

# CHAPTER 10

## EVIDENCE/OBJECTIONS/MISTRIAL

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## I. RULES OF EVIDENCE CHART

SUBJECT	RULE	COMMENTS
<b>AUTHENTICATION</b>		
Rule on Admissibility	901(a)	Requires a showing that matter in question is what its proponent claims.
Proper Means of Authentication	901(b)	<p>Examples of proper means of authentication include:</p> <ol style="list-style-type: none"> <li>(1) Testimony of witness with knowledge,</li> <li>(2) Non-expert opinion on handwriting,</li> <li>(3) Comparison by trier or expert witness to authenticated specimens,</li> <li>(4) Distinctive characteristics and the like,</li> <li>(5) Voice identification,</li> <li>(6) Telephone conversations, by proof of call being made,</li> <li>(7) Public records or reports,</li> <li>(8) Ancient documents or data compilation, in existence for 30 years or more and found in likely place,</li> <li>(9) Evidence describing process or system to show accurate result,</li> <li>(10) Methods provided by statute or rule.</li> </ol>
Self-Authenticating Documents	902	<p>Extrinsic evidence of authenticity not required for admissibility. <u>Coates v. State</u>, 650 N.E.2d 58 (Ind. Ct. App. 1995). Self-authentication of document relieves proponent from submitting foundational testimony as to authenticity, but it does not guarantee admissibility. <u>Dumes v. State</u>, 718 N.E.2d 1171 (Ind. Ct. App. 1999).</p> <ol style="list-style-type: none"> <li>(1) Domestic public documents under seal,</li> <li>(2) Certified copies of unsealed domestic public documents,</li> <li>(3) Foreign public documents signed and certified to level of U.S. consul,</li> <li>(4) Certified copies of public records,</li> <li>(5) Official publications issued by a public authority,</li> <li>(6) Newspapers and periodicals</li> <li>(7) Trade inscriptions (tags, labels),</li> <li>(8) Documents with acknowledgment certificates,</li> <li>(9) Commercial Paper and related documents,</li> <li>(10) Matters declared presumptively authentic by United States or Indiana law,</li> <li>(11) Certified domestic or foreign records of regularly conducted activity (business records).</li> </ol>
Subscribing Witness's Testimony Unnecessary	903	Subscribing witness's testimony unnecessary to authenticate writing unless required by jurisdiction whose laws govern the validity of writings.
<b>HEARSAY</b>		
Admissibility	802	Hearsay is inadmissible absent an "exception" or by law. <u>Arndt v. State</u> , 642 N.E.2d 224 (Ind. 1994).
Attacking and Supporting the Declarant's Credibility	806	Credibility of hearsay declarant may be attacked, then supported, by evidence that would be admissible for those purposes if declarant had testified.
Defined	801(c)	Hearsay "is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." <u>Bonner v. State</u> , 650 N.E.2d 1139 (Ind. 1995) (Out-of-court statements by informants that defendant was drug trafficking lacked

SUBJECT	RULE	COMMENTS
		relevance except as to matter asserted therein and were thus inadmissible hearsay).
<b>NOT HEARSAY</b>		
Prior Statements by Witness	801(d)	Prior statement of witness, then under oath and now cross-examined, is not hearsay. <u>Owens v. State</u> , 659 N.E.2d 466 (Ind. 1995) (Police officer's testimony that witness's two pre-trial statements were consistent was inadmissible under evidence rule concerning prior consistent statements; State should have offered statements themselves into evidence; officer's bare conclusion that statements were consistent irrelevant in attempt by state to rebut charge that witness changed his testimony).
Statement by Party-Opponent	801(d)	Admissions of a party, including his co-conspirators or agents (within scope of employment), and admissions adopted by a party are not hearsay.
<b>HEARSAY EXCEPTIONS:</b> Availability of Declarant Immaterial	803	<ol style="list-style-type: none"> <li>(1) Present sense impression (e.g., "Look, it is raining").</li> <li>(2) Excited utterance, by anyone, "relating to" event and before excitement fades. <u>Arndt v. State</u>, 642 N.E.2d 224 (Ind. 1994) (out-of-court statements by 3-year-old victim, made while in pain, arguably admissible under excited utterance exception).</li> <li>(3) Then existing mental state or physical condition. <u>Arndt v. State</u>, 642 N.E.2d 224 (Ind. 1994).</li> <li>(4) Statements made by attack victim to doctor for purpose of diagnosis and treating her injuries admissible; however, all non-diagnostic statements are inadmissible. <u>VanPatten v. State</u>, 986 N.E.2d 255 (Ind. 2013).</li> <li>(5) If witness record past recollected facts once facts known, recorded them when fresh in mind, and presently has exhausted recollection, memorandum may be read into record but may not become exhibit unless offered by adverse party.</li> <li>(6) Business records: Testimony by custodian or other qualified witness, showing a regular practice to keep such records and that the exhibit was made in ordinary course of business and relates thereto. <u>Carmichael v. Kroger Co.</u>, 654 N.E.2d 1188 (Ind. Ct. App. 1995) (affidavit from custodian of records and report from doctor about physical exam of plaintiff met requirements of hearsay exception for records of regularly conducted business activity).</li> <li>(7) Absence of entry in business records or other records regularly kept.</li> <li>(8) Public records or reports maintained by public office or agency: regular conducted and recorded activities, matters observed pursuant to duty and duty to report; or factual findings from duty to investigate, except: (a) police reports; (b) investigative reports for government where government is party; (c) factual findings offered by government in criminal cases; and (d) factual findings resulting from special investigation of complaint, case, or incident. <u>Coates v. State</u>, 650 N.E.2d 58 (Ind. Ct. App. 1995) (Properly certified records of BMV admissible under public records hearsay exception). <b>Note:</b> (a) and (d) are admissible when offered by accused.</li> <li>(9) Records of vital statistics (e.g., births, marriages).</li> <li>(10) Absence of public record entry.</li> <li>(11) Records of religious organization.</li> <li>(12) Marriage, baptismal certificates.</li> <li>(13) Family records (e.g., Bibles, genealogies, charts).</li> <li>(14) Records of documents relating to property interests</li> <li>(15) Statements in rule 803(14) documents.</li> <li>(16) Statements in ancient documents.</li> <li>(17) Market reports, commercial lists (relied upon by public or professionals).</li> </ol>

