavailable, then the exceptions of Rule 804(b) may apply. Of these exceptions, the survey period demonstrated: a pretrial deposition will usually satisfy Rule 804(b)(1)'s former testimony exception;³⁰⁰ a declaration may constitute a dying declaration, even if the declarant did not succumb until ten days later;³⁰¹ "[t]he statement 'Ight ima lyk wen I'm done bussin dese plays n if u want it so I can slide back' is not comprehensible, much less incriminating, on its face" and, therefore, "does not fall within the hearsay exception of Evidence Rule 804(b)(3)" for statements against interest;³⁰² and an inmate's refusal to testify coupled with evidence of messages indicating defendant had threatened harm on the witness was sufficient to constitute forfeiture by wrongdoing for admission under Rule 804(b)(5).³⁰³

IX. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Authenticating or Identifying Evidence

"To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated. This generally requires extrinsic evidence 'sufficient to support a finding that the item is what the proponent claims it is.'"³⁰⁴ Rule 901(b) provides a non-exhaustive list of

296. *Bass v. State*, No. 24A-CR-2502, 2025 LX 198058, at *7 (Ind. Ct. App. June 20, 2025), *trans. denied*, 267 N.E.3d 983 (Ind. 2025); *Wright v. State*, No. 24A-CR-781, 2024 LX 71838, at *11 (Ind. Ct. App. Dec. 11, 2024).

297. *Davis v. State*, No. 24A-CR-2373, 2025 LX 25306, at *6–7 (Ind. Ct. App. Apr. 23, 2025).

298. *Hunt v. State*, 269 N.E.3d 1223, 1227–28 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 966 (Ind. 2025).

299. *Day v. State*, No. 24A-CR-1273, 2025 LX 62199, at *5–7 (Ind. Ct. App. Feb. 11, 2025), *trans. denied*, 259 N.E.3d 990 (Ind. 2025); *see also Dunn v. State*, No. 24A-CR-1855, 2025 LX 11600, at *14–15 (Ind. Ct. App. Mar. 28, 2025), *trans. denied*, 265 N.E.3d 988 (Ind. 2025).

300. *Bass*, 2025 LX 198058, at *7–10; *see, e.g., Davis*, 2025 LX 25306, at *7–9; *Quartier v. State*, 258 N.E.3d 1034, 1040 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 989 (Ind. 2025).

301. *Wright v. State*, No. 24A-CR-781, 2024 LX 71838, at *11–16 (Ind. Ct. App. Dec. 11, 2024). For discussion of history of dying declarations, *see Frank Sullivan, Jr. & Marianne L. Vorhees, The Legal Legacy of the Stephenson Case: Madge Oberholtzer's Final Testimony and its Impact on Indiana Law*, 69 RES GESTAE 12 (Nov. 2025).

302. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *14–15 (Ind. Ct. App. Apr. 30, 2025); *see also Dunn*, 2025 LX 11600, at *14–15.

303. *Quiroz v. State*, 265 N.E.3d 574, 580–81 (Ind. Ct. App. 2025).

304. *Howard v. U.S. Bank Tr. Nat'l Ass'n*, No. 24A-MF-142, 2024 Ind. App. Unpub. LEXIS 1339, at *9 (Ind. Ct. App. Oct. 15, 2024) (quoting *Whetstone v. Menard, Inc.*, 161 N.E.3d 1274, 1282 (Ind. Ct. App. 2020); IND. R. EVID. 901(a)).

methods for authenticating evidence.³⁰⁵ Although the survey period produced classic examples of many of the enumerated methods for authentication, such as through personal knowledge of fingerprint cards,³⁰⁶ handwriting on letters,³⁰⁷ identification of text message authorship based on statements therein identifying the author,³⁰⁸ and identification of a recorded voice,³⁰⁹ the vast majority of decisions addressing authentication pertained either to authentication regarding social media accounts or application of the silent witness theory to visual recordings.

