2017 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

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In the summer of 1993, the Indiana Supreme Court set aside more than a century of common-law evidentiary practice in favor of the Indiana Rules of Evidence.[1] Although a handful of uniquely common-law practices managed to survive,[2] the survey period reminds that many of the once deeply ingrained aspects of common law are confined to history.[3] The focus of this survey is upon developments in Indiana's evidence law spanning the period from October 1, 2016 through September 30, 2017. In keeping with the consistent practice of this survey since the 1996 installment,[4] the topics for discussion shall be addressed in the same order as the Indiana Rules of Evidence.

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

A. Rule 101: To What Do the Rules Apply

Although designed to govern proceedings in each court of the state, there are numerous settings in which the Rules of Evidence do not apply.[5] Indiana Evidence Rule 101 generally sets forth their applicability.[6] Two decisions from the survey period addressed some of the specific parameters for application. In *Matthews v. State*, the court of appeals reiterated that the Rules are inapplicable in parole revocation hearings;[7] but the Rules are applicable to the formal fact-finding portion of juvenile delinquency hearings, as recognized by *M.T.V. v.*

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1. Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 IND. L. REV. 1063, 1063 (1994).

2. *See*, *e.g.*, IND. R. EVID. 501(a) (preserving common-law privileges); State v. Walton, 715 N.E.2d 824, 826-27 (Ind. 1999) (recognizing additional common law exception to IND. R. EVID. 412 permitting evidence of prior false accusations of rape).

3. Snow v. State, 77 N.E.3d 173, 174 (Ind. 2017) ("We thus reiterate today our holding from over twenty years ago: *res gestae*—the common-law doctrine that made evidence admissible when it was part of a crime's story—is no more."); *accord* Harris v. State, 76 N.E.3d 137, 139 (Ind. 2017).

4. Edward F. Harney, Jr. & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887 (1996); *see*, *e.g.*, Yvonne M. Dutton, *Recent Developments in Indiana Evidence Law: October 1, 2014 to September 30, 2015*, 49 IND. L. REV. 1053 (2016).

5. *See*, *e.g.*, IND. R. EVID. 101(d); IND. CODE § 4-21.5-3.5-24 (2017) (inapplicable in mediation); IND. SM. CL. R. 8(A) (evidence rules generally inapplicable in small claims).

6. IND. R. EVID. 101. Statutes also dictate specific instances in which the Rules of Evidence apply. *See*, *e.g.*, IND. CODE § 33-38-13-18 (2017) (applying in judicial disciplinary hearings); *id.* § 33-38-14-20 (same).

7. 64 N.E.3d 1250, 1256 (Ind. Ct. App. 2016) (citing IND. R. EVID. 101(d)(2)).

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State.[8]

B. Rule 103: Preserving Review on Evidentiary Rulings

The steps necessary to preserve most forms of error in admission or denial of evidence are set forth in Rule 103. Four decisions from the survey period provide further insight into what suffices to preserve appeal. In both *Green v. State*[9] and *Alvarez-Madrigal v. State*,[10] the court of appeals, looking to subdivision (a) of the Rule, cautioned that even erroneous admission of evidence will not provide ground for reversal unless the "error is inconsistent with substantial justice or affects the substantial rights of a party."[11] Such an admission constitutes harmless error so long as "there is substantial independent evidence" supporting the verdict.[12]

But even to be able to argue error, unless dealing with the rare circumstance of fundamental error,[13] a party must either timely object to admission or, in the instance of exclusions, inform the court of the exhibit's "substance by an offer of proof, unless the substance [i]s apparent from the context."[14] In *Davis v. State*, the self-represented defendant fell short of the obligation to suitably apprise the court of the excluded exhibit's substance.[15] "Before trial, Davis informed the trial court that he intended to introduce records of his vehicle's maintenance."[16] The court sustained an objection to the records and "Davis did not attempt to introduce the exhibits at trial or make an offer of proof."[17] The failure to do so was ruled a waiver of the issue on appeal.[18]

On the other end of the spectrum was *K.G. v. State*, which acknowledged that repetitive objections are unnecessary to preserve error so long as "the court [has] rule[d] definitively on the record at trial[.]"[19] The appeal stemmed from an adjudication of delinquency of a minor following a stop by a police officer that resulted in discovery of ammunition, alcohol, and a pipe containing marijuana residue on the minor.[20] In the same session, the juvenile court held a hearing on the minor's motion to suppress evidence and, immediately after denial of

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8. 66 N.E.3d 960, 962 (Ind. Ct. App. 2016) (citing N.L. v. State, 989 N.E.2d 773, 779 (Ind. 2013)), *trans. denied*, 83 N.E.3d 1220 (Ind. 2017).

9. 65 N.E.3d 620, 634-35 (Ind. Ct. App. 2016).

10. 71 N.E.3d 887, 894 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1077 (Ind. 2017).

11. *Alvarez-Madrigal*, 71 N.E.3d at 894; *accord Green*, 65 N.E.3d at 634-35.

12. *Alvarez-Madrigal*, 71 N.E.3d at 894.

13. Fundamental error is preserved even without objection. IND. R. EVID. 103(e).

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

15. 74 N.E.3d 1215, 1219-20 (Ind. Ct. App. 2017).

16. *Id*. at 1217.

17. *Id*. at 1218.

18. *Id*. at 1220.

19. 81 N.E.3d 1078, 1080 n.5 (Ind. Ct. App. 2017) (quoting IND. R. EVID. 103(b)) (quotation marks omitted).

20. *Id*. at 1079-80.

suppression, conducted the hearing on delinquency.[21] During the delinquency hearing, the minor's counsel stated, "I guess Judge for the record since we're technically at the trial I renew my motion to suppress objection."[22] With the court's response being, "Yeah I'm denying that[,]" the error in denying suppression was preserved.[23]

C. Rule 105: Instructing Jury on Limited Scope of Evidence

In one of the most important decisions from the survey period, the Indiana Supreme Court incidentally provided some insight into the rarely addressed Rule 105. At issue in *Sims v. Pappas* was whether evidence of prior alcohol-related driving offenses could be admitted to support a claim for punitive damages in an injury case following a drunk-driving motor-vehicle collision.[24] The case addressed many Rules of Evidence, including Rule 105.[25] After holding that the prior offenses could be admitted for the limited purpose of ascertaining punitive damages, the court advised that a party concerned with a jury impermissibly viewing the evidence more broadly had resort to Rule 105 to require the trial court to instruct the jury on the limited scope of the evidence.[26] The court also added that the burden to request an instruction falls upon "the party seeking to limit the evidence[,]" not the trial court, which "has no affirmative duty to admonish a jury sua sponte as to such evidentiary matters[.]"[27]

II. JUDICIAL NOTICE: RULE 201

Carl Sagan famously wrote, "If you wish to make an apple pie from scratch, you must first invent the universe."[28] Judicial notice is the tool that saves legal chefs the labor of creating the universe before baking the pie. As Judge Miller's esteemed treatise recognizes, judicial notice is the logical outgrowth of expecting reasonably competent men and women to serve as judges and jurors.[29] In a similar vein, long ago, the Indiana Supreme Court stated, "[C]ourts will take judicial notice of matters of common and general knowledge, and 'not pretend to be more ignorant than the rest of mankind.'"[30]

Judicial notice by Indiana tribunals is governed by Evidence Rule 201 and the Uniform Judicial Notice of Foreign Law Act.[31] Judicial notice was addressed in

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21. *Id*. at 1080 n.5.

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

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

24. 73 N.E.3d 700, 703 (Ind. 2017).

25. *Id*. at 705-08 (discussing IND. R. EVID. 105, 401, 403, 404 & 609).

26. *Id*. at 707.

27. *Id*. (quoting Small v. State, 736 N.E.2d 742, 746 (Ind. 2000)) (internal quotation marks omitted).

28. CARL SAGAN, COSMOS 218 (1985).

29. 12 IND. PRACTICE SERIES: IND. EVIDENCE § 201.101 at 175-76 (3d ed. 2007).

30. Page v. State, 139 N.E. 143, 144 (1923) (internal citation omitted).

31. H.B. v. J.R. (*In re* P.R.), 940 N.E.2d 346, 349 (Ind. Ct. App. 2010); IND. CODE §§ 34-38-

numerous decisions in the survey period. Most notable was a footnote by the Indiana Supreme Court in *State v. Hancock*.[32] In determining whether a foreign conviction was sufficiently similar to trigger the serious violent felon statute, the court cautioned that the presumption of a trial judge knowing the law "does not extend to other jurisdictions' laws—which courts must receive as evidence, through judicial notice."[33] Although a trial court is permitted to conduct its own research into the laws of other jurisdictions, it is neither obligated nor expected to do so.[34] Thus, "the onus of presenting another jurisdiction's law lies properly with the party relying on that law."[35]

Of similar note was *D.P. v. Indiana Department of Child Services* from the Court of Appeals of Indiana.[36] In determining that D.P. was a child in need of services ("CHINS"), the trial court took judicial notice of "preliminary reports and other filings during the course of the proceedings."[37] Included in the items noticed were references to drug use by D.P.'s father.[38] The court, however, held that judicial notice of the contents of the records exceeded the scope of Rule 201.[39] The court reasoned that Rule 201 permits only notice of "the fact of a record's existence[,]" not "all facts contained within a court record."[40] That it was a CHINS case, in which "the trial judge . . . is required to be an attentive and involved participant in the process[,]" did not make consideration of "inadmissible evidence or evidence outside the record" allowable.[41]

Other useful observations were: a court may take judicial notice of records in related cases pending before the same court,[42] a press release issued by the Governor of Indiana,[43] court orders available on the Odyssey system,[44] and the underlying briefs that resulted in an authoritative decision;[45] although judicial notice may be taken "at any stage of the proceeding, all evidence to be considered for summary judgment purposes must be designated at the time of the filing of the

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4-1 *et seq*. (2017).

32. 65 N.E.3d 585, 593 n.8 (Ind. 2016).

33. *Id*.

34. *Id*.

35. *Id*.

36. 72 N.E.3d 976, 982-84 (Ind. Ct. App. 2017).

37. *Id*. at 982.

38. *Id*.

39. *Id*.

40. *Id*. at 983.

41. *Id*. at 983-84 (quoting Baker v. Marion Cty. Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind. 2004)) (internal quotation marks omitted).

42. Cheek v. State, 79 N.E.3d 388, 392 n.2 (Ind. Ct. App. 2017).

43. Groth v. Pence, 67 N.E.3d 1104, 1120 n.10 (Ind. Ct. App.), *trans. denied*, 86 N.E.3d 172 (Ind. 2017).

44. J.S. v. Ind. Dep't of Child Servs. (*In re* L.S.), 82 N.E.3d 333, 336 n.1 (Ind. Ct. App.), *trans. denied*, 95 N.E.3d (Ind. 2017).