SUBJECT	RULE	COMMENTS
		<p>(18) Learned Treatises relied on in direct or called to an expert's attention on cross. If shown by testimony or judicial notice to be reliable authority, may be read into record but may not become an exhibit.</p> <p>(19) Reputation re: personal or family history.</p> <p>(20) Reputation re: boundaries or historical matters.</p> <p>(21) Character reputation.</p> <p>(22) Judgments of convictions. Crime punishable by death or imprisonment more than one year (felonies).</p> <p>(23) Judgments involving personal, family, or general history, or a boundary.</p>
<b>HEARSAY EXCEPTIONS:</b>	804(a)	Declarant must be unavailable (e.g., exempted by privilege, refuses despite order, shows lack of memory, cannot attend due to illness or death, or is absent despite attempt to subpoena).
Declarant Unavailable	804(b)	<p>(1) Former Testimony where predecessor in interest had opportunity and motive to develop testimony via direct, cross, or redirect. <u>Kellems v. State</u>, 651 N.E.2d 326 (Ind. Ct. App. 1995) (depositions of defendant's alibi witnesses should have been admitted where witnesses were unavailable due to invocation of 5th Amendment and prosecutor had previous opportunity to examine witnesses concerning testimony at their depositions).</p> <p>(2) Dying declarations, if believed death imminent, concerning the cause or circumstances of what he believed to be impending death.</p> <p>(3) Statements against interests pecuniary, penal, or proprietary.</p> <p>(4) Statements re: personal or family history (e.g., birth, adoption)</p> <p>(5) Forfeiture by wrongdoing.</p>
Hearsay within Hearsay	805	Barred unless each statement is covered by an exception. <u>Davis v. State</u> , 635 N.E.2d 1117 (Ind. Ct. App. 1994) (when multiple levels of hearsay offered, each level must qualify under an exception to hearsay rule)
<b>JUDICIAL NOTICE</b>		
Facts	201(a)	Court may take judicial notice of a fact. <u>Griffin v. Acker</u> , 659 N.E.2d 659 (Ind. Ct. App. 1995). Burden is on opposing party to show inaccuracy. <u>Horton v. State</u> , 51 N.E.3d 1154 (Ind. 2016) (trial or appellate court, by request or <i>sua sponte</i> , can take judicial notice of case files not entered into record).
Instructing Jury	201(f)	In civil case, court must instruct jury to accept as conclusive judicially noticed fact. <u>Griffin v. Acker</u> , 659 N.E.2d 659 (Ind. Ct. App. 1995). In criminal case, court must instruct jury that it may, but is not required to, accept as conclusive any fact judicially noticed. <u>Bonds v. State</u> , 729 N.E.2d 1002 (Ind. 2000) (error to fail to instruct jury on effect of court's taking judicial notice of administrative regulations).
Laws	201(b)	Court may take judicial notice of decisional, constitutional, public statutory law, rules of court, public regulations of gov't agencies, codified ordinances of municipalities, records of a court in this state, and law of other gov't subdivision of U.S. <u>Christie v. State</u> , 939 N.E.2d 691 (Ind. Ct. App. 2011).
Mandatory	201(c)	Court shall take judicial notice if requested by a party and supplied with necessary information. <u>Griffin v. Acker</u> , 659 N.E.2d 659 (Ind. Ct. App. 1995) (error for court to refuse to take judicial notice of interest tables).
Opportunity to be Heard	201(e)	Opponent is entitled to be heard upon timely request, on "the propriety of taking judicial notice and the nature of the fact to be noticed." <u>In re Paternity of P.R.</u> , 940 N.E.2d 346, 349 (Ind. Ct. App. 2010).
Time of Taking Notice	201(d)	Any stage of the proceeding.
<b>OPINION TESTIMONY</b>		

SUBJECT	RULE	COMMENTS
<b>EXPERT OPINION</b>	702	Allowed if it assists trier of fact. Court must be satisfied scientific principles reliable. <u>Matter of Adoption of L.C.</u> , 650 N.E.2d 726 (Ind. Ct. App. 1995) (determination of whether witness qualifies as expert in sound discretion of trial court; advanced degrees, special recognition, or accomplishments not necessary; error to admit psychotherapist's testimony about child sexual abuse syndrome following defense objection, when no foundational showing of reliability made). <u>Fleener v. State</u> , 656 N.E.2d 1140 (Ind. 1995).
Basis of Opinion	703	Expert opinion may be based on known, admissible facts or any fact typically relied on in the field. <u>Matter of Adoption of L.C.</u> , 650 N.E.2d 726 (Ind. Ct. App. 1995).
Disclosure of Facts or Data	705	Expert may be required to disclose underlying facts or data on cross.
Lay Opinion	701	Admissible if rationally based on perceptions and helpful to trier of fact. <u>Hawkins v. State</u> , 626 N.E.2d 436 (Ind. 1993) (officer's testimony provides sufficient factual basis on which she could reasonably form an opinion). <u>See also Castillo v. State</u> , 734 N.E.2d 299 (Ind. Ct. App. 2000).
Ultimate Issue	704	Opinion on ultimate issue is admissible if otherwise proper. Witnesses may not testify to opinions of guilt, innocence, or intent in criminal case; truth or falsity of allegations; or legal conclusions. <u>Smith v. State</u> , 721 N.E.2d 213 (Ind. 1999) (Rule 704(b) applies to statements offered at trial that were made at another time or place). <u>Osmulski v. Becze</u> , 638 N.E.2d 828 (Ind. Ct. App. 1994) (opinion testimony by witness as to ultimate fact in issue not objectionable merely because it invades province of trier of fact). <u>Weaver v. State</u> , 643 N.E.2d 342 (Ind. 1994) (court properly excluded girlfriend/victim's testimony concerning what she believed caused defendant to beat her and whether he intended to kill her).
<b>PAST SEXUAL CONDUCT</b>		
Rape Shield Rule	412	Rule allows three exceptions to inadmissibility of past sexual behavior, and <u>State v. Walton</u> , 715 N.E.2d 824 (Ind. 1999) adds a fourth: witness has made past false sexual misconduct allegations against others.
Procedure	412(c)	File written notice 10 days before trial specifically describing evidence and purpose for evidence (must serve parties and notify alleged victim). Before admitting evidence under this rule, court must conduct <i>in camera</i> hearing and give victim and parties a right to attend and be heard. Motion, related materials, and record of hearing is confidential and excluded from public access in accordance with Administrative Rule 9.
<b>PLEA DISCUSSIONS</b>	410	Withdrawn offers of pleas, plea discussions not admissible. <u>Bell v. State</u> , 622 N.E.2d 450 (Ind. 1993) (confession made during plea negotiations inadmissible during subsequent jury trial). <u>Cf. Gilliam v. State</u> , 650 N.E.2d 45 (Ind. Ct. App. 1995) (statements made to police detective were not part of plea negotiations and were admissible.).
<b>PRIVILEGES</b>	501	Privileges are decided by state law
<b>REFRESHING MEMORY</b>	612	Writings or objects used to refresh witness's memory during or before testimony must be produced to adversary.
<b>PRESUMPTIONS</b>	301	In civil proceedings, presumptions apply only to the burden of going forward and do not shift the burden of proof.
<b>RELEVANCY</b>		
Defined	401	Relevant evidence: makes a fact of consequence to the case more or less probable. <u>McKinstry v. State</u> , 660 N.E.2d 1052 (Ind. Ct. App. 1996) (false alibi statement given to investigators relevant to show consciousness of guilt). <u>See also Robinson v. State</u> , 720 N.E.2d 1269 (Ind. Ct. App. 1999).