In four published decisions from the final quarter of 2024, the Indiana Court of Appeals affirmed authentication of social-media evidence. In *Harris v. State*, the court affirmed authentication of Instagram messages because the evidence showed the messages were found on the Instagram app on the defendant's phone and under the account number associated with the user name signed into the app.³¹⁰ In the related appeals of *Anderson*, *Jones*, and *Shields*, the court of appeals affirmed admission of Facebook messages consistent with Rule 901(b)(4),³¹¹ which allows authentication based upon "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."³¹² An important aspect of *Anderson*, *Jones*, and *Shields* was rejection of the argument that there was no inherent link between Facebook URLs requested in a warrant and records produced by Facebook that used numeric identifiers for the corresponding accounts.³¹³

Rule 901(b)(9) allows authentication through "[e]vidence describing a process or system and showing that it produces an accurate result."³¹⁴ Although it applies to systems like weights and measurement devices,³¹⁵ it is usually used

305. IND. R. EVID. 901(b).

306. *Rosas v. State*, No. 24A-CR-416, 2025 LX 56554, at *5–6 (Ind. Ct. App. Feb. 25, 2025).

307. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *25–26 (Ind. Ct. App. May 1, 2025) (applying IND. R. EVID. 901(b)(2)), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025); *see also* *King v. State*, No. 24A-CR-249, 2024 Ind. App. Unpub. LEXIS 1335, at *7–9 (Ind. Ct. App. Oct. 15, 2024) (applying IND. R. EVID. 901(b)(1) to authenticate through testimony of author of letter).

308. *Bess v. State*, No. 24A-CR-51, 2024 LX 10936, at *15–19 (Ind. Ct. App. Nov. 25, 2024) (applying IND. R. EVID. 901(b)(4)), *trans. denied*, 253 N.E.3d 525 (Ind. 2025).

309. *Mauricio v. State*, No. 24A-CR-2009, 2025 LX 34655, at *6–7 (Ind. Ct. App. Apr. 21, 2025) (applying IND. R. EVID. 901(b)(5)).

310. 245 N.E.3d 184, 190 (Ind. Ct. App. 2024), *trans. denied*, 259 N.E.3d 299 (Ind. 2025).

311. *Anderson v. State*, 251 N.E.3d 1066, 1085–88 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025); *Jones v. State*, 250 N.E.3d 1062, 1081–84 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 442 (Ind. 2025); *Shields v. State*, 248 N.E.3d 1246, 1265–68 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025).

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

313. *Anderson*, 251 N.E.3d at 1087–88; *Jones*, 250 N.E.3d at 1083; *Shields*, 248 N.E.3d at 1268.

314. IND. R. EVID. 901(b)(9).

315. *See, e.g., Flaherty v. State*, No. 24A-CR-1148, 2024 LX 22561, at *12–14 (Ind. Ct. App. Dec. 19, 2024) (authentication of scale based on testimony "that the testing instruments are

for the silent-witness theory for visual recordings:

The foundation required for admitting a video depends on its use at trial. If the video is solely being used for demonstrative purposes, an adequate foundation only requires “testimony . . . that [it] accurately depict[s] the scene or occurrence as it appeared at the time in question[.]” Evidence offered for demonstrative purposes acts as an “aid[] that assist[s]’ in a human witness’s testimony.” But a video, including surveillance footage, can also be admitted as substantive, rather than demonstrative, evidence. “When surveillance videos . . . are admitted as substantive evidence, they serve ‘as silent witness[es] as to what activity is being depicted.’” This evidence triggers a heightened foundational requirement, including “a strong showing of authenticity and competency, including proof that the evidence was not altered.”³¹⁶

The rule applies equally to videos and photographs.³¹⁷ The silent-witness theory falls under Rule 901(b)(9) because it requires “evidence describing the process or system that produced the videos or photographs [to show] that the process or system produced an accurate result.”³¹⁸

During the survey period, the Indiana Court of Appeals applied the silent-witness theory to affirm authenticity of multiple surveillance videos where the sponsor of the video was able to provide explanations of the systems capturing and preserving the video.³¹⁹ Most notably, in the published decision in *Woodard-Ward v. State*, the court of appeals rejected the argument that “the State should have been required to call a witness from the jail’s IT department to testify about the functionality of the recording software” to authenticate jail surveillance video.³²⁰ The court found a sufficient foundation for authenticity was laid by testimony from “one of the limited group of persons with access to the recording [] that there was no way for him to manipulate or alter the recording” and “that he had reviewed the footage multiple times and that it had not been altered and was still the same footage as he had originally viewed a short time after the

validated by external vendors on a monthly or weekly basis, depending on the type of instrument, maintenance is performed annually, and log books are kept at the lab of calibration checks performed on the machines”), *trans. denied*, 255 N.E.3d 441 (Ind. 2025).