45. Jones v. State, 79 N.E.3d 911, 916 n.3 (Ind. Ct. App. 2017).

summary judgment motion or response, including 'matters of judicial notice'";[46] even if judicial notice would prove an affirmative defense, it does not relieve a party of its burden of both pleading and proving the defense;[47] in awarding attorney fees, a court may take judicial notice of the reasonable fees "in certain routine actions, such as dissolutions of marriage, in which modest fees are sought[,]" but must receive objective evidence of reasonableness when the amount sought is substantial;[48] and the Indiana Board of Tax Review is not subject to Rule 201, so the board may, but is not required to, take judicial notice of other proceedings before it.[49]

III. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

A. Rule 401: What Is and Is Not Relevant Evidence

Rule 401 establishes what evidence is relevant: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[50] The standard for relevancy is "liberal" and "sets a low bar" for admission.[51] The importance of Rule 401 lies in the dictates of Rule 402 that relevant evidence is generally admissible and irrelevant evidence is not.[52] Numerous decisions during the survey period broadened the understanding of relevancy under Rule 401.

The Indiana Supreme Court held that evidence of reduced rates paid by governmental healthcare providers is "relevant, probative evidence of the reasonable value of medical services."[53] The court also found a gun in the possession of a woman while assaulting a police officer was admissible even without a charge for unlawful possession because it was relevant to show aggressiveness, which is an element of both crimes that were charged against the woman.[54]

A few other noteworthy cases found: evidence in a child molestation action that the criminal defendant drinks alcohol and owns guns is relevant to explain why a child "delayed in disclosing the molestations;"[55] "[a] parent's criminal history is relevant to whether the parent is unfit to be a parent" for purposes of

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46. Mizen v. State *ex rel.* Zoeller, 72 N.E.3d 458, 468 (Ind. Ct. App.) (quoting IND. R. TRIAL P. 56(C)), *trans. denied*, 88 N.E.3d 1078 (Ind. 2017).

47. Dumka v. Jones, 70 N.E.3d 828, 833 n.2 (Ind. Ct. App. 2017).

48. Shelby's Landing-II, Inc. v. PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship, 65 N.E.3d 1103, 1112 (Ind. Ct. App. 2016).

49. CVS Corp. v. Monroe Cty. Assessor, 83 N.E.3d 1281, 1283-84 (Ind. T.C. 2017).

50. IND. R. EVID. 401.

51. Snow v. State, 77 N.E.3d 173, 177 (Ind. 2017) (internal quotation marks omitted).

52. IND. R. EVID. 402.

53. Patchett v. Lee, 60 N.E.3d 1025, 1031 (Ind. 2016).

54. *Snow*, 77 N.E.3d at 177-78.

55. Baumholser v. State, 62 N.E.3d 411, 414 n.2 (Ind. Ct. App. 2016), *trans. denied*, 80 N.E.3d 180 (Ind. 2017).

determining whether consent is required under Indiana's adoption statute;[56] and testimony of a person familiar with a company's business practices is relevant to address practices prior to the date on which the declarant was hired when independent evidence shows that there has been no change in practices up to the hiring date of the declarant.[57]

But not every challenge to relevance was rebuffed. In *Davis v. State*, the court of appeals ruled that evidence of a defendant's "DePauw University license plate" was not relevant to rebut a defense of necessity for speeding.[58] At issue was the claim that the defendant was speeding because he was urgently trying to get his overheating car home or to a mechanic before it ceased to operate.[59] "The State sought to rebut this defense, in part, by showing that Davis is a college educated individual who is employed full-time as a real estate broker and has the means to repair his vehicle[,]" or should otherwise have known better than to drive a malfunctioning car.[60] Without much discussion, the appellate court concluded that evidence of the license plate was simply irrelevant to rebut the defense.[61]

B. Rule 403: Unfairly Prejudicial Evidence

Although otherwise relevant and admissible, evidence may be excluded under Rule 403 "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."[62] The survey period brought many important interpretations of Rule 403. Easily the most important was the Indiana Supreme Court's *Escamilla v. Shiel Sexton Co.* opinion.[63]

After ruling that unauthorized immigrants may pursue claims for decreased earning capacity damages,[64] the court turned to whether a person's immigration status is admissible in a claim for such damages.[65] Following thorough analysis, the unanimous court ruled, under Rule 403, that "a plaintiff's unauthorized immigration status is admissible only under one limited circumstance: if the evidence's proponent shows by a preponderance—in other words, that it is more likely than not—that the plaintiff will be deported."[66]

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56. Mendez v. Weaver (*In re* D.M.), 82 N.E.3d 354, 359 (Ind. Ct. App. 2017) (citing IND. CODE § 31-19-9-8(a)(11)).

57. Richardson's RV Inc. v. Ind. Dep't of State Revenue, 80 N.E.3d 945, 947 (Ind. T.C. 2017).

58. 74 N.E.3d 1215, 1220-21 (Ind. Ct. App. 2017).

59. *Id*. at 1218.

60. *Id*. at 1221.

61. *Id*.

62. IND. R. EVID. 403.

63. 73 N.E.3d 663 (Ind. 2017).

64. *Id*. at 666-68.

65. *Id*. at 668-76.

66. *Id*. at 670.

Another important decision from the Indiana Supreme Court permitted evidence of payments below the listed price for medical charges made by governmental payers.[67] In so holding, the court rejected a Rule 403 challenge, writing:

> We [ ] doubt the record in most personal-injury cases will justify excluding such evidence under Rule 403, at least where the tort plaintiff has introduced the amount of billed medical charges under Rule 413. These opposing, complementary twin values—billed charges and accepted amounts—are the yin and yang of a personal-injury suit for damages where the issue is the reasonable value of necessary medical services. In such cases, parties should expect and courts should presume that the admission of billed provider charges will be accompanied by the admission of reduced amounts accepted by providers as payment in full.[68]

The court did, however, clarify that its holding did not mean "that Rule 403 can *never* supply a proper basis for excluding the reduced amount a healthcare provider has accepted as full payment for medical services. But we imagine the permissible circumstances for excluding such evidence under Rule 403 will be few and far between."[69]

In *Snow v. State*, the Indiana Supreme Court ruled that the trial court acted within the permissible scope of its discretion in allowing evidence of a firearm that was not the basis for a criminal charge.[70] Having found the firearm was relevant, the court ruled that either exclusion or admission was a permissible ruling by the trial court in that instance.[71] The court recognized that evidence of possession of a firearm can be unfairly prejudicial when it "suggests another uncharged crime."[72] But because the state did not accuse the defendant of breaking the law in her possession of the firearm, there was no basis to reverse the admission on appeal.[73]

Other notable insights into Rule 403 were: Rule 403 does not "impose[] a temporal component on the admissibility of prior offense evidence";[74] "any danger of unfair prejudice" by a photograph of a victim from three days before he was killed "by blunt force trauma to the head" "was not so high that it overrode the trial court's discretion under Rule 403";[75] evidence is not unfairly prejudicial just because the only way for a criminal defendant to contradict it is

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67. Patchett v. Lee, 60 N.E.3d 1025, 1027 (Ind. 2016).

68. *Id*. at 1033.

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

70. 77 N.E.3d 173, 179 (Ind. 2017).

71. *Id.* at 177-79.

72. *Id.* at 179 (quoting Jervis v. State, 679 N.E. 2d 875, 878 (Ind. 1997) (internal alteration omitted)).

73. *Id.*

74. Sims v. Pappas, 73 N.E.3d 700, 708 (Ind. 2017).

75. Rolston v. State, 81 N.E.3d 1097, 1103 (Ind. Ct. App.), *trans. denied*, 94 N.E.3d 297 (Ind. 2017).

to waive her Fifth Amendment right to remain silent because "*all* incriminating evidence may have that effect"; [76] evidence of a medical expert's personal practices is not prohibited by Rule 403 when the expert testifies as to the standard of care because "[t]he jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration";[77] and, on first impression, the court of appeals concluded that removal of an artificial eye in the presence of a jury by a victim so as to indicate the severity of the injury did not violate Rule 403 because the state had the "burden to prove a protracted injury."[78]

C. Rule 404(b): Use of Prior Crimes & Bad Acts

Like Rule 403, "Evidence Rule 404(b) further limits the admissibility of otherwise relevant evidence . . . ."[79] "Ind. Evidence Rule 404(b) prohibits the use of a defendant's 'crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the defendant acted in accordance with that character.'"[80]

Although the rule is most often applied in the criminal law context, the most notable decision applying the rule during the survey period was in a civil action. In *Sims v. Pappas*, the Indiana Supreme Court ruled that use of prior "alcohol-related driving convictions" for the purpose of establishing a claim to punitive damages for personal injuries following the defendant's drunken driving did not violate Rule 404(b).[81] In the criminal context, the rule serves the purpose of "prevent[ing] the jury from making the 'forbidden inference' that prior wrongful conduct suggests present guilt."[82] But when used "in support of a punitive damages claim in the civil context . . .[,]" the paradigm shifts:

> Admitting evidence of past similar criminal conduct allows the factfinder to determine whether defendant has learned his lesson and profited by his past experience or whether despite his past experience the defendant nonetheless engaged in a conscious, voluntary act or omission in reckless disregard of the consequences to another party. Essentially, evidence of a civil defendant's past similar convictions is sought to be introduced

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76. Wallace v. State, 79 N.E.3d 992, 999 (Ind. Ct. App. 2017) (emphasis in original, internal alteration omitted).

77. Oaks v. Chamberlain, 76 N.E.3d 941, 950 (Ind. Ct. App.) (quoting Smethers v. Campion, 108 P.3d 946, 955 (Ariz. Ct. App. 2005)), *trans. denied*, 94 N.E.3d 699 (Ind. 2017).

78. Bowman v. State, 73 N.E.3d 731, 734-36 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1079 (Ind. 2017).

79. Stettler v. State, 70 N.E.3d 874, 879 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1079 (Ind. 2017).

80. Baumholser v. State, 62 N.E.3d 411, 415 (Ind. Ct. App. 2016) (quoting IND. R. EVID. 404(b)), *trans. denied*, 80 N.E.3d 180 (Ind. 2017).

81. 73 N.E.3d 700, 703, 708-09 (Ind. 2017).

82. *Id.* at 708 (citation and quotation marks omitted).

precisely to show his proclivity to engage in the prohibited conduct.[83]

An insightful decision from the court of appeals was also handed down applying Rule 404(b) in the criminal context.[84] At trial for child molestation, evidence of the defendant's alleged prior sexual conduct toward the victim was admitted over objection.[85] In support of admission, the state argued that the evidence was used for the permissible purpose of establishing the defendant's plan.[86] The court identified two branches of the "plan" exception to Rule 404(b).[87] "One branch . . . is for acts that are part of a common scheme or plan, that is, evidence of acts that constitute an uninterrupted transaction, and of which the charged act is one."[88] The other branch "relates to questions of identity and motive, and often involve an examination of the similarity of the prior bad acts to the charged offense, or to the relationship between the defendant and the victim as means for showing motive."[89]

The evidence did not satisfy the first branch because "[t]here was no evidence that the prior acts were in any way committed in conjunction with the charged offense, and thus there was no basis upon which to conclude that the prior acts were evidence of a common scheme or plan."[90] In a prior decision, the court of appeals "held that 'monthly molesting which continued for six years' did not constitute an uninterrupted transaction within the contemplation of Rule 404(b)."[91] The evidence also failed the second branch because "the State did not articulate how this would give evidence of either a plan or a specific motive, there was no dispute as to identity such that a more distinctive *modus operandi* was at issue, and there was no evidence of any particularly 'unique' manner of committing the prior uncharged offenses."[92]

D. Rule 413: Medical Expenses Under Patchett v. Lee

Without question, the most important evidentiary decision during the survey period was the Indiana Supreme Court's opinion in *Patchett v. Lee*,[93] which addressed a gap left open by the landmark case *Stanley v. Walker*.[94] Both *Stanley*

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83. *Id.* at 708-09 (citation and quotation marks omitted).