SUBJECT	RULE	COMMENTS
Admissibility	402	Irrelevant evidence is inadmissible. <u>Williams v. State</u> , 634 N.E.2d 849 (Ind. Ct. App. 1994) (document “not material to the issues in both time and content” properly excluded).
Balancing Test for Exclusion: Prejudice v. Probative value	403	Relevant evidence may be excluded if outweighed by prejudice. <u>Carson v. State</u> , 659 N.E.2d 216 (Ind. Ct. App. 1995) (evidence of drive-by shooting had little probative value and created potential for unfair prejudice). <u>Fisher v. State</u> , 641 N.E.2d 105 (Ind. Ct. App. 1994) (evidence of acts occurring 23 years previously too remote in time to be relevant and admission was error). <u>Barnes v. State</u> , 634 N.E.2d 46 (Ind. 1994) (not error to admit gruesome photos of victim at crime scene and autopsy when photos depicted witnesses’ testimony).
<b>CHARACTER EVIDENCE</b>		
Generally, not admissible	404(a)	Character is not admissible to prove an act unless first offered by an accused via a witness. <u>Forrest v. State</u> , 655 N.E.2d 584 (Ind. Ct. App. 1995) (cross examination of defendant’s character witnesses regarding defendant’s prior arrest for disorderly conduct proper where witnesses had testified as to defendant’s peaceful nature).
Other Crimes, Wrongs, or Acts	404(b)	Evidence of other crime, wrongs, or acts not admissible to prove character of a person to show action in conformity therewith. It may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. <u>Kimble v. State</u> , 659 N.E.2d 182 (Ind. Ct. App. 1995) (evidence of defendant’s participation in racially biased group admissible to show motive for robbery/murder of black victim). <u>Levi v. State</u> , 627 N.E.2d 1345 (Ind. Ct. App. 1994) (error to admit evidence of defendant’s prior burglary conviction to show intent to commit current burglary).
<b>METHOD OF PROVING</b>		
Character Witness, On Cross	405(a)	Character is proved by reputation or opinion.
Character Witness, On Cross	405(a)	On cross-examination, inquiry is allowable into specific instances of conduct. <u>Forrest v. State</u> , 655 N.E.2d 584 (Ind. Ct. App. 1995) (witnesses who testified as to defendant’s reputation as nonviolent, peaceful person properly cross-examined regarding his prior arrests for disorderly conduct and resisting law enforcement).
Specific Instances of Conduct	405(b)	Where character of person is essential element of charge, claim, or defense, specific instances of conduct allowed.
Compromise, Offers to	408	All statements in settlement discussions are inadmissible (except to explain delay or show bias).
Habit/Routine Practices	406	Relevant to prove conduct on particular occasion in conformity with habit, whether or not corroborated.
Liability Insurance	411	Insurance is inadmissible on liability (allowed re: ownership, control, agency, or bias).
<b>MEDICAL EXPENSES</b>		
Charges	411	Statements of charges for medical expenses occasioned by injury are admissible and constitute prima facie evidence that charges are reasonable.
Payment of	409	Payment of medical expenses is not admissible to prove liability.
Subsequent Remedial Measures	407	Subsequent measures not admissible to prove culpable conduct or liability in connection with the event (allowed re: ownership, control, feasibility).
<b>RULINGS ON EVIDENCE</b>		
Effect of Erroneous Ruling	103(a)	Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected, and an objection or offer-of-proof is made (unless it is clear error). <u>Coates v. State</u> , 650 N.E.2d 58 (Ind. Ct. App. 1995) (objection must be timely and specific).