316. *McFadden v. State*, No. 24A-CR-1857, 2025 LX 185586, at *7–8 (Ind. Ct. App. June 16, 2025) (alterations in original) (footnote omitted) (citations omitted).

317. *Id.* at *7–8 n.5; *Mullis v. State*, 256 N.E.3d 567, 586–87 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 1002 (Ind. 2025).

318. *Mullis*, 256 N.E.3d at 587 (citation omitted).

319. *See Roberts v. State*, No. 23A-CR-3033, 2024 Ind. App. Unpub. LEXIS 1368, at *3–5 (Ind. Ct. App. Oct. 18, 2024); *Payton v. State*, No. 24A-CR-1175, 2025 LX 65549, at *6–8 (Ind. Ct. App. Mar. 12, 2025); *Boyd v. State*, No. 25A-CR-155, 2025 LX 331801, at *9–16 (Ind. Ct. App. Aug. 11, 2025), *trans. denied*, 270 N.E.3d 959 (Ind. 2025); *Cross v. State*, No. 24A-CR-2059, 2025 LX 395466, at *6–8 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 962 (Ind. 2025).

320. 268 N.E.3d 1266, 1272 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 952 (Ind. 2025).

battery.”³²¹

B. Rule 902: Self-Authenticating Evidence

Rule 902 acts as an exception to Rule 901’s need for authentication by classifying certain categories of evidence as self-authenticating.³²² “Self-authentication does not guarantee admissibility; rather, it relieves the proponent from providing foundational testimony.”³²³ Two of Rule 902’s twelve subparts were addressed by the Indiana Court of Appeals during the survey period. Rule 902(1), which deems domestic public documents that are sealed and signed as self-authenticating, was used in *Fisher v. State* to authenticate a packet from the Department of Correction to establish the criminal defendant’s status as a serious violent felon because the document bore “the seal of the State of Indiana, [wa]s attested to by the keeper of records, and was notarized.”³²⁴

The other subpart relied upon was Rule 902(11), which applies to a business record “that meets the requirements of Rule 803(6)(A)-(C)” and is attested to “by a certification under oath of the custodian or another qualified person.”³²⁵ A handful of notable observations can be taken from decisions by the Indiana Court of Appeals during this survey period. In *Jones v. State*, the court rejected a challenge to a certification under Rule 902(11), which contended that the certification affidavit required a notary’s signature to be valid.³²⁶ In *Quail v. State*, the court found that Rule 902(11) did not require both authentication of cellphone records and, separately, of the computer software used to generate those records.³²⁷

One other important lesson from the survey period is the need to avoid unforced errors in drafting certifications. In *Fox-Doerr v. State*, a challenge to the adequacy of a certification proved unfruitful based on waiver.³²⁸ A similar challenge, however, was sufficiently preserved and successful on appeal in *Howard v. US Bank Trust National Association*, in which the court of appeals found an attestation insufficient under Rule 902(11) that stated:

I have access to business records relating to mortgage loans that are

321. *Id.* at 1272–73.

322. IND. R. EVID. 902.

323. *In re A.B.*, No. 24A-JT-991, 2024 Ind. App. Unpub. LEXIS 1313, at *10 (Ind. Ct. App. Oct. 9, 2024) (quoting *Wells Fargo Bank, N.A. v. Hallie*, 142 N.E.3d 1033, 1038 (Ind. Ct. App. 2020)).

324. 264 N.E.3d 696, 706 (Ind. Ct. App. 2025) (applying IND. R. EVID. 902).

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

326. 258 N.E.3d 1063, 1079 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025).

327. No. 24A-CR-1501, 2025 LX 34668, at *10–11 (Ind. Ct. App. Jan. 30, 2025), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

328. No. 24A-CR-1673, 2025 LX 12947, at *21–22 (Ind. Ct. App. May 1, 2025) (alteration in original) (calling into question attestation that the affiant “read the foregoing Affidavit and declare[d] that it is true and correct to the best of my knowledge”), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

maintained in the ordinary course of the regularly conducted activity of mortgage loan servicing, including the business records for and relating to the mortgage loan of Howard. The statements I make in this Affidavit are based upon my review of those records relating to Howard's mortgage loan. The business records for Howard's mortgage loan were made at or near the time of the event, and by or from information transmitted from a person with knowledge.³²⁹