84. *Stettler*, 70 N.E.3d at 878-81.

85. *Id.* at 878.

86. *Id.* at 880. Evidence otherwise prohibited under Rule 404(b)(1) "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." IND. R. EVID. 404(b)(2).

87. *Stettler*, 70 N.E.3d at 880.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (quoting Sloan v. State, 654 N.E.2d 797, 799 (Ind. Ct. App. 1995), *abrogated on other grounds by* Hicks v. State, 690 N.E.2d 215, 220-21 (Ind. 1997)).

92. *Id.*

93. 60 N.E.3d 1025 (Ind. 2016).

94. 906 N.E.2d 852 (Ind. 2009).

and *Patchett* turned on the overlap of Rule 413 and Indiana's collateral-source statute. Rule 413 reads, "Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements are prima facie evidence that the charges are reasonable."[95] The collateral-source statute dictates that evidence of collateral sources are generally admissible in personal injury claims, with only limited exceptions.[96] Most notable among the exceptions is that evidence of insurance paid for by the plaintiff or her family is inadmissible as are payments made by an instrumentality of the state.[97]

In *Stanley*, focusing on the exception for insurance paid for by the plaintiff, the Indiana Supreme Court "interpreted Indiana's collateral-source statute to permit a defendant in a personal-injury suit to introduce discounted reimbursements negotiated between the plaintiff's medical providers and his private health insurer, so long as insurance is not referenced."[98] At the heart of *Stanley* was the dictate that a plaintiff was entitled to recover his or her "reasonable medical expenses."[99] Thus the debate was whether the billed amounts for medical expenses or the reduced amounts actually paid by health insurers were the reasonable amount. The *Stanley* court held that each were admissible evidence from which the jury could determine the actual reasonable values and that evidence of the discounted amounts did not violate the collateral-source statute.[100]

When an insurance provider pays medical bills, it is typically at a rate that has been negotiated.[101] But not all reduced payments to healthcare providers are the result of arms-length negotiations. When payments are made by governmental entities, the amounts to be paid may be unilaterally mandated by the governmental entity.[102] The *Patchett* plaintiff argued that the distinction meant evidence of reduced payments to a healthcare provider were not admissible if the payments were made by governmental entities because the paid amounts were not the product of negotiations.[103] The Indiana Supreme Court majority ruled that "*Stanley* applies to all accepted reimbursements, regardless of whether they are negotiated or mandated."[104]

The decision drew a concurrence from Justice Rucker, joined by Justice

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95. IND. R. EVID. 413.

96. IND. CODE § 34-44-1-2 (2017)

97. *Id.* § 34-44-1-2(1)(B) & (C).

98. *Patchett*, 60 N.E.3d at 1027.

99. *Stanley*, 906 N.E.2d at 858.

100. *Id*. at 858-59.

101. *Patchett*, 60 N.E.3d at 1028; Allen v. Clarian Health Partners, Inc., 980 N.E.2d 306, 310 (Ind. 2012) (discussing setting of insurance rates for medical services).

102. Patchett v. Lee, 46 N.E.3d 476, 484 (Ind. Ct. App. 2015), *vacated on trans.*, 60 N.E.3d 1025 (Ind. 2016).

103. *Patchett*, 60 N.E.3d at 1028.

104. *Id*. at 1030-31.

David.[105] The concurrence agreed that the logic of *Stanley* applied to governmental payers, but reiterated a dissent from *Stanley* by Justice Dickson, which Justice Rucker had joined, and would have ruled that reduced amounts were not admissible at all.[106] The concurrence also recognized that the governmental exception to the collateral-source statute, in the absence of *Stanley*, should dictate a contrary result:

> Indiana's collateral source statute could not be any clearer. It precludes admission into evidence of, among other things, "payments made by: i) the state or the United States; or ii) any agency, instrumentality, or subdivision of the state or the United States . . . ." Payments made by HIP—a federal/state government program—unquestionably fall within this prohibition. A contrary reading endorsed by Stanley and reaffirmed today simply cannot be reconciled with the collateral source statute."[107]

But because the plaintiff had not asked the court to reconsider *Stanley*, what may otherwise have been a dissent, was only a concurrence.[108]

Interestingly, the majority opinion was authored by Justice Slaughter, who had replaced Justice Dickson following his retirement in April 2016.[109] Had Justice Dickson still been on the bench, it is possible that *Stanley* would have been overruled instead of expanded.

IV. PRIVILEGES: RULES 501 & 502

Indiana evidence law looks to both Rules 501 and 502 along with statutes and common law to determine the scope and applicability of privileges.[110] The survey period saw numerous issues of privilege arise in Indiana courts.

In December 2014, then-Governor Mike Pence decided that the state of Indiana would join Texas in a lawsuit against the office of the President of the United States.[111] A request was made to the governor's office under the Indiana Access to Public Records Act for records related to that decision.[112] A document known as the "white paper," which was "created by a Texas deputy solicitor general concerning the proposed Texas litigation and disseminated to governors' offices in Indiana and numerous other states[,]" was withheld.[113] Invoking the

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105. *Id*. at 1033-34.

106. *Id*.

107. *Id*. (quoting IND. CODE § 34-44-1-2(1)(C)(ii) (2017)).

108. *Id.* at 1034.

109. *Justice Brent E. Dickson*, COURTS.IN.GOV, http://www.in.gov/judiciary/citc/2829.htm [perma.cc/9QVP-ER6X] (last visited Jan. 13, 2017).

110. 13B ROBERT L. MILLER, JR., INDIANA PRACTICE: COURTROOM HANDBOOK ON INDIANA EVIDENCE at 116 (2016-17 ed.).

111. Groth v. Pence, 67 N.E.3d 1104, 1108 (Ind. Ct. App.), *trans. denied*, 86 N.E.3d 172 (Ind. 2017).

112. *Id.* at 1109 (discussing IND. CODE §§ 5-14-3-1 *et seq*. (Supp. 2014)).

113. *Id.*

common interest privilege as an extension of the attorney-client privilege,[114] the court of appeals held that the white paper was properly excluded from public disclosure as a communication between prospective co-plaintiffs.[115]

But before the attorney-client privilege can attach, there must be, in fact, an attorney-client relationship. That was the issue presented to the U.S. District Court for the Southern District of Indiana in *Arc Welding Supply Co. v. American Welding & Gas, Inc*.[116] The decision arose from a motion to compel production of communications between the plaintiff and his accountant.[117] The plaintiff asserted both the attorney-client privilege and the accountant-client privilege to resist production.[118] As to the attorney-client privilege, the court recognized that the privilege extends to communications with agents of the attorney.[119] But what constitutes an agent for purposes of the privilege, the court determined, is not the broad standard applied for common law agency.[120] And, in that case, there was no attorney-client relationship because the accountant was the agent of the plaintiff, not the agent of the plaintiff's counsel.[121]

The court further examined whether the accountant-client privilege applied. The privilege dictates that "[a] certified public accountant . . . is not required to divulge information relative to and in connection with any professional service as a certified public accountant."[122] It, however, is a product of statute and not common law.[123] As a result, it is subject to strict construction.[124] Finding a lack of evidence that the communications at issue were the product of the accountant's professional services, the court ordered disclosure.[125]

The accountant-client privilege also arose before the U.S. District Court for the Northern District of Indiana.[126] The court rejected a broad attempt to invoke

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114. The common interest privilege applies "[w]hen two or more persons, with a common interest in some legal problem, jointly consult an attorney, [making] their confidential communications with the attorney, though known to each other . . . privileged in a controversy of either or both the clients with the outside world." *Id*. at 1120 (quotation marks and citations omitted).

115. *Id*. at 1117-23.

116. No. 3:16-cv-00173-RLY-MPB, 2017 U.S. Dist. LEXIS 161593 (S.D. Ind., May 4, 2017).

117. *Id*. at *1-2.

118. *Id*. at *3-4.

119. *Id*. at *5-6.

120. *Id*. at *7-8.

121. *Id*.

122. *Id*. at *8 (quoting IND. CODE § 25-2.1-14-1). "Professional services" means "matters 'arising out of or related to the specialized knowledge or skills associated with certified public accountants.'" *Id*. (quoting IND. CODE § 25-2.1-1-10.3).

123. *Id*. at *8-9 (citing IND. CODE § 25-2.1-14-1).

124. *Id*.

125. *Id*. at *9-11.

126. Ello v. Brinton, No. 2:14-CV-299-TLS-JEM, 2017 U.S. Dist. LEXIS 64927, at *7-8, (N.D. Ind., Apr. 28, 2017).

the privilege to shield personal tax returns.[127]

Returning to the Southern District of Indiana, there was also an informative decision regarding the spousal testimonial privilege.[128] The court acknowledged that the "privilege may be available in criminal cases when a spouse's testimony would be adverse to the non-testifying party spouse."[129] But the privilege has undergone a great deal of modification over the past century, with it no longer applying when the spouse is the victim of the alleged crime and allowing the testifying spouse the sole discretion whether to invoke or waive the privilege.[130]

V. WITNESSES: RULES 601 THROUGH 617

A. Rule 606: Post-Trial Testimony of Jurors

"Rule 606 governs the permissible limits of investigation into a juror's service and experience."[131] Subdivision (b) generally prohibits, with limited exceptions,[132] testimony of a juror "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[133] During the underlying trial in *Shaw v. State*, "the jurors had a question during deliberations, [and] the trial court sent them a note [telling] them that it could not answer any questions."[134] The convicted criminal defendant "requested state funds to investigate what had occurred during deliberations[.]"[135] But the court of appeals ruled that it would have been improper to award "funds to hire an investigator to help him 'reconstruct the record with respect to jury questions during deliberations" because it would run afoul of the dictates embodied by Rule 606 that "a jury's verdict may not be later impeached by the testimony or affidavit of the jurors who returned it."[136]

B. Rule 607: Experts on Standard of Care are Subject to Cross-Exam on Personal Practices

Rule 607 governs impeachment of witnesses. It replaced the common law prohibition on impeaching one's own witness without first demonstrating that the

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127. *Id.* (citing IND. CODE § 25-2.1-14-1 & -2).

128. Suding v. Superintendent Corr. Indus. Complex, No. 2:15-cv-00218-WTL-DKL, 2016 U.S. Dist. LEXIS 178995, at *14-15 (S.D. Ind. Dec. 28, 2016), *certificate of appealability denied*, No. 17-1167, 2017 U.S. App. LEXIS 14108 (7th Cir. June 2, 2017).

129. *Id.* at *14.

130. *Id.* at *14-15.

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

132. IND. R. EVID. 606(b)(2).

133. IND. R. EVID. 606(b)(1).

134. 82 N.E.3d 886, 894 (Ind. Ct. App. 2017), *trans. denied*, 96 N.E.3d 577 (Ind. 2018).