SUBJECT	RULE	COMMENTS
Fundamental Error	103 (c)	Nothing precludes taking notice of fundamental errors affecting substantial rights of defendant although they were not brought to attention of court.
Limited Admissibility	105	Evidence may be received for a limited purpose; jury should be admonished.
Remainder of Writing or Statement	106	If fairness requires, upon offer of a writing or recording, the offering party may be required to offer at that time related parts thereof or related exhibits.
<b>PRELIMINARY QUESTIONS</b>		
Judge Decides	104(a)	Judge decides qualification of person to be a witness, existence of privilege or admissibility of evidence.
Outside Hearing of Jury	104(c)	Hearings on admissibility of confessions, other preliminary matters in the interest of justice, or when an accused is a witness and so requests are all conducted out of the presence of jury.
Relevancy Conditioned on Fact	104(b)	When relevancy of evidence depends upon fulfillment of a condition of fact, court shall admit it upon, or subject to, the introduction of evidence sufficient to support fulfillment of the condition.
Testimony of Accused	104(d)	Accused does not become subject to cross as to other issues in case by testifying on preliminary matter.
Weight and Credibility	104(e)	Party's right to introduce relevant evidence to weight or credibility is not limited by rule 104.
<b>SCOPE OF EXAMINATION</b>		
	611(a)	Court controls examination to find truth, avoid delay, and protect witness. <u>Isaacs v. State</u> , 659 N.E.2d 1036 (Ind. 1995) (within court's discretion to refuse to allow defendant to recall pathologist where testimony not vital to case and testimony could have been presented through another witness). See also <u>Haak v. State</u> , 695 N.E.2d 944 (Ind. 1998).
Scope of Cross-examination	611(b)	Scope of cross is limited to direct and matters affecting credibility unless Court permits more. <u>Whitehair v. State</u> , 654 N.E.2d 296 (Ind. Ct. App. 1995) (defendant opened door to cross-examination of witness about defendant's less than honorable military discharge by repeated references to defendant's military service during direct exam).
Leading Questions	611(c)	Leading is allowed on direct, if necessary, to develop testimony, on cross, and with hostile or adverse witnesses.
<b>WITNESSES</b>		
Bias	616	Evidence of bias, prejudice, interest of witness is admissible.
Call and interrogate by judge and jury	614	Court may call and question witnesses; objections may be made out of jury's presence. Jury may submit written questions.
Competency	601	Witness is competent unless Rules disqualify. <u>Thornton v. State</u> , 653 N.E.2d 493 (Ind. Ct. App. 1995).
Interpreters	604	Interpreters must be qualified as expert and work under oath.
Lack of Personal Knowledge	602	Disqualified if witness does not have personal knowledge (perception, recall, and ability to communicate).
Judges, as Witness	605	Judge may not serve as witness.
Jurors, as Witness	606	Jurors may not testify; verdicts impeachable only regarding extraneous influences.
<b>IMPEACHMENT</b>		
Prior Convictions	609	Unpardoned convictions of murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or crime involving dishonesty or false statement, if less than 10 years old or older if, upon notice and hearing, court finds it fair to permit their use. <u>Currin v. State</u> ,

SUBJECT	RULE	COMMENTS
		638 N.E.2d 1319 (Ind. Ct. App. 1994) (conviction that has no bearing on witness's propensity to tell truth not admissible for impeachment purposes). <u>Pierce v. State</u> , 640 N.E.2d 730 (Ind. Ct. App. 1994) (prior bad acts may be used for impeachment only if "infamous" crime or crime probative of credibility - conviction for dealing in cocaine may not be used to impeach).
Prior Juvenile Adjudications	609(d)	Generally inadmissible, but adjudications of witnesses other than accused if offense would be admissible to attack credibility of an adult and court finds it fair to permit use. <u>Lahr v. State</u> , 640 N.E.2d 756 (Ind. Ct. App. 1994) (evidence regarding juvenile delinquency proceedings cannot later be used for impeachment purposes).
Prior Statements	613	(a) Prior statements need not be first disclosed to witness in impeachment; and (b) Extrinsic proof of prior statements is permitted only if witness is first given opportunity to explain or deny. <u>Griffith v. State</u> , 31 N.E.3d 965 (Ind. 2015) (despite preferred method of confronting a witness with his inconsistent statement prior to its introduction into evidence, trial courts are given broad discretion in excluding or admitting extrinsic evidence under Rule 613(b)).
Religious Beliefs	610	Religious beliefs may not be used to impeach.
Specific Instances of Conduct to Prove Character	608	Credibility is attacked by opinion or reputation for truthfulness, not specific acts other than crimes (Rule 609), unless on cross-examination court permits in its discretion. <u>Manuel v. State</u> , 971 N.E.2d 1262 (Ind. Ct. App. 2012). <u>Dynes v. Dynes</u> , 637 N.E.2d 1321 (Ind. Ct. App. 1994) (reversible error to exclude mother's reputation for dishonesty in workplace; evidence central to her credibility as a witness). <u>Palmer v. State</u> , 654 N.E.2d 844 (Ind. Ct. App. 1995) (evidence of police officer's drug use not admissible impeachment evidence; does not constitute opinion of officer's reputation; may not inquire into specific acts of misconduct except as provided for in Rule 609).
Who Can Impeach?	607	Any witness's credibility may be impeached by any party (e.g., bias, prior statements).
Interrogations by Court	614 (a-c)	Court may call and question witnesses; objections must be made out of jury's presence.
Interrogations by Jury	614(d)	Jurors may submit questions in writing to judge who has discretion to ask witness those questions; parties can object outside presence of jury.
Oath or Affirmation	603	Witness must make and understand oath or affirmation to tell truth.
Separation of Witnesses	615	Court shall order witnesses except party, agent of party, or person essential to party excluded at request of party or on own motion. <u>Smiley v. State</u> , 649 N.E.2d 697 (Ind. Ct. App. 1995) (error to disqualify witness from testifying for violating witness separation order where no evidence defendant connived to have witness violate order). <u>Vinson v. State</u> , 735 N.E.2d 828 (Ind. Ct. App. 2000) (whether witness fits exemption under rule within trial court's discretion).
<b>WRITINGS</b>		
<b>DEFINITIONS</b>		
Original	1001(d)	Include counterparts and prints from negatives; "duplicates" are identical copies.
Photographs	1001(c)	Include photographic images or equivalent stored in any form.
Writings and Recordings	1001(1)	Consists of letters, words, sounds, or numbers, or their equivalent, set down in any form.



SUBJECT	RULE	COMMENTS
Duplicates, Admissibility of	1003	Duplicates are admissible unless (1) genuine question of authenticity exists, or (2) use of duplicate would be unfair.
Functions of Court and Jury	1008	Trier of fact decides (a) if original ever existed, (b) whether an exhibit is an original, and (3) whether evidence of its contents reflects the contents.
Other Evidence of Contents, Admissibility of	1004	Evidence of the contents of an original is permitted if (1) original is lost without bad faith, (2) original is unobtainable, (3) opponent will not produce original, or (4) writing, recording, or photograph relates only to collateral matters.
Public Records	1005	Public records must be proved by a copy unless unobtainable despite due diligence.
Requirement of Original	1002	Original writing, recording, or photograph must be used to prove its contents, except as provided by statute.
Summaries	1006	Summaries of voluminous records are permitted for convenience; originals must be reasonably available for review.
Testimony or Written Admissions	1007	Contents of originals may be proved by a party's testimony or written admissions.