Consistent with *Speybroeck v. State*, the language was “merely a boilerplate recitation of the requirements of Evidence Rule 803(6) [that] certifies nothing under Evidence Rule 902(11).”³³⁰

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

“The best evidence rule requires an ‘original writing, recording, or photograph’ to ‘prove its content.’”³³¹ The term “best evidence rule. . . is something of a misnomer. The rule is perhaps more accurately dubbed the original document rule, for instead of requiring the ‘best’ evidence in every case, the rule actually requires the production of an original document rather than a copy.”³³² Regardless of its name, its purpose “is to ‘ensure that the best version of a particular item of evidence is presented—not that one item of evidence should be disregarded as being less reliable or somehow not as good as another.’”³³³

Although the heart of the rule is embodied in Rule 1002, it works in conjunction with other rules, including Rule 1003, which govern use of duplicates,³³⁴ and Rule 1004 which provides other circumstances in which the original is not required.³³⁵ Because these rules are interrelated, they are often argued in conjunction with one another when asserting a best-evidence-rule challenge.³³⁶ *Cobb v. State* was such a case in which Rules 1002, 1003, and 1004 were each raised as part of a best-evidence-rule challenge.³³⁷ There, the court of

329. No. 24A-MF-142, 2024 Ind. App. Unpub. LEXIS 1339, at *8–12 (Ind. Ct. App. Oct. 15, 2024).

330. *Id.* at *10–11 (discussing *Speybroeck v. State*, 857 N.E.2d 813, 817, 820 (Ind. Ct. App. 2007)).

331. *Straws v. State*, No. 24A-CR-929, 2024 LX 62258, at *8 n.2 (Ind. Ct. App. Dec. 3, 2024) (quoting IND. R. EVID. 1002).

332. *DeMarco v. Ohio Decorative Prods.*, No. 92-2294, 1994 U.S. App. LEXIS 3848, at *27 (6th Cir. Feb. 25, 1994).

333. *Straws*, 2024 LX 62258, at *8 n.2 (quoting *Swihart v. State*, 71 N.E.3d 60, 63 n.3 (Ind. Ct. App. 2017)).

334. IND. R. EVID. 1003.

335. IND. R. EVID. 1004.

336. *See, e.g., Stansel v. State*, No. 24A-CR-554, 2024 Ind. App. Unpub. LEXIS 1438, at *4–5 (Ind. Ct. App. Oct. 31, 2024).

337. No. 23A-CR-2907, 2024 Ind. App. Unpub. LEXIS 1443, at *10–18 (Ind. Ct. App. Nov. 4, 2024).

appeals held that it was error to allow five still images from a video and witness to testify as to the contents of the video in lieu of placing a copy of the video into evidence.³³⁸ What implicated Rules 1003 and 1004 was that the original security surveillance video no longer existed; instead, what remained was a re-recorded video captured using a cell phone.³³⁹

The appellate court rejected an argument under Rule 1003 that “the still photos were admissible as either originals or duplicates.”³⁴⁰ As the court explained:

Under Evidence Rule 1003, a duplicate is admissible to the same extent as an original unless “the circumstances make it unfair to admit the duplicate.” As our Supreme Court has observed, the introduction of “photos pulled from a video” raises interesting questions about the best evidence rule and whether such photos are duplicates within the meaning of Evidence Rule 1003. We, too, need not determine whether still photographs pulled from a video would constitute an original or a duplicate of the video, because the State never sought to introduce all 9,006 photos comprising the video. And regardless of classification, five photos and witness recollection of a video are an insufficient substitute for a video’s contents, especially where a video *still exists*. Under these circumstances, it was unfair to admit five select photos in lieu of the video itself.³⁴¹

Notably, had it been the defendant who sought to use the still photos, the best evidence rule would likely have not been an impediment. The video was not produced by the state in discovery.³⁴² Under Indiana Trial Rule 34,³⁴³ “[w]hen a party or witness in control of a writing or document subject to examination under this rule or Rule 9.2(E) refuses or is unable to produce it, evidence thereof must be allowed by other parties without compliance with the rule of evidence requiring production of the original document or writing as best evidence.”³⁴⁴ In this instance, Rule 34 would not apply, because it was the prosecution, not the defense, seeking to use the still images.

338. *Id.*

339. *Id.* at *10.

340. *Id.* at *14.