135. *Id.*

136. *Id.* at 893-94.

witness is hostile.[137] But Rule 607 also more generally permits attacks on credibility during cross-examination.[138] On first impression, the court of appeals addressed whether a medical expert testifying about the standard of care in a medical malpractice case can be cross-examined regarding his or her personal practices.[139] Aligning with the majority of other states to have addressed the issue,[140] the court held that the expert should have been subject to cross-examination as to his personal practices because it contradicted his testimony regarding the standard of care.[141] In so doing, the court rejected the argument that the expert's testimony would only show that his personal practices exceeded the minimum standard of care.[142]

C. Rule 609: Evidence of Criminal Convictions When Not Impeaching Credibility

Generally, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."[143] There is, however, an exception: criminal convictions may be admitted in accordance with Rule 609.[144] Two cases in the survey period addressed the breadth of Rule 609. *Sims v. Pappas*, from the Indiana Supreme Court, concluded that the ten-year limitation of Rule 609(b) did not apply to use of prior alcohol offenses in a personal injury case resulting from drunk driving because the purpose of the evidence was to support a claim for punitive damages, not assail the defendant's credibility, and because the ten-year limitation is not a complete bar, to admission anyway.[145]

In the other case, also a civil suit, the court of appeals found no error in the admission of the charging information and transcript from a change of plea hearing in the plaintiffs' related criminal action.[146] The charging information was

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137. *Compare* Hossman v. State, 473 N.E.2d 1059, 1062 (Ind. Ct. App.), *trans. denied*, 475 N.E.2d 1197 (Ind. Ct. App. 1985), *and* J. ALEXANDER TANFORD & RICHARD M. QUINLAN, INDIANA TRIAL EVIDENCE MANUAL § 34.4 (2d ed. 1987), *with* Harrison v. State, 699 N.E.2d 645, 648-49 (Ind. 1998) (citing IND. R. EVID. 607).

138. Oaks v. Chamberlain, 76 N.E.3d 941, 947 (Ind. Ct. App.), *trans. denied,* 94 N.E.3d 699 (Ind. 2017).

139. *Id*. at 947-51.

140. *Id*. at 948-50.

141. *Id*. at 950.

142. *Id*. at 948-50.

143. IND. R. EVID. 608(b).

144. *Id*.

145. Sims v. Pappas, 73 N.E.3d 700, 708 (Ind. 2017) ("[I]n addition to prior notice, the Rule simply imposes the requirement that the 'probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.' Although worded slightly differently this requirement is essentially the same as that imposed by the rule at stake here, namely Rule 403 . . . ." (citation omitted)).

146. Garwood v. State, 77 N.E.3d 204, 231-33 (Ind. Ct. App.), *aff'd in relevant part on trans.*,

admissible without regard for Rule 609 because it was offered "for the purpose of showing the chronology of events of [the] case," not to impeach the plaintiffs' credibility.[147] And the transcript was admissible because it was proper evidence of criminal convictions, which in the court's opinion, was actually "better evidence of the [plaintiffs'] criminal convictions than their plea agreements, to which [they did] not object, because the agreements do not disclose that they were accepted by the court and actually resulted in convictions."[148]

D. Rule 614(d): Questions by Jurors

Unlike federal practice, in which the decision to permit questions by jurors is left to the discretion of the district judge,[149] Indiana practice mandates that jurors be instructed that they "may seek to ask questions of the witnesses by submission of questions in writing[.]"[150] Rule 614(d) governs how those questions are handled.[151] An interesting point was raised in *Pierson v. State* as to whether introduction of a video deposition deprived the jury of its right to question a witness.[152] Recognizing that use of depositions at trial is explicitly permitted by Indiana Trial Rule 32(A) and that to hold otherwise could inhibit the ability of future criminal defendants to introduce evidence on their own behalves, the court of appeals rejected the argument.[153]

E. Rule 617: Hotels Can be "Places of Detention"

Since it took effect on January 1, 2011, Rule 617 has received very little attention from Indiana's appellate courts. At the close of the survey period, a mere five published decisions from the court of appeals had so much as mentioned the rule.[154] The rule mandates the electronic recording of any "statement made by a person during a Custodial Interrogation in a Place of Detention" in order to be admissible in a criminal prosecution against that

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84 N.E.3d 624 (Ind. 2017).

147. *Id*. at 231-32.

148. *Id*. at 232-33.

149. United States v. Sykes, 614 F.3d 303, 312-13 (7th Cir. 2010); United States v. Rawlings, 522 F.3d 403, 407 (D.C. Cir. 2008).

150. Pierson v. State, 73 N.E.3d 737, 741 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1079 (Ind. 2017); IND. JURY RULE 20(a)(7).

151. 13 ROBERT L. MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 614.401 (3d ed. 2007).

152. *Pierson*, 73 N.E.3d at 741-42.

153. *Id*. at 742.

154. Steele v. State, 975 N.E.2d 430, 431-32 (Ind. Ct. App. 2012), *trans. denied*, 980 N.E.2d (Ind. 2013); Cutler v. State, 983 N.E.2d 217, 219-20 (Ind. Ct. App. 2013); Esmond v. State, 20 N.E.3d 213, 219-20 (Ind. Ct. App. 2014); Cherry v. State, 57 N.E.3d 867, 875-76 (Ind. Ct. App.), *trans. denied*, 60 N.E.3d 1039 (Ind. 2016); Fansler v. State, 81 N.E.3d 671, 674-77 (Ind. Ct. App.), *trans. granted and opinion vacated*, 94 N.E.3d 298 (Ind. 2017).

person.[155] There are, however, enumerated exceptions to the requirement, one of which was addressed on first impression by the court of appeals during the survey period.

At issue in *Fansler v. State* was both the meaning of a "Place of Detention" and the scope of the exception that allows for use of the statement "upon clear and convincing proof" that it was made as "part of a routine processing or 'booking" of the person[,]" known as the "booking exception."[156] The criminal defendant was arrested at a hotel and interrogated in a hotel room.[157] The only prior decision to address the meaning of "Place of Detention" was *Steele v. State*, decided by an entirely different panel than *Fansler*.[158] The *Fansler* decision distinguished *Steele*, writing, "In *Steele*, without exhaustive analysis, we held that a gas station to which a police officer had transported a drunk-driving arrestee for field sobriety testing was not a place of detention."[159] Unlike the gas station in *Steele*, the *Fansler* court reasoned:

> [T]he hotel room was operated by the police and was used to detain Fansler in connection with a criminal investigation. The drug-crime task force investigating Fansler had used the hotel "a couple times" for other investigations in the year preceding Fansler's arrest. The owner of the hotel was "police friendly" and allowed police use of his rooms without charge. The police had the opportunity to set up the location and prepare it for Fansler's arrival, and lay in wait for him there. The police thus had possession and control over the room, plus ample opportunity to prepare the room for the custodial interrogation police knew or anticipated would result from Fansler's arrest there. Under these circumstances, the hotel room was a place of detention.[160]

The appellate court also rejected application of the booking exception.[161] The trial court had found the booking exception applied by analogizing the interrogation to the Fourth Amendment exception for "searches incident to arrest."[162] The court of appeals discarded the analogy, instead determining that "the language of Rule 617 plainly evokes the formal, administrative setting of the routine-booking exception to the warning requirement of *Miranda v. Arizona*."[163] Applying that view, the court found:

> In this light, we conclude that, irrespective of whether the precise focus should be on the nature of the questions asked (administrative or

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155. IND. R. EVID. 617(a).
156. *Fansler*, 81 N.E.3d at 675; IND. R. EVID. 617(a)(1).
157. *Fansler*, 81 N.E.3d at 673.
158. *Steele*, 975 N.E.2d at 431-32.
159. *Fansler*, 81 N.E.3d at 675.
160. *Id*. (citations to record omitted)
161. *Id*. at 675-76.
162. *Id*. at 675.
163. *Id*. at 676 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

> investigative) or on the character of the setting (formal or informal), Fansler's answers given minutes after his arrest in an undercover drug operation to questions of the type "Where is the heroin?" were not statements made in the course of routine processing or booking.[164]

Although an important decision, after the close of the survey period, the ruling was superseded. On transfer, the Indiana Supreme Court held that "[a] motel room, as used by law enforcement in this case—to carry out an undercover investigation and to search a suspect incident to his arrest—is not a place of detention as defined by Indiana Evidence Rule 617."[165] It was the first time the Indiana Supreme Court addressed Rule 617.[166]

VI. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Skilled Witnesses

Although admission of an expert opinion must satisfy the rigors of Rule 702, an opinion may be given by a witness under Rule 701 even if it would not meet the threshold for expert opinion under Rule 702.[167] In *Zanders v. State*, the Indiana Supreme Court summarized:

> In Indiana, knowledge beyond that of the average juror can qualify a witness as either an expert or a skilled witness. An expert witness, according to Indiana Evidence Rule 702(a), is one who is qualified "by knowledge, skill, experience, training, or education" to give opinions about a situation without necessarily having personal knowledge. A skilled witness, by contrast, is a person with a degree of knowledge short of that sufficient to be declared an expert under [Indiana Evidence] Rule 702, but somewhat beyond that possessed by the ordinary jurors. A skilled witness, then, will perceive more information from the same set of facts and circumstances than an unskilled witness would. [Under Rule 701, t]he skilled witness may give an opinion "(a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue."[168]

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164. *Id*.

165. Fansler v. State, 100 N.E.3d. 250, 256 (Ind. 2018).

166. *Fansler*, 81 N.E.3d at 675 ("Rule 617 is of recent vintage and has never been construed by our supreme court.").

167. Zanders v. State, 73 N.E.3d 178, 188 (Ind. 2017); *see also* McDaniel v. Robertson, 83 N.E.3d 765, 773-74 (Ind. Ct. App. 2017) (although not finding doctor's opinion as to life expectancy sufficient to qualify as expert opinion, allowing it as opinion of skilled witness); T.F. v. Ind. Dep't of Child Servs. (*In re* A.F.), 69 N.E.3d 932, 948-49 (Ind. Ct. App.) (opinion of guardian ad litem offered based upon personal observation not expertise was admissible under Rule 701), *trans. denied*, 88 N.E.3d 1078 (Ind. 2017).

168. *Zanders*, 73 N.E.3d at 188 (alteration in original; further quotation marks and citations omitted).

Applying that standard, the court "held that a police detective trained in cell-phone technology may explain [cell-site location information] to the jury as a skilled witness."[169]

B. Rule 702: Expert Witnesses

The survey period also included many noteworthy decisions regarding expert testimony under Rule 702. In order for an expert opinion to be admitted under Rule 702, the 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."[170] To meet that requirement, the expert must be competent on the subject matter to render an opinion.[171]

For practitioners in the realm of personal-injury litigation, perhaps no decision from the survey period relating to expert testimony was more important than *Aillones v. Minton*.[172] Doctors are generally permitted to testify regarding causation of physical injuries.[173] But whether a nurse practitioner could testify to the medical causation of injuries remained an unanswered question.[174] Three prior decisions from the Court of Appeals of Indiana seemed to signal a bright-line rule that nurses could not testify about causation.[175] A more recent decision, however, had reviewed the prior decisions and concluded that "we cannot foreclose the possibility that some nurses have sufficient expertise to qualify as an expert witness."[176] Looking also to a decision from the Indiana Supreme Court, which held that Rule 702 permitted a psychologist to testify as to causation of a brain injury,[177] the *Aillones* panel determined that "no blanket rule prevents a nurse as acting as an expert witness."[178] Nurse practitioners, in particular, are "highly

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169. *Id*. at 188-89. The detective's training "consist[ed] of several classes on cell towers, a forty-hour course with the National White Collar Crime Center, and certification as a mobile examiner." *Id*. at 188.