## II. COMMON TRIAL OBJECTIONS

### 1. VOIR DIRE

Asking Jurors to Predetermine Weight and Credibility  
 Being Repetitive or Argumentative  
 Commenting on Defendant's Right not to Testify  
 Commenting on Role of Defense Counsel  
 Conditioning Jurors to Be Receptive to State's Case  
 Deliberately Exposing to Substantive Issues  
 Fear of Retribution Created  
 Informing Jury of Legal Theories or Principles  
 Misstating Law  
 Making Prejudicial or Inflammatory Comments  
 Suggesting Personal Knowledge of Guilt  
 Trying Case Before Evidence Presented

### 2. OPENING STATEMENT

Addressing Jurors by Name  
 Anticipating Defenses of Adversary  
 Arguing  
 Attacking Character of Accused  
 Attacking Character of Defense Counsel  
 Commenting on Defendant's Failure to Testify  
 Discussing Prosecutor's Personal Dealings With Witness  
 Introducing Unprovable Facts  
 Instructing Jurors on Law  
 Making Inflammatory Remarks/Pleas to Passion  
 Mentioning Inadmissible Matter  
 Mentioning Polygraph  
 Mentioning Prior Crimes, Wrongs, or Acts  
 Misstating Facts  
 Presuming Defendant's Guilt  
 Putting Jurors in Place of Victim  
 Stating Personal Belief or Opinion

### 3. COMPETENCY OF WITNESSES

Deadman's Statute Bars Testimony  
 Inability to Observe, Remember, and Communicate  
 Inability to Understand Duty to tell the Truth  
 Judge Called as Witness  
 Juror Called as Witness  
 Personal Knowledge Lacking

### 4. FORM OF QUESTION

Ambiguous  
 Argumentative  
 Asked and Answered  
 Assumes a Fact Not in Evidence

Compound  
 Confusing or Unintelligible  
 Hypothetical Question Misused  
 Leading  
 Misquotes a Witness or Exhibit  
 Narrative Answer Requested  
 Overly Broad or General

### 5. TESTIMONY AND EXHIBITS

Bolstering Credibility Before Impeachment  
 Authentication Lacking  
 Best Evidence Rule Violated  
 Collateral Matter  
 Conclusion Improperly Elicited  
 Corpus Delicti Not Proven  
 Cumulative  
 Deadman's Statute Violated  
 Excludable in Court's Discretion  
 Fact Barred by Pleading or Admission  
 Foundation Defective  
 Hearsay  
 Illegally Obtained Evidence  
 Immaterial  
 Impeachment Improperly Handled  
 Irrelevant  
 Narrative Answer  
 Non-Responsive Answer  
 Objectionable on Other Grounds  
 Opinion Offered Without Basis  
 Parol Evidence Rule Violated  
 Prejudicial or Inflammatory  
 Pretrial Order Precludes Testimony  
 Privileged or Protected Information  
 Reading from Document Not in Evidence  
 Rehabilitation Improperly Handled  
 Scope of Proper Examination Exceeded  
 Self-Serving (Frequently Hearsay)  
 Plea Negotiations Disclosed  
 Speaks for Itself (Exhibit)  
 Speculation or Agreement Obviates Answer  
 Subsequent Repairs Inadmissible  
 Testimony by Counsel  
 Uncharged Misconduct Misused  
 Undefined Term Employed  
 Undisclosed Document Barred  
 Wealth or Poverty Injected

### 6. CONDUCT OF A WITNESS

Argumentative Answer  
 Communication with a Juror  
 Disparaging Comments  
 Display of Unadmitted Exhibit to Jury

Fee Contingent on Answers  
 Inaudible Answers  
 Interruption of Questions  
 Looking to Counsel for Answer Cue  
 Narrative Answers  
 Notes Being Used Without Permission  
 Prejudicial or Inflammatory Statements  
 Protracted Answers  
 Refusal to Answer Precise Question  
 Unavailability for Cross-Examination  
 Unresponsive Answers

## 7. CONDUCT OF PROSECUTOR

Bickering  
 Blocking View of Counsel, Judge, or Jury  
 Candor or Fairness Lacking  
 Characterizing Witnesses as Liars  
 Coaching Comments in Question or Objection  
 Communicating with a Represented Party  
 Communicating with a Jury  
 Currying Jury Favor  
 Custom or Courtesy of Practice Ignored  
 Cutting Off Witnesses' Answers  
 Deceit or Collusion  
 Deliberately Eliciting Inadmissible and  
     Prejudicial Evidence  
 Dilatory Tactics  
 Displaying Unadmitted Exhibit to Jury  
 Disparaging Counsel, Party, or Witness  
 Distracting Noise or Movement  
 Ex Parte Communications with Court  
 Facts not Proved or Provable Stated  
 Failing to Follow Court Instructions  
 Forcing a Claim of Privilege  
 Gesturing or Signaling to Witness or Jury  
 Habitual or Intentional Violation of Rules  
 Hostility to Court, Counsel, Party, or Witness  
 Insurance Injected  
 Interrupting Questions of Adversary  
 Interviewing Potential Jurors  
 Irrelevant Matter Injected  
 Location of Counsel while Questioning  
 Misquoting Testimony or Exhibit  
 Objecting for Improper Purposes  
 Orderly Trial Subverted  
 Personal Belief in Merit or Credibility  
     Conveyed  
 Personal Knowledge Asserted  
 Personal Influence Exerted on Judge or Juror  
 Prejudicial or Inflammatory Matter Raised  
 Pretrial Order Violated  
 Protracted Examination  
 Publicity Violations  
 Religious Beliefs Injected  
 Repeating Objectionable Questions  
 Respect for Court Lacking

Stipulation Violated  
 Subornation of Perjury  
 Suppressing Evidence  
 Testimony by Counsel  
 Undignified Conduct  
 Using False Testimony  
 Withdrawn Guilty Plea Mentioned

## 8. CONDUCT OF JUDGE

Bias re Counsel or a Party  
 Coercion  
 Credibility of Witnesses Assessed  
 Disparaging Counsel or a Party  
 Disparaging Witness or Testimony  
 Excessive Examination of Witnesses  
 Gestures or Facial Expressions  
 Interfering with Presentation of Case  
 Merits of Case Evaluated for Jury  
 Mistakes (and Misconduct)  
 Off-The-Record Comments  
 Prejudicial Statements  
 Summarization of Testimony