341. *Id.* at *14–15 (footnote omitted) (quoting IND. R. EVID. 1003; *D.Z. v. State*, 100 N.E.3d 246, 249 n.1 (Ind. 2018)).

342. *Id.* at *16–17.

343. Although the Indiana Trial Rules generally govern only civil proceedings, IND. R. TRIAL P. 1, the discovery rules are incorporated into Indiana criminal proceedings. *Minges v. State*, 192 N.E.3d 893, 897 (Ind. 2022) (citing IND. R. CRIM. P. 21 (2022)); IND. R. CRIM. P. 1.1 (2024); IND. R. CRIM. P. 2.5 (2024).

344. IND. R. TRIAL P. 34(H) (2026). The language quoted above is taken from the amended version of Rule 34, which took effect on January 1, 2026. Prior to amendment, nearly identical language was contained in Rule 34(D). *In re* Ord. Amending Rules of Trial Proc., No. 25S-MS-5, 2025 LX 365814, at *23 (Ind. Sep. 9, 2025).

Although not addressed in *Cobb*, its holding is reminiscent of the Indiana Supreme Court's ruling in *Tobar v. State* that the best evidence rule dictates that the audio recording, when they exist, should be used in lieu of transcripts because "[t]he best evidence of the statement or conversation remains the tape itself."³⁴⁵ The rationale for preferring recordings over transcripts is the need to place statements into context.³⁴⁶ As with audio recordings, video stills strip context that only recordings can provide. It merits mention, however, that courts from beyond Indiana have held that stills of videos are duplicates of originals and satisfy the best evidence rule.³⁴⁷

XI. STATUTORY EVIDENTIARY PROCEDURES

Like common-law evidentiary procedures, Rule 101(b) preserves statutory evidentiary procedures that do not conflict with the Rules of Evidence.³⁴⁸ One such statute is codified at Indiana Code section 9-30-6-6, which governs the admission of blood-test results.³⁴⁹ One provision of that statute allows collection of samples by non-physicians "acting under the direction of or under a protocol prepared by a physician[.]"³⁵⁰ During the survey period, there were multiple challenges to whether there was sufficient evidence that samples were collected pursuant to a physician's protocol.³⁵¹ The Indiana Court of Appeals found a sufficient foundation laid where a nurse "testified that her hospital had a protocol for blood draws, that a physician approved the protocol, and that she was trained in and followed the protocol."³⁵² In a separate opinion, the court of appeals rejected a challenge based on the witness's inability to "articulate every step of the protocol verbatim in her testimony."³⁵³ Instead, the court noted, the witness "was not required to recite the hospital protocol verbatim in her testimony, nor was she required to be viewing the protocol at the time she completed the blood draw."³⁵⁴

345. 740 N.E.2d 106, 107 (Ind. 2000).

346. *See, e.g.,* *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1480 (D.S.C. 1996) ("However, since the remarks were clearly intended to be, and taken as humorous, and since humor is a matter of words, timing, and audience context, the best evidence of the remarks is an authentic audio recording.").

347. *See, e.g.,* *United States v. Perry*, 925 F.2d 1077, 1082 (8th Cir. 1991); *Est. of Pickett v. Howell*, No. A21-0960, 2022 Minn. App. Unpub. LEXIS 322, at *11–12 (Minn. Ct. App. May 23, 2022); *State v. Jennings*, No. 08-MA-181, 2009 Ohio App. LEXIS 5460, at *6 (Ohio Ct. App. Dec. 7, 2009).

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

349. IND. CODE § 9-30-6-6 (2025).

350. IND. CODE § 9-30-6-6(a) (2025).

351. *See, e.g.,* *James v. State*, No. 24A-CR-378, 2025 LX 41972, at *3–6 (Ind. Ct. App. Mar. 25, 2025), *trans. denied*, 262 N.E.3d 816 (Ind. 2025).

352. *Howard v. State*, No. 24A-CR-1246, 2025 LX 41197, at *5 (Ind. Ct. App. Apr. 8, 2025).

353. *Martinez-Orta v. State*, 254 N.E.3d 1149, 1157 (Ind. Ct. App. 2025).