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

171. State Auto. Ins. Co. v. DMY Realty Co., LLP, 977 N.E.2d 411, 423 (Ind. Ct. App. 2012).

172. 77 N.E.3d 196 (Ind. Ct. App. 2017), *trans. not sought*.

173. Ind. Dep't of Child Servs. v. J.D., 77 N.E.3d 801, 808 (Ind. Ct. App.), *trans. denied*, 89 N.E.3d 405 (Ind. 2017).

174. *Aillones*, 77 N.E.3d at 200.

175. *Id*. at 199-200 (citing Nasser v. St. Vincent Hosp. & Health Servs., 926 N.E.2d 43 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010); Long v. Methodist Hosp., 699 N.E.2d 1164 (Ind. Ct. App. 1998); Clarian Health Partners v. Wagler, 925 N.E.2d 388, 389 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010)).

176. *Id*. at 200 (quoting Curts v. Miller's Health Sys., Inc. 972 N.E.2d 966, 971 (Ind. Ct. App. 2012)) (quotation marks omitted).

177. *Id*. at 200-01 (citing Bennett v. Richmond, 960 N.E.2d 782, 786 (Ind. 2012)).

178. *Id*. at 201.

trained and educated medical professional[s] in a highly regulated field."[179] The court further ruled that the discrepancy between the training and education of a doctor compared to a nurse practitioner does not affect admissibility, but goes purely to "the weight to be given to such evidence."[180]

Two weeks later, a different panel of the court of appeals, in *Totton v. Bukofchan*, ruled that a chiropractor was permitted to testify about "causation of injuries inflicted by chiropractic treatment."[181] Unaware of *Aillones*, the decision recognized a "general rule [ ] that non-physician healthcare providers are not qualified under Evidence Rule 702 to render opinions as to medical causation[,]" but also that "there is not a blanket rule that prohibits non-physician healthcare providers from qualifying as expert witnesses as to medical causation under Evidence Rule 702."[182] The *Totton* panel, however, still found a limitation to causation testimony: "A non-physician healthcare provider, such as a chiropractor, may qualify under Indiana Evidence Rule 702 to render an opinion as to medical causation *if the causation issue is not complex*."[183] And a medical-review panel comprised of chiropractors can only be used as experts as to the standard of care, not causation, when the causation issue is complex.[184]

With *Aillones* providing no complexity limitation such as that stated in *Totton*, the two decisions appear to be in conflict and will need to be resolved at some point in the future.

Merely being a nurse, however, is not sufficient to render a medical opinion if the opinion is devoid of an underlying scientific methodology. In addition to requiring the expert be competent to profess an opinion, Rule 702 also requires that the opinion be based upon sound methodology.[185] The methodology does not need to be beyond all dispute.[186] But failure to provide anything to show the "reasoning or methodology underlying" testimony prohibited admission of a nurse's opinion that a child's autism was caused by exposure to lead.[187]

Another decision of particular importance with regard to methodology was the court of appeals' decision in *The Hope Source v. B.T.*, which addressed use of facilitated communication for a child rendered non-verbal through severe autism.[188] On a case of first impression, the court ruled that "testimony obtained by facilitated communication is admissible in evidence" "in certain situations[.]"[189] Looking to guidance from other states and to the thorough

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179. *Id*. at 203.

180. *Id*.

181. 80 N.E.3d 891, 894 (Ind. Ct. App. 2017), *trans. not sought*.

182. *Id*. at 894.

183. *Id*. at 892 (emphasis added).

184. *Id*.

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

186. *See* Alcantar v. State, 70 N.E.3d 353, 357-58 (Ind. Ct. App. 2016) (dispute over application of 2p formula to DNA went to weight not admissibility).

187. Duby v. Woolf, 76 N.E.3d 190, 195 (Ind. Ct. App. 2017).

188. 83 N.E.3d 144 (Ind. Ct. App. 2017), *trans. denied*, 95 N.E.3d 1292 (Ind. 2018).

189. *Id*. at 145.

analysis of the trial court "regarding the science surrounding facilitated communication and its admissibility[,]" the court determined that the emphasis in modern caselaw is no longer the efficacy of the technology but now "on the examination of the details of the application of facilitated communication to each specific case."[190] Application in a specific case will turn on whether the responses are actually those of the witness and not the facilitator.[191] Resolution of that issue is a matter of competency left to the sound discretion of the trial court.[192]

The failure of methodology can go beyond scientific testimony. In *Barkal v. Gouveia & Associates*, the court of appeals found that two experts, although otherwise possessing requisite expertise to testify as to attorney conduct, failed to review "the materials relevant to the instant legal malpractice proceeding," rendering them insufficient to provide expert opinions as to the "specific conduct in the matter at hand, [the] standard of care and alleged breach thereof."[193]

One final point under Rule 702 that was well highlighted in the survey period is the obligation to preserve error for appeal through objection. The *Evansville Courier Co. v. Uziekalla* decision from the court of appeals exemplified the problems that can arise with joint submissions of evidence.[194] Having permitted an opposing expert's opinion to be submitted as "Joint Exhibit 1" without objection, the appellant was deemed to have invited any error in the admission of the expert's testimony, barring review on appeal.[195]

C. Rule 704(b): Vouching Evidence Prohibited

Rule 704 is often most well-known for cementing the abandonment of the common-law prohibition on opinion testimony regarding an "ultimate issue" in the case.[196] But the rule also circumscribes "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."[197] When a witness proffers an opinion regarding the veracity of another's testimony, it is often referred to as vouching evidence, which is prohibited by Rule 704(b).[198] Two decisions from the survey period addressed whether expert testimony regarding the propensity of children to be truthful ran afoul of the vouching prohibition.

In *Baumholser v. State*, the court of appeals determined that testimony of a

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190. *Id*. at 148-52.

191. *Id*. at 152.

192. *Id*. at 152-53.

193. 65 N.E.3d 1114, 1121-22 (Ind. Ct. App. 2016).

194. 81 N.E.3d 267, 271-72 (Ind. Ct. App.), *trans. denied*, 94 N.E.3d 701 (Ind. 2017).

195. *Id*.

196. MILLER, JR., *supra* note 151, at § 704.101. Abrogation of the requirement in Indiana, however, predates adoption of the Indiana Rules of Evidence. *See* TANFORD & QUINLAN, *supra* note 137, at § 42.7.

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

198. *See*, *e.g.*, Hamilton v. State, 49 N.E.3d 554, 556 (Ind. Ct. App. 2015); MILLER, JR., *supra* note 110, at 260.

forensic interviewer about "the propensity of victims of child molestation to delay disclosure of the event" was not vouching for the victim's testimony.[199] Instead, the court concluded, the testimony was "about how victims of child molestation behave in general[,]" and not about the truth or falsity of the specific victim's testimony.[200] Had the testimony been that the victim suffered from Child Sexual Abuse Accommodation Syndrome ("CSAAS"), however, then it would have been disallowed pursuant to the Indiana Supreme Court's ruling in *Steward v. State*.[201] But "behavioral evidence without use of the term CSAAS," such as that at issue in *Baumholser*, is admissible.[202]

Later in the period, adhering to its *Baumholser* decision, a majority of the court of appeals ruled that an expert who testified that "some statistics will quote that less than two to three children out of a thousand are making up claims" regarding child molestation and that "about 4 to 5 percent of children who have been victims of sexual abuse will have some kind of obvious physical evidence of penetration or sexual abuse" permissibly provided statistics about "how victims of child molestation behave in general."[203] In concurrence,[204] Judge Barnes expressed the opinion that the testimony at issue was of the same sort prohibited by the Indiana Supreme Court in *Sampson v. State* and recently by the court of appeals in *Hamilton v. State*, an opinion he authored.[205] "[I]n *Sampson*, [the] supreme court held that expert witnesses cannot testify as to the general signs that a child has or has not been coached and then testify as to whether a particular child exhibited any such signs, unless the defendant has opened the door to such testimony."[206] Applying his understanding of *Sampson* to the case at hand, Judge Barnes concluded:

> I disagree with my colleagues that Dr. Thompson's testimony was permissible, especially with respect to her statistical statement about the number of children who purportedly make up molestation claims. That kind of testimony is, in my mind, the type of indirect vouching addressed and rejected in [ ] *Sampson*[] and *Hamilton*. Even if Dr. Thompson's testimony was not directly tied to [the victim], what other conclusion could a jury draw from this testimony other than, "there's a very small

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199. 62 N.E.3d 411, 415-16 (Ind. Ct. App. 2016), *trans. denied*, 80 N.E.3d 180 (Ind. 2017).

200. *Id*. at 416.

201. *Id*. (citing Steward v. State, 652 N.E.2d 490 (Ind. 1995)).

202. *Id*. (quoting State v. Velasquez, 944 N.E.2d 34 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 637 (Ind. 2012)) (quotation marks omitted).

203. Alvarez-Madrigal v. State, 71 N.E.3d 887, 892-93 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1077 (Ind. 2017).

204. Judge Barnes was of the opinion that the defendant had waived the argument on appeal, and, therefore, concluded in the majority's affirmance. *Id.* at 896 (Barnes, J., concurring).

205. *Id.* at 896-98 (citing Sampson v. State, 38 N.E.3d 985 (Ind. 2015); Hamilton v. State, 43 N.E.3d 628 (Ind. Ct. App. 2015) (Barnes, J.), *aff'd on reh'g*, 49 N.E.3d 554 (Ind. Ct. App. 2015), *trans. denied*, 50 N.E.3d 148 (Ind. 2016)).

206. *Id.* at 896 (citing *Sampson*, 38 N.E.3d at 991-92).

chance this child is making these things up"?[207]

Transfer was sought and denied in the case, leaving Judge Barnes's interpretation for another day.

VII. HEARSAY: RULES 801 THROUGH 807

"A hearsay statement is one 'other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'"[208] The scope of what constitutes hearsay and its uses at trial are governed by Rules 801 through 807.

A. Rule 801: Definition of Hearsay

"Hearsay is not admissible unless [the Indiana Rules of Evidence] or other law provides otherwise."[209] Under Rule 801, generally stated, "hearsay is any statement made out of court and offered to prove the truth of the matter asserted."[210] Subdivision (d) of the rule specifically excludes certain statements that would otherwise meet the definition, including statements of an opposing party,[211] prior identifications,[212] and a declarant's prior consistent[213] and inconsistent statements.[214]

The most notable decision from the survey period to address Rule 801 was *M.T.V. v. State*, which focused on the extension of the exception for a party's own statement to co-conspirators.[215] The exception applies to co-conspirators only if the "statement [was] made in furtherance of the conspiracy."[216] As a result, independent evidence of the conspiracy must be introduced in order to render the co-conspirator's statements admissible.[217] In *M.T.V.*, the defendant sought to exclude Facebook messages concerning a plan between the defendant and another student to perpetrate a school shooting.[218] The court of appeals ruled that testimony from another student who heard "M.T.V. say that he and B.E. planned

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207. *Id.* at 897.

