VIII. Evidence

HENRY C. KARLSON*

A. Hearsay

1. Patterson *Unlimited.*—In *Dowdell v. State*,[1] the fourth district court of appeals ignored a limitation upon the substantive use of out-of-court statements that the third district court of appeals had created in *Carter v. State*.[2] In the landmark opinion *Patterson v. State*,[3] the Indiana Supreme Court had held that an extrajudicial statement may be used as substantive evidence if the declarant is available for cross-examination.[4] Then, construing *Patterson*, the third district court of appeals in *Carter* created foundational requirements for the substantive use of extrajudicial statements permitted by *Patterson*. In *Carter*, the court required that the declarant be confronted with the statement while on the witness stand and admit or deny making the statement.[5] Neither of these foundational requirements were honored in *Dowdell*.

The defendant in *Dowdell* was convicted of theft. The only evidence indicating that the property in question was not the property of the

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[1]429 N.E.2d 1 (Ind. Ct. App. 1981).

[2]412 N.E.2d 825 (Ind. Ct. App. 1980). For further discussion of this case, see Karlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 227-30 (1982).

[3]263 Ind. 55, 324 N.E.2d 482 (1975).

[4]*Id.* at 58, 324 N.E.2d at 484-85. In *Patterson*, the court made reference to the revised federal rules, effective July 1, 1975. FED. R. EVID. 801(d), in part, provides:

> *Statements which are not hearsay.* A statement is not hearsay if—
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> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

Id. The *Patterson* court, however, went beyond the federal rule and held that if the declarant is available for cross-examination, then his out-of-court statement is not hearsay, even if the statement is not made while the declarant is subject to the penalty of perjury and is consistent with the declarant's present testimony. 263 Ind. at 58, 324 N.E.2d at 485. Unlike the federal rule, the rule announced in *Patterson* permits the general use of out-of-court statements which are consistent with the declarant's in-court testimony. *Id.*, 324 N.E.2d at 484-85. *But see* Samuels v. State, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978); Stone v. State, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978); Smith v. State, 400 N.E.2d 1137, 1141 (Ind. Ct. App. 1980).

[5]412 N.E.2d 825, 828-29. An oral statement may be used as substantive evidence, the *Carter* court held, only if the declarant admits making the statement. *Id.* at 829-30, 831 n.4. A written statement or an oral statement that was electronically recorded may be used as substantive evidence even though the declarant denies or fails to remember making it. *Id.* at 831 n.4.

defendant consisted of testimony from a police officer that a William Coleman had identified the property as his own property, which was missing from his home.[6] Although present in the courtroom, Coleman did not take the witness stand. Despite Coleman's failure to testify, the court in *Dowdell* found that Coleman's presence in the courtroom made him available for cross-examination. Therefore, the court held that Coleman's out-of-court statements were "admissible hearsay under the rule of *Patterson v. State*."[7] Assuming that a proper objection to the police officer's testimony was made, the *Dowdell* court's ruling on the admissibility of such evidence is incorrect.

An examination of cases wherein the *Patterson* rule has been relied upon discloses a common factor. In each case, although the declarant was not always confronted with the out-of-court statement prior to its admission, the declarant did testify and, thus, could actually be cross-examined.[8] Although the Indiana Supreme Court has not required that a declarant testify before his extrajudicial statement is received into evidence, the court has warned that such statements are not to be used "as a mere substitute for available in-court testimony."[9] Because the declarant in *Dowdell* was available and could have been called as a witness, his extrajudicial statement to the police officer was clearly used in place of available in-court testimony.

An expansion of *Patterson* to permit substantive use of an extrajudicial statement made by a declarant who, while available to be called as a witness, never in fact takes the witness stand serves no valid purpose. Live testimony is always preferred over mere recorded testimony. An example of this preference is the requirement that, before testimony from a prior proceeding is admissible in court under the former testimony exception to the hearsay rule, the declarant must be shown to be unavailable as a witness.[10] If a witness is available

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[6]429 N.E.2d at 3.

[7]*Id.* at 3 n.4. It must be noted that the court is incorrect in referring to the evidence as "admissible hearsay." Under the rule anounced in *Patterson*, the evidence is *not* hearsay. Patterson v. State, 263 Ind. 55, 58, 324 N.E.2d 482, 484-85 (1975).

[8]*See, e.g.*, Rapier v. State, 435 N.E.2d 31 (Ind. 1982); Lowery v. State, 434 N.E.2d 868 (Ind. 1982); Bundy v. State, 427 N.E.2d 1077 (Ind. 1981); Riddle v. State, 402 N.E.2d 958 (Ind. 1980); Brown v. State, 390 N.E.2d 1000 (Ind. 1979); Gutierrez v. State, 386 N.E.2d 1207 (Ind. 1979); Thompkins v. State, 383 N.E.2d 347 (Ind. 1978); Buttram v. State, 269 Ind. 598, 382 N.E.2d 166 (1978); Lamar v. State, 266 Ind. 689, 366 N.E.2d 652 (1977); Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977); Carter v. State, 266 Ind. 196, 361 N.E.2d 1208, *cert. denied*, 434 U.S. 866 (1977); Barrientos v. State, 173 Ind. App. 652, 365 N.E.2d 789 (1977); Lloyd v. State, 166 Ind. App. 248, 335 N.E.2d 232, *trans. denied* (1976). An excellent discussion of this aspect of the *Patterson* rule is found in D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981).