354. *Id.*

XII. COMMON LAW RULES: CORPUS DELICTI & SPOLIATION

Upon their adoption, the Indiana Rules of Evidence supplanted common-law practices, but only to the extent not reconcilable with a rule of evidence.³⁵⁵ The survey period provided important insights into two common law doctrines: the *corpus delicti* rule and spoliation.³⁵⁶

A. Corpus Delicti Rule

Under the *corpus delicti* rule, evidence solely of “a nonjudicial confession of guilt” is insufficient to support a criminal conviction.³⁵⁷ In order to sustain a conviction based upon a confession, “[t]here must be ‘independent proof of the corpus delicti’”³⁵⁸—i.e., the “body or substance of the crime.”³⁵⁹ “The corpus delicti rule requires only enough independent evidence to support an inference that someone committed the charged crime—a much lower bar than proving beyond reasonable doubt that a specific defendant committed the crime.”³⁶⁰ “This rule exists to prevent convictions based solely upon confessions to crimes that never occurred.”³⁶¹

The Indiana Court of Appeals twice analyzed the corpus delicti rule in the context of confessions. In *Smith v. State*, the court found sufficient independent evidence for a conviction of unlawful possession of a firearm where the criminal defendant had stipulated to his status as a felon and that a firearm was found in the vehicle in which the defendant was a passenger.³⁶² In *Womack v. State*, the court affirmed a conviction for neglect of a dependent, resulting in the death of a 28-day-old infant, based on evidence that a deceased infant died from suffocation and was found in a position consistent with that described by the defendant in his confession.³⁶³

B. Spoliation

During the survey period, the Indiana Court of Appeals issued an opinion

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

356. Although not breaking new ground, the Indiana Court of Appeals opinion in *Turner v. KLS Servs., LLC*, 254 N.E.3d 1082, 1088–90 (Ind. Ct. App. 2025), provided a thorough summary to Indiana’s application of the common-law parol evidence rule, which would serve practitioners as a useful reference point for the standards governing its application.

357. *Womack v. State*, No. 24A-CR-3127, 2025 LX 162713, at *5 (Ind. Ct. App. June 20, 2025) (quoting *Shinnock v. State*, 76 N.E.3d 841, 843 (Ind. 2017)), *trans. denied*, 267 N.E.3d 982 (Ind. 2025).

358. *Id.* (quoting *Shinnock*, 76 N.E.3d at 843).

359. DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 128 (1992).

360. *Smith v. State*, No. 24A-CR-1278, 2024 LX 33519, at *5 (Ind. Ct. App. Dec. 23, 2024).

361. *Id.* at *4.

362. *Id.* at *1–2, *5.

363. *Womack*, 2025 LX 162713, at *4–6.

that was viewed as a major victory for plaintiffs in applying the doctrine of spoliation.³⁶⁴ “Spoliation is a particular discovery abuse that involves the intentional or negligent destruction, mutilation, alteration, or concealment of physical evidence.”³⁶⁵ In *Rosen v. Community Healthcare System*, the appellate court held that refusal of a jury instruction on spoliation due to a hospital’s failure to preserve video evidence was an abuse of discretion.³⁶⁶ As the appellate court stated, “Whether intentional or negligent, Hospital’s failure to preserve additional footage from the camera facing the main entrance and the video recordings from other cameras in the area of the lobby was spoliation.”³⁶⁷

Although the opinion was notable, the Indiana Supreme Court granted transfer, thereby vacating the opinion of the court of appeals.³⁶⁸ On transfer, Justice Goff believed “the trial court should have had the parties present evidence on the destruction of the video footage, had the parties argue what inferences to draw from the destruction of evidence, and given Rosen’s proffered instruction.”³⁶⁹ The majority of the court, however, concluded that “the trial court’s evidentiary rulings were reasonable judgment calls within the trial judge’s discretion, and [that the court] must defer to those rulings.”³⁷⁰

364. *Rosen v. Cmty. Healthcare Sys.*, 257 N.E.3d 6, 12–16 (Ind. Ct. App. 2025), *vacated*, 2026 LX 129887 (Ind. 2026).

365. *Id.* at 12 (citation omitted).

366. *Id.* at 12–16.

367. *Id.* at 14.

368. *Rosen v. Cmty. Healthcare Sys.*, 265 N.E.3d 1002 (Ind. 2025); IND. R. APP. P. 58(A).

369. *Rosen v. Cmty. Healthcare Sys.*, No. 25S-CT-217, 2026 LX 129887, at *28 (Ind. Mar. 11, 2026) (Goff, J., dissenting).

370. *Id.* at *23 (majority opinion).