208. VanPatten v. State, 986 N.E.2d 255, 260 (Ind. 2013) (quoting IND. R. EVID. 801(c)).

209. IND. R. EVID. 802.

210. M.T.V. v. State, 66 N.E.3d 960, 964 (Ind. Ct. App. 2016) (citing IND. R. EVID. 801(c)), *trans. denied*, 83 N.E.3d 1220 (Ind. 2017).

211. IND. R. EVID. 801(d)(2); *see*, *e.g.*, Morris v. Crain, 71 N.E.3d 871, 877-78 (Ind. Ct. App. 2017) (transcript of tape-recorded conversation between plaintiff and defendant was not hearsay because it was "a statement by an opposing party").

212. IND. R. EVID. 801(d)(1)(C).

213. IND. R. EVID. 801(d)(1)(B).

214. IND. R. EVID. 801(d)(1)(A). Prior inconsistent statements do not, however, become substantive evidence. Humphrey v. State, 73 N.E.3d 677, 685-86 (Ind. 2017).

215. *M.T.V.*, 66 N.E.3d at 964.

216. *Id.*

217. *Id.*

218. *Id.*

to bring guns into the school, that they had a list, and J.R. was first on their list" was sufficient independent evidence of the conspiracy.[219] But the court went a step further and acknowledged that the portions of the Facebook messages written by the defendant were otherwise admissible and could also provide independent evidence to admit the co-conspirators statements in the same communications.[220]

The Indiana Tax Court provided another informative analysis in holding that unsworn written statements of customers attesting to delivery of recreational vehicles in Indiana were inadmissible hearsay in an action for unpaid sales taxes because the customers were not parties and the statements were neither sworn nor subject to cross-examination.[221]

B. Rule 803: Excited Utterances, Statements for Medical Diagnoses, and Business Records

While Rule 801 provides the definitional exceptions to hearsay, Rule 803 sets out exceptions to statements that otherwise constitute hearsay. Three categories of hearsay exceptions drew meaningful attention during the survey period: excited utterances;[222] statements made for medical diagnoses or treatments;[223] and records of regularly conducted activities.[224]

Under the excited utterance exception of Rule 803(2), a statement that is otherwise hearsay is admissible if: "(1) a startling event or condition has occurred; (2) the declarant made a statement while under the stress or excitement caused by the event or condition; and (3) the statement was related to the event or condition."[225] The court of appeals affirmed admission of a 9-1-1 phone call as an excited utterance made "in the midst of a serious altercation[,]" where the declarant "urged the police department to respond quickly because two women were about to fight, and a baby was present."[226] Thereafter, the declarant did not respond to the 9-1-1 operator, but could "be heard encouraging one woman to shoot the other and advising the same woman to collect her firearm and flee before the arrival of the police."[227] The court found that the declarant "was speaking in the heat of the moment in response to the excitement of the unfolding altercation[,]" thereby "satisf[ying] the requirements for an excited utterance."[228]

In another case before the court of appeals, admission was sustained under

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219. *Id.*

220. *Id.*

221. Richardson's RV Inc. v. Ind. Dep't of State Revenue, 80 N.E.3d 945, 947-48 (Ind. T.C. 2017).

222. IND. R. EVID. 803(2).

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

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

225. Wallace v. State, 79 N.E.3d 992, 997 (Ind. Ct. App. 2017) (quotation marks and citation omitted).

226. *Id.*

227. *Id.* at 997-98.

228. *Id.* at 998.

the excited-utterance exception for a written statement provided to a police officer.[229] The victim had just been taken from the scene of her injury to "the hospital's 'shock room wing' where" she communicated with an officer.[230] The officer "attempted to interview her but she had a difficult time speaking because she had been shot through the mouth."[231] To respond to the officer's question of "who had shot her[,]" she wrote a name.[232] The court ruled that the statement constituted an excited utterance because she "had just been brought to the hospital after being shot through the mouth, her vocalization was impaired, and she was situated in the shock room, we believe that she was still under the stress of excitement caused by the shooting and that she was accordingly incapable of thoughtful reflection[.]"[233]

Subdivision (4) to the rule, which applies to statements made for medical diagnoses or treatments, also received substantial attention during the survey period. In order for Rule 803(4) to apply, "it must be a statement that: (A) is made by a person seeking medical diagnosis or treatment; (B) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause."[234]

> This exception reflects the idea that people are unlikely to lie to their doctors because doing so might jeopardize their opportunity to be made well. To test whether the declarant's self-interest in obtaining effective medical treatment makes the hearsay report adequately reliable for admission, the court must determine: 1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.[235]

It was under Rule 803(4) that the court of appeals permitted testimony of a sexual-assault-nurse examiner about statements made to her by a child victim.[236] In determining whether admission of the testimony was error, the court tracked the Indiana Supreme Court's analysis in *VanPatten v. State*.[237] The court first recognized that statements regarding sexual assault necessarily satisfy the second prong "because they assist medical providers in recommending potential treatment for sexually transmitted disease, pregnancy testing, psychological

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229. Brittain v. State, 68 N.E.3d 611, 621 (Ind. Ct. App.), *trans. denied*, 86 N.E.3d 172 (Ind. 2017).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Walters v. State, 68 N.E.3d 1097, 1100 (Ind. Ct. App.) (quoting IND. R. EVID. 803(4)), *trans. denied*, 86 N.E.3d 170 (Ind. 2017).

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

236. *Id.* at 1100-01.

237. *Id.* (citing VanPatten v. State, 986 N.E.2d 255 (Ind. 2013)).

counseling, and discharge instructions."[238] And the first prong is often evidenced by the victim seeking medical attention.[239] But the first-prong analysis requires added scrutiny when the victim is a child who has been taken by another to seek medical care.[240] "[I]n these situations, evidence must be presented to show the child understood the medical professional's role and the importance of being truthful."[241] That evidence may be provided in whole by "the medical professional detailing the interaction between [her] and the declarant, how [she] explained [her] role to the declarant, and an affirmation that the declarant understood that role."[242]

Although the court's analysis tracked the structure set forth in *VanPatten*, the conclusion did not.[243] The medical testimony was deemed inadmissible in *VanPatten* because there was no evidence that the six-year-old children "understood the importance of telling the nurse the truth in order to get accurate medical treatment[,]" the nurse could not provide sufficient evidence of her interaction with the children to indicate reliability, and "[t]he nurse had observed the police interviews, [with] the medical examination . . . directly preceded by extensive interviews at the Department of Child Services[.]"[244]

But the case before the court of appeals was distinguishable.[245] Noting from *Van Patten* that "if victims are older, 'the appearance of the building, the exam room, and [nurse's] scrubs and job title would probably be sufficient circumstances from which to infer [the victims] were thus motivated to speak truthfully[,]"[246] the court of appeals observed:

> First, B.E. was eleven years old, not six, when she saw the nurse. Second, the nurse had not attended any of the previous interviews of B.E., so there was no suggestion she would steer the conversation to support the allegations. Third, the physical examination took place on a different day than the other interviews, rather than immediately following the police interviews. Fourth, Nurse Callahan was able to recall exactly what and how she explained her role to B.E. In fact, she twice explained her role to B.E. before starting the physical examination. In addition, Nurse Callahan was dressed in scrubs and explained that medical practitioners wear them, the building was situated separate from law enforcement agencies, and the décor of the office mimicked that of a regular doctor's office. Fifth, B.E. was able to articulate Nurse Callahan was "a nurse or

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238. *Id.* at 1100 (quoting *VanPatten*, 986 N.E.2d at 260) (quotation marks omitted).

239. *Id.* (citing *VanPatten*, 986 N.E.2d at 260-61).

240. *Id.* at 1100-01 (citing *VanPatten*, 986 N.E.2d at 260-61).

241. *Id.* at 1101 (citing *VanPatten*, 986 N.E.2d at 260-61).

242. *Id.* (quoting *VanPatten*, 986 N.E.2d at 261).

243. *Id.* (citing *VanPatten*, 986 N.E.2d at 265-67).

244. *Id.* (quoting *VanPatten*, 986 N.E.2d at 261) (quotation marks omitted, alterations in original).

245. *Id.*

246. *Id.* (quoting *VanPatten*, 986 N.E.2d at 265).

doctor."[247]

Not all statements to a nurse, however, will be admissible under Rule 803(4), as was illustrated in *Perryman v. State*.[248] There, a treating nurse testified not as to what the child had told her, but what the child had told to the on-staff social worker.[249] Had the statement been made directly from the child to the nurse, then it may have been admissible.[250] But the testimony fell within Rule 805's hearsay-within-hearsay prohibition, which mandates that each layer of hearsay be independently admissible.[251] "The State [could] not . . . allege that the *social worker* sought diagnosis or treatment from the nurse," thereby failing to provide a basis for admission under Rule 803(4).[252]

The third category of exceptions that drew attention was the business-records exception of Rule 803(6). The exception "permits admission of records of regularly conducted business activity provided that certain requirements are met."[253] The rule requires that:

> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.[254]

Three decisions from the Court of Appeals of Indiana indicate how easily the procedural formalities of the business-records exception can be overlooked. In *Williams v. State*, the state failed to establish chain of custody for a blood sample because the certification of authenticity was signed only by a notary, was not signed under penalty of perjury, was not signed "by a records custodian or another qualified person," did not show that the records were "made at or near the time by—or from information transmitted by—someone with knowledge[, and

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247. *Id.*; *see also* T.F. v. Ind. Dep't of Child Servs. (*In re* A.F.), 69 N.E.3d 932, 943-48 (Ind. Ct. App.) (affirming admission of statements by ten-year-old child to therapist), *trans. denied*, 88 N.E.3d 1078 (Ind. 2017).

248. 80 N.E.3d 234, 247-48 (Ind. Ct. App. 2017).

249. *Id.* at 247.

250. *Id.* at 248.

251. IND. R. EVID. 805.

252. *Perryman*, 80 N.E.3d at 248 (emphasis in original).