## 9. JURY INSTRUCTIONS

Ambiguous  
 Argumentative  
 Confusing or Unclear  
 Credibility Assessed Improperly  
 Emphasis on One Theory, Issue, or Side of  
     Case  
 Evidence Lacking to Support Charge  
 Failure to Call Witness Mishandled  
 Jury Role Usurped  
 Inconsistent Charge  
 Legal Standard Erroneous  
 Overly General or Abstract Charge  
 Personal Opinion Stated  
 Prejudice or Sympathy Appealed to  
 Suggestion Improper  
 Technical Terms Undefined or Misused  
 Theory or Issue Omitted  
 Weight of Evidence Assessed Improperly

## 10. CLOSING ARGUMENT

Appealing to Prejudices and Biases  
 Attacking Counsel  
 Attacking Defendant  
 Denigrating Counsel's Objections  
 Defendant's Failure to Call Witness  
 Defendant's Failure to Testify  
 Duration of Punishment  
 Facts Misstated  
 Grand Jury Improperly Mentioned  
 Hung Jury Improperly Mentioned  
 Inadmissible Evidence Mentioned

Irrelevant Facts or Issues  
Jurors Addressed by Name  
Law Misstated  
Matters not in Evidence Mentioned  
Personal Belief on Guilt of Accused  
Personal Knowledge Independent of  
Evidence  
Post-arrest Silence Mentioned  
Prosecutor's Duty to All Society  
Rebuttal: Matters Not Addressed by  
Defendant  
Repetitious Reading of Charging Document  
Role of Defense Counsel

Sleeping  
Using Prescribed Tranquilizers  
Testifying as Witness before Jury  
Foreman Prevents Free and Open Discussion  
Impeaching Own Verdict  
Divulging Extraneous Evidence Before Verdict  
Experiment by Jury  
Failing to Disclose Personal Knowledge of  
Material Fact  
Talking About Case Related Subject Before  
Case is Submitted to Jury

## **11. JUROR MISCONDUCT**

False Statements on Voir Dire  
Out-of-Court Communication or Contact  
Socializing with State's Witnesses  
Consuming of Alcohol

### III. MISTRIAL

*Note: For discussion of “Mistrial” during OPENING STATEMENT see IPDC Trial Manual, Chapter 8 § III.B.*

#### A. PROSECUTORIAL MISCONDUCT – GENERAL FAIRNESS IN TRIAL PROCEEDINGS

##### 1. Prompt admonition presumed adequate

If alleged misconduct concerns general fairness in the trial proceedings, there is strong presumption a timely and accurate admonition to the jury is sufficient to protect the rights of the defendant. Agilera v. State, 862 N.E.2d 298, 307-08 (Ind. Ct. App. 2007) and Smith v. State, 471 N.E.2d 733, 734 (Ind. Ct. App. 1984).

Boner v. State, 796 N.E.2d 1249, 1252-53 (Ind. Ct. App. 2003) (trial judge’s timely, specific, and accurate admonishment to jury regarding inadmissible and potentially prejudicial hearsay testimony was sufficient and recommended for future cases).

Greenlee v. State, 655 N.E.2d 488 (Ind. 1995) (references to prior misconduct did not warrant mistrial because of trial court’s prompt admonishments and strong eyewitness testimony supporting the verdict). See also Lucio v. State, 907 N.E.2d 1008 (Ind. 2009).

James v. State, 613 N.E.2d 15 (Ind. 1993) (even though two police officers testified about defendant’s criminal history, trial court did not abuse discretion in denying motion for mistrial because trial court promptly admonished jury to disregard references to criminal history, independent evidence of guilty was overwhelming, so there was no substantial likelihood that improper evidence played role in defendant’s conviction).

Moore v. State, 652 N.E.2d 53 (Ind. 1995) (mistrial properly denied even though prosecutor repeatedly used word “murder” after being directed by trial court. to use word “homicide” instead).

However, Indiana Supreme Court requires a high level of assurance that there was no residuum of prejudice left after the jury was admonished to disregard the testimony. Davis v. State, 418 N.E.2d 203, 205 (Ind. 1981) and English v. State, 485 N.E.2d 93 (Ind. 1985).

Bonner v. State, 650 N.E.2d 1139 (Ind. 1995) (simple fact that admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from minds of reasonable jurors or omitted from their deliberations).

##### 2. Waiver if counsel refuses admonition

Refusal to agree to the court’s offer to admonish waives any error in denial of a motion for mistrial. Boyd v. State, 430 N.E.2d 1146, 1149 (Ind. 1982) and Kindred v. State, 540 N.E.2d 1161, 1176 (Ind. 1989).

Gamble v. State, 831 N.E.2d 178, 183-84 (Ind. Ct. App. 2005) (must request jury admonishment to avoid waiver, even when counsel believes that an admonishment would compound the error by drawing attention to it).

##### 3. Instruction to disregard is unmitigated fiction

There are various social science studies and law review articles that seriously question the efficacy of jury admonishments. See Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000) (at a minimum a court should construct and deliver jury admonishments with care and precision). Commentary, Ind. R. Evid. 105. The ineffectiveness of the trial court’s instruction to the jury

to disregard the improper testimony was recognized by Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716(1949): “The naïve assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.”

Martin v. Lilly, 121 N.E. 443, 446 (Ind. 1919) (“one party may not be permitted to get the other into a dying condition and then expect the court to revive him by instructions.”).

White v. State, 272 N.E.2d 312, 319-20 (Ind. 1971) (in view of an admonition, we feel that where there are serious conflicts in the evidence entitling the jury to go either way upon the issue of guilt or innocence, it is especially important that they not be subjected to improper influences; in such a case, the defendant should be given the benefit of reasonable doubts).

Bonner v. State, 650 N.E.2d 1139, 1142 (Ind. 1995) (despite presence of jury admonition, Court declined to find improper admission of prejudicial hearsay evidence harmless; simple fact that admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from minds of reasonable jurors or omitted from their deliberations).

Scifres-Martin v. State, 635 N.E.2d 218 (Ind. Ct. App. 1994) (evidence inferring family cover-up of crime was so prejudicial that neither admonishment from the court nor curative instruction could remove prejudice).

## **B. EVIDENTIARY HARPOON – NOT CORRECTED BY ADMONITION**

An evidentiary harpoon involves improper evidence deliberately introduced by counsel or a witness to prejudice the jury, the effect of which cannot be corrected by an admonition by the trial court. Pallett v. State, 381 N.E.2d 452, 456 (Ind. 1978) and Lewis v. State, 438 N.E.2d 289, 291 (Ind. 1982).

### **1. Can be evidentiary harpoon even if not elicited by State**

The doctrine of evidentiary harpoons is concerned with protecting parties from intentionally prejudicial comments, not counsel misconduct. Therefore, a harpoon may hit the defendant even if not purposely fired by counsel.

Perez v. State, 728 N.E.2d 234, 237 (Ind. Ct. App. 2000) (although not elicited by prosecutor’s question, comment by detective about defendant being a convicted felon was an evidentiary harpoon; the detective undoubtedly understood significance of statement and the comment was deliberately made to incite prejudice).

### **2. If intentional and evidence of guilt in conflict**

Indiana Supreme Court requires a high level of assurance the irregularity did not affect the verdict before it will affirm trial court’s judgment. Smith v. State, 471 N.E.2d 733, 734 (Ind. Ct. App. 1984).

### **3. No harpoon if defendant opens door**

If defendant opens door to prejudicial comment, therefore making it admissible, there is not an evidentiary harpoon. Alvies v. State, 795 N.E.2d 493, 504 (Ind. Ct. App. 2003).

Alvies v. State, 795 N.E.2d 493, 504 (Ind. Ct. App. 2003) (where defense asked witness on cross-examination whether anything would have happened in jail to cause memory problems, State could then ask him to discuss beating received by cellmates hours before testifying in murder trial).

#### 4. Move for mistrial

Where counsel has deliberately violated the rights of Defendant and there are reasonable grounds to believe that such violation may have prejudiced his cause, a mistrial should be declared, if moved by the injured party. White v. State, 272 N.E.2d 312, 319-20 (Ind. 1971); Lambert v. State, 448 N.E.2d 288, 291 (Ind. 1983); and May v. State, 502 N.E.2d 96, 102 (Ind. 1986).

The motion for mistrial should demonstrate in what manner the movant would be prejudicially harmed if the motion was denied by the trial court. Duke v. State, 249 Ind. 466, 233 N.E.2d 159 (1968).

#### 5. Showing – “Grave Peril”

To prevail on appeal based on claim that trial court erred by failing to grant mistrial, defendant must show that he was so prejudiced that he was placed in a position of grave peril to which he should not have been subjected. White v. State, 272 N.E.2d 312, 319-20 (Ind. 1971) and Neuhausel v. State, 530 N.E.2d 121, 123 (Ind. Ct. App. 1988). Factors considered in determining whether circumstances place defendant in grave peril and warrant mistrial include: (1) degree of materiality of improper testimony or comment; (2) other evidence of guilt; (3) whether prosecutor deliberately presented improper material; (4) whether defendant or defense counsel played part in presenting improper material; and (5) whether improper material was repeatedly placed before jury. Small v. State, 632 N.E.2d 779 (Ind. Ct. App. 1994).

Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000) (grave peril to a defendant as a result of trial court’s failure to grant mistrial is measured by the probable persuasive effect on the jury of the challenged action, evidence, or misconduct).

Mote v. State, 775 N.E.2d 687, 691 (Ind. Ct. App. 2002) (motion for mistrial should have been granted when a redacted videotape containing twelve references to the defendant’s prior criminal history was played to the jury over defendant’s objection without any limiting admonishment).

Fox v. State, 399 N.E.2d 827 (Ind. Ct. App. 1980) (reversible error for police witness to make reference to “mug file” and bring same into court, where such reference was distinguishable from an inadvertent reference to “mug shots”).

Carr v. State, 388 N.E.2d 603, 605 (Ind. Ct. App. 1979) (reversible error in theft prosecution to admit evidence that defendant’s home was under police surveillance prior to crime and his arrest for suspected involvement in other thefts).

#### 6. Factors determining whether mistrial is necessary

In determining whether a trial irregularity mandates reversal, the gauge is not exclusively the way in which the testimony entered the case but rather the probable impact of the irregularity on the verdict. Davis v. State, 418 N.E.2d 203, 205 (Ind. 1981) and English v. State, 481 N.E.2d 413, 415 (Ind. Ct. App. 1985).

Owens v. State, 714 N.E.2d 250, 252 (Ind. Ct. App. 1999) (motion for mistrial must be granted when defendant is subjected to grave peril, and grave peril is measured by the probable persuasive effect on the jury of the challenged action, evidence, or misconduct; the trial court’s decision will be reversed on appeal only for abuse of discretion).

Bisard v. State, 26 N.E.3d 1060 (Ind. Ct. App. 2016) (defendant moved for a mistrial upon learning that a juror had performed an internet search on reliability of blood tests;

trial court's remedy of replacing juror with an alternate as opposed to granting mistrial affirmed).

Jarrett v. State, 160 N.E.3d 526 (Ind. Ct. App. 2020) (trial judge's comments that she was uncomfortable after defendant wished judge happy birthday did not entitle defendant to mistrial when judge's comments were made outside presence of jury and could have had no persuasive effect on members of jury).

**(a) The way the testimony entered the case**

Courts have applied the following factors in determining the adequacy of striking improper testimony and admonishing the jury, as opposed to declaring a mistrial:

1. Effect of constitutional provisions, statutes or rules relating to harmless error;
2. Degree of materiality of the testimony;
3. Other evidence of guilt;
4. Other evidence tending to prove the same fact;
5. Other evidence that may cure the improper testimony;
6. Possible waiver by the injured party;
7. Whether statement was volunteered by witness and whether there had been deliberate action by prosecution to present the matter to the jury;
8. Penalty assessed;
9. Whether or not testimony, although volunteered by witness, was in part brought out by action of the defendant or his counsel;
10. Existence of other errors;
11. Whether question of guilt is close or clear and compelling;
12. Standing and experience of person giving objectionable testimony; and
13. Whether or not objectionable testimony or misconduct was repeated.

White v. State, 272 N.E.2d 312, 314-15 (Ind. 1971) and Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000).

Kemper v. State, 35 N.E.3d 306 (Ind. Ct. App. 2015) (no error in denying motion for mistrial where, after State witness's in-court identification of defendant, the defense became aware that the State was in possession of two videotaped interviews with witness in which he identified someone other than defendant as the robber; there was no evidence the State had intentionally withheld the interviews and trial court effectively remedied situation by allowing defense time to review and making witness available for further cross-examination).