253. Ground v. State, 702 N.E.2d 728, 730 (Ind. Ct. App. 1998).

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

did not show] that they were made and kept by the lab in the ordinary course of business."[255]

Similarly, another decision ruled that records of a father's incarceration from the Indiana Department of Correction ("DOC") could not be admitted under the exception because the affiant of the certification, although "the keeper of the records for DOC," did not "certif[y] that the record was made from information by someone with knowledge, that the record was kept in the course of regular activity of the DOC, or that making the record was a regular practice of that activity."[256] Despite not citing rule 803(6)(E), it also appears that the court of appeals was skeptical of the trustworthiness of the documents since the certificate "state[d] that sixty-four pages [were] attached, but the exhibit contain[ed] only fifty pages."[257]

And, finally, in *Williams v. Unifund CCR, LLC*, the court of appeals excluded two different exhibits for failing to meet the dictates of Rule 803(6).[258] It is a decision that should be studied by anyone attempting to collect a purchased debt. The first exhibit "consist[ed] of seventeen credit card statements produced by Citibank for the account at issue, bearing the credit card account number, [Defendant]'s name, and the balance due."[259] But the witness through which the records were admitted, who was the custodian of records for the company who purchased the debt from Citibank, "was not familiar with Citibank's records or operations" and did "not know Citibank's records or bookkeeping methods."[260] His lack of personal knowledge foreclosed resort to Rule 803(6).[261]

The second exhibit consisted of two documents that were not admissible under Rule 803(6) when offered through the same witness: "a Bill of Sale and Assignment, signed by [the] Financial Account Manager at Citibank . . . [and] a redacted thirty-page spreadsheet[.]"[262] Because the Bill of Sale and Assignment was generated by Citibank and not Unifund, the witness "could not testify as to the document's reliability and authenticity. Therefore, lacking the proper foundation" under Rule 803(6).[263] So too was the spreadsheet prohibited because it was also a product of Citibank, about which the witness knew nothing.[264] Without that evidence, the plaintiff was unable to carry its burden of entitlement

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255. 64 N.E.3d 221, 224-25 (Ind. Ct. App. 2016).

256. O.G. v. Ind. Dep't of Child Servs. (*In re* O.G.), 65 N.E.3d 1080, 1086-87 (Ind. Ct. App. 2016), *trans. denied*, 86 N.E.3d 170 (Ind. 2017).

257. *Id.* at 1087. The business-records exception requires that "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." IND. R. EVID. 803(6)(E).

258. 70 N.E.3d 375, 378-80 (Ind. Ct. App. 2017).

259. *Id.* at 378

260. *Id.* at 379.

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

262. *Id.*

263. *Id.*

264. *Id.*

to collect the debt.[265]

C. Rule 804: Use of Depositions

Even though Rule 804 permits hearsay in certain circumstances when the declarant is unavailable, there may still be an additional limitation on admission. "The Sixth Amendment to the United States Constitution . . . provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[266] As a result, if the witness does not appear at trial, his or her testimony may not be admissible.[267] But, it may be admitted if "the defendant had a prior opportunity for cross-examination."[268] In *Brittain v. State*, the Court of Appeals of Indiana was tasked with deciding whether use of a discovery deposition deprived a criminal defendant of his confrontation right.[269] Although not recognized by the Indiana Rules of Trial Procedure,[270] Hoosier practitioners are well acquainted with a distinction between what are commonly called "discovery depositions" and "trial depositions."[271] The distinction may not be "insignificant," with the motivations underlying each being very different.[272] Nevertheless, adhering to the Indiana Supreme Court's decision in *Howard v. State*,[273] the court of appeals ruled the mere fact that a deposition was taken in a discovery posture and then read into the record at a criminal trial did not violate the defendant's confrontation right.[274]

The Indiana Supreme Court also held that use of a videotaped deposition at which the party's counsel was not present was permissible because the party's counsel had been given notice of the deposition, had no objection, "and expressed his intention not to participate."[275]

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265. *Id.* at 380.

266. Brittain v. State, 68 N.E.3d 611, 617 (Ind. Ct. App.), *trans. denied*, 86 N.E.3d 172 (Ind. 2017).

267. *Id.*

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

269. *Id.* at 616-18.

270. Hagerman Constr. v. Copeland, 697 N.E.2d 948, 953 (Ind. Ct. App. 1998).

271. Spangler v. Sears, Roebuck & Co., 138 F.R.D. 122, 124-25 (S.D. Ind. 1991) (Tinder, J.) (The "distinction [between trial depositions and discovery depositions] goes beyond the lore or myth surrounding the practice of litigation in the federal courts. The difference is recognized in the daily practice of these courts, and is commonly accepted by the members of the bar who frequently practice here.").

272. Howard v. State, 853 N.E.2d 461, 469 n.6 (Ind. 2006).

273. *Id.* at 468-70.

274. *Brittain*, 68 N.E.3d at 616-18.

275. *In re* Powell, 76 N.E.3d 130, 134-35 (Ind. 2017).

VIII. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Challenges in Authenticating Modern Technology

In order for a tangible piece of evidence to be admitted, it must be authenticated as that which it is purported to be.[276] Rule 901(a) states, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[277] The remainder of the rule provides illustrative examples of authentication.[278] "Absolute proof of authenticity is not required. Rather, the proponent of the evidence must establish only a reasonable probability that the evidence is what it is claimed to be, and may use direct or circumstantial evidence to do so."[279]

Technological advancements have drawn Rule 901 into territory unimagined when the authors of the corresponding federal rule, upon which Indiana's Rule 901 is based, drafted it.[280] Typically, courts looking to admit electronic evidence turn to the example of Rule 901(b)(4).[281] Two opinions by the Court of Appeals of Indiana from the survey period applied Rule 901(b)(4) to modern technology. *M.T.V. v. State* built upon *Wilson v. State*, which had held Twitter messages were admissible, to allow admission of Facebook messages.[282] Looking at the totality of the circumstances, the Facebook messages were sufficiently shown to be authentic:

> Here, in an interview with law enforcement, M.T.V. admitted to having Facebook conversations with B.E. and said that, in those conversations, B.E. made threats to shoot up the school on April 20, 2018. M.T.V. also said that B.E. asked M.T.V. for help conducting the shooting. The Facebook records introduced at the hearing contain the content M.T.V. said they would. Moreover, in addition to having distinctive characteristics in content, the Facebook records were also supported by an affidavit from Facebook's authorized records custodian . . . . At the hearing, Detective Foster testified that the procedure he used to obtain

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276. MILLER, JR., *supra* note 110, at 364.

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

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

279. M.T.V. v. State, 66 N.E.3d 960, 963 (Ind. Ct. App. 2016) (citations omitted), *trans. denied*, 83 N.E.3d 1220 (Ind. 2017).

280. Bone v. State, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002) ("Federal Rule of Evidence 901(a) is identical to Indiana's Rule 901(a)."). Federal Rule of Evidence 901 was adopted in 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1943, and has not been substantively altered since. FED. R. EVID. 901 (advisory committee's note to 2011 amendment).

281. *M.T.V.*, 66 N.E.3d at 963-64; IND. R. EVID. 901(b)(4) ("The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.").

282. *M.T.V.,* 66 N.E.3d at 963 (citing Wilson v. State, 30 N.E.3d 1264, 1268-69 (Ind. Ct. App.), *trans. denied*, 35 N.E.3d 671 (Ind. 2015)).

> the Facebook records was an ordinary procedure that he had previously used for criminal investigations involving Facebook.[283]

On the flip side, following the guidance of *Wilson* and *M.T.V.*, another decision from the court of appeals affirmed exclusion of Facebook messages for failure of authentication:

> Detective Melton described the procedure used to unlock the password-protected cellphone and after opening up the Facebook application, he located an account under the name of Bandman Trapp. Upon preliminary questioning by the State, Detective Melton explained that there are several ways a Facebook account could be accessed. He clarified that anyone who signed into the Facebook account, through a computer or cellphone, could compose messages that would then sync to the Facebook application on the recovered cellphone. In other words, Detective Melton had "no idea who made that statement or who composed that message." Unlike the defendants in *Wilson* and *M.T.V.*, Richardson did not present any evidence describing distinctive characteristics that could connect the particular statement to Kendall, nor did he present any other indicia of reliability establishing Kendall as the author of the contested statement. Accordingly, the trial court did not abuse its discretion when it refused to admit the Facebook message.[284]

In a third decision, the court of appeals looked to Rule 901(b)(9) for guidance on admitting cell-phone videos and pictures.[285] "Photographs and videos can be authenticated through either a witness's testimony or, in instances in which no witness observed what a photograph or video portrays, the silent-witness theory."[286] Because the evidence was procured by a confidential source ("CS") who did not testify at trial, the state turned to the silent-witness theory to support admission.[287]

> In order to authenticate videos or photographs using the silent-witness theory, there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result. The requirements are "rather strict." That is, the proponent must show that the photograph or video was not altered in any significant respect, and the date the photograph or video was taken must be established when relevant. If a foundational requirement is missing, then the surrounding circumstances can be

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283. *Id*. at 963-64.

284. Richardson v. State, 79 N.E.3d 958, 963-64 (Ind. Ct. App.), *trans. denied*, 92 N.E.3d 1090 (Ind. 2017); IND. R. EVID. 901(b)(9) ("Evidence describing a process or system and showing that it produces an accurate result.").

285. McFall v. State, 71 N.E.3d 383, 387-89 (Ind. Ct. App. 2017).

286. *Id*. at 388 (citation omitted).

287. *Id*.

used.[288]

Because there was no evidence produced to show that the videos and photos had not been altered in the interim between when they were captured by the CS and the time the CS provided them to the police, the videos and pictures should have been excluded by Rule 901.[289] But, because a subsequent witness "identified herself in the videos and photos and acknowledged that the events depicted in them occurred on" the date in question, the erroneous admission was deemed harmless.[290]

B. Rule 902(11): Self-Authentication of Business Records

Two cases from the survey period added clarity to when business records will meet the self-authentication requirements of Rule 902(11). "Indiana Evidence Rule 902(11) allows the self-authentication of business records that meet the requirements of Indiana Evidence Rule 803(6), the business-records exception to the hearsay rule, as shown by a certification under oath from a business records custodian or another qualified person."[291] "The certification should set forth the signer's qualifications and be notarized in order to avoid any issues concerning the identity of the person who signed it."[292]

In an action to terminate the parent-child relationship, the court of appeals ruled that criminal records were erroneously admitted because, although "the affiant of the certification [offered with the documents was] the keeper of records for" the Department of Correction ("DOC"), the affiant did not "certif[y] that the record was made from information by someone with knowledge, that the record was kept in the course of regular activity of the DOC, or that making the record was a regular practice of that activity."[293]

Similarly, the court of appeals reversed a conviction predicated upon use of a document that was admitted under the business record exception to establish chain of custody of a blood sample.[294] The court determined that the certificate was deficient because "it contain[ed] only a notary signature as 'witness[,]'" it was not made under penalty of perjury, it did "not set forth the qualifications of the purported records custodian or other qualified person[,]" and it otherwise failed to establish the requirements of Evidence Rule 803(6)(A)-(C), such as the records "were made at or near the time by—or from information transmitted by—someone with knowledge and that they were made and kept by the lab in the ordinary course of business."[295]

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288. *Id*. (citations omitted).

289. *Id*.

290. *Id*. at 389.

291. Williams v. State, 64 N.E.3d 221, 224 (Ind. Ct. App. 2016).

292. *Id*.

293. O.G. v. Ind. Dep't of Child Servs. (*In re* O.G.), 65 N.E.3d 1080, 1086-87 (Ind. Ct. App. 2016), *trans. denied*, 86 N.E.3d 170 (Ind. 2017).

294. *Williams*, 64 N.E.3d at 222-26.

295. *Id*. at 225.