**(b) Probable impact on verdict**

In cases concerning an irregularity bearing on a constitutionally secured right or concerning an evidentiary harpoon, the reviewing court undertakes to assess the probable impact of the irregularity on the final verdict and will require a high level of assurance that the irregularity did not affect the verdict. Hightower v. State, 296 N.E.2d 654 (Ind. 1973); Phillips v. State, 719 N.E.2d 809, 811 (Ind. 1999); and Smith v. State, 471 N.E.2d 733, 736 (Ind. Ct. App. 1984).



Davis v. State, 418 N.E.2d 203, 205 (Ind. 1981) (reference by police officer that “a person,” meaning defendant, had been apprehended at scene of another offense near in time and location to scene of burglary for which defendant was charged, was inadvertent and did not mandate reversal; reference was vague as to defendant’s involvement in other crime, trial judge immediately admonished jury to disregard what they had heard, and in response to individual polling by judge, jurors each stated that they could disregard both the question, the answer and any inference from it).

### C. RE-PROSECUTION AFTER MISTRIAL

#### 1. Retrial barred only when prosecutor “intended to goad” defendant to move for mistrial

##### (a) Federal double jeopardy clause

If defendant moves for mistrial, he or she forfeits right to raise double jeopardy claim in subsequent proceedings unless motion for mistrial was necessitated by governmental conduct intended to goad defendant into moving for mistrial. Wilson v. State, 697 N.E.2d 466 (Ind. 1998).

Butler v. State, 724 N.E.2d 600, 604 (Ind. 2000) (prosecutor’s attempt to introduce new evidence mid-trial was intended to obtain conviction, not to goad defendant into seeking a mistrial).

Wilson v. State, 697 N.E.2d 466, 472-73 (Ind. 1998) (trial court’s determination that prosecutor did not intend to goad the defendant into requesting a mistrial is “very persuasive” but not conclusive on the issue of intent).

Noble v. State, 734 N.E.2d 1119 (Ind. Ct. App. 2000) (double jeopardy did not prohibit retrial where prosecutor called police officer and elicited testimony about lab report which had not been admitted into evidence or disclosed to defense; court granted defendant’s motion for mistrial; and at subsequent hearing on motion to dismiss the charges, prosecutor stated that he had expected defense counsel would object to his line of questioning and he did not intentionally try to goad defendant in requesting mistrial by eliciting inadmissible evidence).

Etter v. State, 56 N.E.3d 53 (Ind. Ct. App. 2016) (no evidence trial court’s flippant comments “have it your way” and “it’s Burger King Day” in response to defense counsel’s request for mistrial were made with the intent of goading defendant into moving for a mistrial).

Jackson v. State, 925 N.E.2d 369 (Ind. 2010) (trial court did not abuse discretion or subject defendant to double jeopardy in granting State’s motion for mistrial (over defendant’s objection) and allowing retrial because, even though five jurors said they read defendant’s letter to prosecutor, reproduced in a local newspaper, which implied defendant was prosecuted because of his race and that prosecutor was not honest with the victim’s family. Even though 5 jurors said the newspaper article would not influence their decision, trial court was in best position to determine article’s impact on jurors. As to double jeopardy issue, Court balanced factors against allowing retrial, such as stigmatization of defendant, against society’s interest in allowing the prosecution “one complete opportunity for a conviction”).

Brock v. State, 955 N.E.2d 195 (Ind. 2011) (trial court neither abused its discretion by denying defendant’s Motion to Dismiss retrial, where the retrial was prompted by granting State’s motion for mistrial, nor violate defendant’s rights against double jeopardy by allowing the retrial; even though trial court did not allow defendant to

object to granting of mistrial, there was manifest necessity of mistrial because defendant's counsel, during closing argument, repeatedly misled the jury about the law and the facts despite numerous admonitions from trial court).

Key to inquiry on appeal concerns subjective intent of prosecuting attorney. Trial court's determination of the State's intent is "very persuasive." Wilson v. State, 697 N.E.2d 466, 473 (Ind. 1998).

**(b) Indiana Constitution**

Article I, Section 14 as a bar to retrial has not been decided. Other states have rejected the "intended to goad" standard set out by Oregon v. Kennedy, 456 U.S. 667 (1982), as too narrow and adopted a broader standard for prohibiting retrials under their own constitutions. See e.g., State v. Rogan, 984 P.2d 1231 (Haw. 1999) and State v. Breit, 930 P.2d 792 (N.M. 1996). Counsel must provide authority or independent analysis supporting separate standard under Indiana Constitution or claim is waived. Butler v. State, 724 N.E.2d. 600, 605 n.1 (Ind. 2000) and Noble v. State, 734 N.E.2d 1119, 1121 n.4 (Ind. Ct. App. 2000).

Calvert v. State, 14 N.E.3d 818 (Ind. Ct. App. 2014) (Court rejected defendant's argument that Indiana Constitution's double jeopardy prohibition barred retrial on conviction reversed where trial court denied continuance request and let trial proceed *in absentia*; defendant failed to move for mistrial based on State's bad faith pursuit of trial *in absentia* and the challenged misconduct occurred in argument prior to defendant's trial).

**2. Retrial barred where judge or prosecutor asked for mistrial, and no manifest necessity**

A trial court does not necessarily have to make a specific finding that a mistrial is required by a manifest necessity in order to permit a retrial. Renico v. Lett, 130 S.Ct. 1855 (2010). The term "manifest necessity" contemplates a sudden and overwhelming emergency beyond the control of the court.

State v. Glasscock, 759 N.E.2d 1170, 1173 (Ind. Ct. App. 2001) (trial court's declaration of a mistrial on its own motion after a witness for the State claimed the privilege against self-incrimination and the State decided not to immunity was not necessary since the State could have granted immunity and the State had other evidence to pursue its case; since there was no manifest necessity for the mistrial, double jeopardy barred retrial).

Pavey v. State, 764 N.E.2d 692, 700-01 (Ind. Ct. App. 2002) (the word "necessity" does not need to be interpreted literally; there need be only a "high degree" of necessity before concluding that a mistrial is appropriate).

For discussion and cases on manifest necessity, double jeopardy, and retrial, see IPDC Pretrial Manual, Chapter 9, Motions to Dismiss (2021 Ed.).