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

Rule 1002 sets out what is generally "[k]nown as the 'best evidence rule[.]'"[296] "The best evidence rule requires that the original writing, recording, or photograph be produced to prove the content of such unless otherwise provided by the rules or by statute."[297] The "purpose of the rule 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."[298] In *Morris v. Crain*, the court of appeals reversed exclusion at summary judgment of a transcript of a tape-recorded conversation.[299] "An effective best evidence objection 'must identify an actual dispute over the accuracy of the secondary evidence.'"[300] Because "the actual tape recording had been given to [the opposing party,] also had been 'utilized in earlier proceedings' before the trial court[,]" and there was "no specific challenge regarding the accuracy of the transcription," the appellate court determined that the best evidence rule was satisfied in that instance.[301]

X. COMMON LAW RULES: *RES GESTAE* & THE *CORPUS DELICTI* RULE

Two evidentiary doctrines from common law were addressed by the Indiana Supreme Court during the survey period. The first was the doctrine of *res gestae*. At common law, *res gestae* permitted admission of otherwise inadmissible evidence so long as it was necessary to "complete[] the crime's story[.]"[302] In 1996, the Indiana Supreme Court held that "[t]he *res gestae* rule itself has not survived the adoption of" the Indiana Rules of Evidence.[303] "But the *res gestae* concept has crept back into Indiana law since[,]" with "Indiana courts [frequently] appl[ying] an 'inextricably bound up' standard for evidence's admissibility."[304] The court of appeals majority, in *Snow v. State*, determined that a gun was admissible because it "was 'inextricably linked' to [the] crimes, and . . . that it was part of the 'circumstances and context' of" [the defendant's] fight with a police officer.[305] Concluding that standards such as "'inextricably bound up,' 'inextricably intertwined,' 'circumstances and context,' and 'part and

296. Jones v. State, 780 N.E.2d 373, 378 (Ind. 2002).

297. Morris v. Crain, 71 N.E.3d 871, 878 (Ind. Ct. App. 2017).

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

299. *Morris,* 71 N.E.3d at 877-79.

300. *Id*. at 879 (quoting Lopez v. State, 527 N.E.2d 1119, 1125 (Ind. 1988)).

301. *Id*. at 879.

302. Snow v. State, 77 N.E.3d 173, 176 (Ind. 2017) (citations omitted); *see also* TANFORD & QUINLAN, *supra* note 137, at § 49.1 ("It is used loosely to refer to the acts and statements surrounding the event being litigated."). For discussion of origin and history of *res gestae*, *see* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 274 (1954).

303. Swanson v. State, 666 N.E.2d 397 (Ind. 1996).

304. *Snow*, 77 N.E.3d at 176 (citations omitted).

305. *Id*. at 177 (citing Snow v. State, 65 N.E.3d 1129, 1134 (Ind. Ct. App. 2016)).

parcel'" are nothing more than *res gestae* in disguise, the Indiana Supreme Court once more pronounced that "*res gestae* is no more."[306]

The other common-law doctrine drawing the Indiana Supreme Court's attention was the *corpus delicti rule*.[307] The rule prohibits a criminal conviction "based solely on a nonjudicial confession of guilt."[308] Its "purpose . . . is to prevent the admission of a confession to a crime which never occurred."[309] The additional evidence can be circumstantial and, in accordance with Rule 104(b),[310] need not be provided prior to admission of the confession, "as long as the totality of independent evidence presented at trial establishes the *corpus delicti*."[311]

In a particularly salacious case, the court was presented with whether independent evidence existed of bestiality perpetrated against a canine outside of the defendant's confession so as to substantiate admission of the confession.[312] A unanimous panel of the court of appeals reversed the conviction, finding the additional evidence insufficient.[313] On transfer, however, the Indiana Supreme Court affirmed the conviction finding that the "Court of Appeals [had] confused two different *corpus delicti* categories: 1) the requirement for admitting a confession into evidence; and 2) the evidence sufficient to uphold a conviction."[314]

Looking to a prior appellate decision, the supreme court explained the distinction:

> . . . the State's case may be tested by reference to the corpus delicti in two ways. For the preliminary purpose of determining whether the confession is admissible, the State must present evidence independent of the confession establishing that the specific crime charged was committed by someone. The degree of proof required to establish the corpus delicti for admission of a confession is that amount which would

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306. *Id*. at 176; *see also* Harris v. State, 76 N.E.3d 137, 139 (Ind. 2017) ("As we hold in our companion Snow opinion, *res gestae* is not proper grounds for the admission of evidence. Instead, we look to our Rules of Evidence . . . .").

307. For discussion of origin and history of *corpus delicti rule*, *see* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 817 (2003). For general discussion and application in Indiana, *see* 8 IND. LAW ENCYC. *Criminal Law* §§ 238, 287 & 288 (2015).

308. Shinnock v. State, 76 N.E.3d 841, 843 (Ind. 2017) (citation omitted).

309. *Id*. (citation omitted).

310. MILLER, JR., *supra* note 110, at 20.

311. *Shinnock*, 76 N.E.3d at 843. *Corpus delicti* means: "The body of a crime. The body (material substance) upon which a crime has been committed, e.g., the corpse of a murdered man, the charred remains of a house burned down. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed." Jones v. State, 252 N.E.2d 572, 577 (Ind. 1969) (citation and quotation marks omitted).

312. *Shinnock*, 76 N.E.3d at 843-44.

313. Shinnock v. State, 70 N.E.3d 845 (Ind. Ct. App.), *trans. granted and opinion vacated*, 76 N.E.3d 841 (Ind. 2017).

314. *Shinnock*, 76 N.E.3d at 843.

> justify the reasonable inference that the specific criminal activity had occurred. It is not necessary to make out a prima facie case as to each element of the offense charged, and the corpus delicti may be shown by circumstantial evidence.
>
> On the other hand, in order to sustain a conviction the corpus delicti must be proved beyond a reasonable doubt. In determining the sufficiency of the evidence for conviction, the confession may be considered along with the independent evidence.[315]

Because the "evidence required to have a confession admitted is not the same as the *corpus delicti* evidence required to sustain a conviction[,]" the supreme court applied a less rigid standard than the court of appeals had.[316] Under the appropriate standard, the supreme court concluded, there was sufficient circumstantial evidence, including the behavior of the dog, to permit admission of the confession.[317]

XI. TESTIMONY UNDER INDIANA'S PROTECTED PERSON STATUTE

In addition to the Indiana Rules of Evidence and residual aspects of common law, Indiana's evidentiary practice is governed by numerous statutes.[318] During the survey period, Indiana's Protected Person Statute[319] was twice the subject of meaningful court interpretation. In *Perryman v. State*, the court of appeals upheld the statute despite a Sixth Amendment challenge.[320] There, a recorded interview of an eight-year-old child-abuse victim conducted at Boone County's Child Advocacy Center was ruled admissible by the trial court in accordance with the Protected Person Statute.[321]

> [T]he protected-person statute protects victims of battery and neglect, who are younger than fourteen. The victim's otherwise inadmissible statement "concern[ing] . . . a material element of [the] offense," may be admitted for its truth against the accused if certain conditions are satisfied: if the trial court finds the child is unavailable to testify at trial because testifying would cause the child serious emotional distress such that the child cannot reasonably communicate; if the trial court finds the child's statement sufficiently reliable after a hearing attended by the child; and if the child was available for cross-

315. *Id*. at 843-44 (quotation marks and citations omitted; ellipsis in original)

316. *Id*. at 844.

317. *Id*.

318. For a comprehensive list of Indiana statutes impacting evidentiary practice, *see* MILLER, JR., *supra* note 110, at App'x I.

319. IND. CODE §§ 35-37-4-6 & -8 (2017).

320. 80 N.E.3d 234, 243-47 (Ind. Ct. App. 2017), *trans. not sought*.

321. *Id*. at 240.

examination at the hearing.[322]

After concluding that the testimony was properly permitted under the statute, the court of appeals was left to address the criminal defendant's constitutional challenge.[323] Each of the defendant's arguments was raised under the Sixth Amendment, and each was dispatched by the court.[324] The first argument was "that the protected-person statute is unconstitutional on its face by failing to require opportunity for cross-examination at the time the protected-person's statement is made[.]"[325] The court of appeals found that the Sixth Amendment's right to confrontation is a right held by an accused, which necessitates inception of prosecution, and, therefore, did not apply to the specific interview in the case.[326] Further, the court concluded, the right to cross-exam is a right that only permits opportunity to cross-examine the declarant prior to admission, not necessarily at the time of the initial statement.[327] Thus the hearing to determine whether to permit the testimony, in which the child must be made available to cross-examination, was sufficient to satisfy the Sixth Amendment.[328]

The defendant also argued that the statute impermissibly "requir[es] trial judges to determine the reliability of the protected person's statement" in derogation of *Crawford v. Washington*.[329] But the court of appeals again disagreed:

> Of course, *Crawford* did not fault reliability per se; it faulted reliability in place of confrontation: "*Dispensing with confrontation* because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." Here, the protected-person statute requires reliability in addition to confrontation; it does not permit the former to take the place of the latter. The confrontation clause does not require more.[330]

Finally, the defendant raised an as-applied challenge to the statute due to the victim's "alleged inability 'to provide any coherent and meaningful testimony about the cause of his injuries[.]'"[331] Again, the court disagreed, ruling that a mere lapse of memory or non-responsiveness by a witness did not amount to "unconstitutional frustration of opportunity for cross-examination."[332] Instead,

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322. *Id*. at 241-42 (citing IND. CODE § 35-37-4-6) (citations omitted).

323. *Id*. at 243-47.

324. *Id*.

325. *Id*. at 243-44.

326. *Id*. at 244-45.

327. *Id*. at 245.

328. *Id*.

329. *Id*. at 245-46.

330. *Id*. at 246 (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)) (emphasis added in original).

331. *Id*.

332. *Id*. at 247.

lapses in a witness's memory are issues of credibility "within the province of the jury to evaluate."[333] The defendant conducted a cross-examination of the child at the hearing covering "the course of events leading up to his battery, and about his hospital visit and [the] interview afterwards. Defense counsel was able to fully probe whether motive or opportunity for manipulation or fabrication existed."[334]

The other decision, *State v. McKinney*, resulted from denials by the trial court of motions to exclude the defendant from the deposition of an eight-year-old child-molestation victim who was diagnosed with PTSD and to allow the victim to testify at trial through closed circuit television.[335] The court of appeals ruled that denial of the motion to exclude the defendant from the deposition, in light of "the unequivocal expert evidence that [the victim] could potentially experience emotional harm if she testified in the presence of" the defendant, was an abuse of discretion.[336] The court also found an abuse of discretion in not permitting the victim to testify via closed circuit television because she clearly met the dictates of Indiana's Protected Person Statute and would be placed under extreme stress if required to testify in the same room as the defendant.[337]

XII. CONCLUSION

From decisions narrowly limiting evidence of immigration status to once more pronouncing the death of the doctrine of *res gestae*, the survey period bore witness to many developments in Indiana evidentiary practice. With lingering questions such as whether a non-physician expert may testify only if medical causation is not complex and whether Rule 617 applies to a hotel room, the next survey period will undoubtedly produce even more changes to Indiana evidence law.

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333. *Id*.

334. *Id*.

335. State v. McKinney, 82 N.E.3d 290, 292-94 (Ind. Ct. App. 2017), *trans. denied*, 95 N.E.3d 1294 (Ind. 2018).

336. *Id*. at 296.

337. *Id*. at 296-99.