[9]Samuels v. State, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978).

[10]*See* Burnett v. State, 162 Ind. App. 543, 319 N.E.2d 878 (1974); FED. R. EVID. 804(b)(1). Professor Seidman in his work on Indiana evidence states: "Since there is

to testify, he should be called to the witness stand to enable the trier of fact to observe the declarant's demeanor while testifying to the disputed facts. Only if the out-of-court statement offered under the *Patterson* rule adds evidentiary information that is not contained in the witness' live testimony, can it be said that the extrajudicial statement is not being used in place of readily available in-court testimony. The *Dowdell* court's attempt to extend *Patterson* by permitting the use of extrajudicial statements made by individuals who never take the witness stand should be rejected by the Indiana Supreme Court.

2. *Statement as Cumulative Evidence.*—The policy that an out-of-court statement is not to be used in place of readily available in-court testimony does not forbid the use of a *Patterson* statement which is in addition to in-court testimony by the declarant. In *Underhill v. State*,[11] the prosecution offered, and the court received, a written report by William Cross. The report, which consisted of a narrative of the events in question, was contained in a one-page, handwritten, unsigned document. On appeal, the defendant alleged that the admission of the report was error because it was not signed and because part of it was prepared by a deputy prosecutor.

In holding that the trial court did not err in receiving the written statement as evidence, the supreme court recognized that a statement, to be admissible under the rule announced in *Patterson*, need not be signed.[12] Indeed oral, as well as written, statements are admissible under *Patterson*.[13]

In explaining its decision, the court also stated: "Furthermore, the matters contained in the report merely reiterated the testimony which Cross gave at trial."[14] If this is true, then the statement should have been excluded. Repeating a witness' testimony gives it undue emphasis. Because it would be improper to permit a witness to repeat his testimony over proper objection on direct examination,[15] it should be equally improper to permit the use of prior out-of-court statements for that purpose. If a proper objection is made to a prior statement

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a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness . . . ." M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 116 (1977). *See also* Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

[11]428 N.E.2d 759 (Ind. 1981).

[12]*Id.* at 765.

[13]Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975). *See* Bundy v. State, 427 N.E.2d 1077 (Ind. 1981); Brown v. State, 390 N.E.2d 1000 (Ind. 1979).

[14]428 N.E.2d at 765-66.

[15]E. BROWNLEE, OBJECTIONS TO EVIDENCE § 2.3 (1974). "Many times the same question will be asked of a witness after it has been asked and answered . . . . The general rule is not to permit such questioning because repetition may give excessive emphasis to selected evidence." *Id.*

of a witness, the extrajudicial statement should be excluded unless the court holds that the statement does more than merely repeat the in-court testimony of the witness.

3. *Judgment of Previous Conviction.*—A new Indiana statute[16] terminates Indiana's adherence to the common law rule that excludes evidence of a criminal conviction when it is offered in a civil proceeding as evidence of a material fact upon which the conviction is based.[17] The statute permits evidence of certain types of criminal convictions to be admissible in a civil action as evidence of "any fact essential to sustaining the judgment," but evidence of an acquittal remains inadmissible.[18] For a conviction to be admissible, it must be entered after a plea of guilty or after a full trial of the issues, and the conviction must be for an offense "punishable by death or imprisonment in excess of one [1] year."[19] Such a conviction may be used as evidence of a material fact upon which the conviction is based in a civil action against a party who was not involved in the criminal prosecution.[20] Admission of the conviction is justified by the reliability of the fact-finding process in criminal proceedings and by the requirement of proof beyond a reasonable doubt.[21]

Enactment of this provision brings Indiana law, as it relates to the use of a conviction in a civil action, in accord with federal law.[22] Unlike Federal Rule of Evidence 803(22),[23] however, the Indiana statute

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[16]Act of Feb. 25, 1982, Pub. L. No. 201, 1982 Ind. Acts 1514 (codified at IND. CODE § 34-3-18-1 (1982)). The new statute provides:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one [1] year, shall be admissible in any civil action to prove any fact essential to sustaining the judgment, and is not excluded from admission as hearsay regardless of whether the declarant is available as a witness. The pendency of an appeal may be shown but does not affect the admissibility of evidence under this section.

Id.

[17]IND. CODE § 34-3-18-1 (1982). *See* Hambey v. Hill, 148 Ind. App. 662, 269 N.E.2d 394 (1971); Beene v. Gibraltar Indus. Life Ins. Co., 116 Ind. App. 290, 63 N.E.2d 299 (1945); *see also* Wheelock v. Eyl, 393 Mich. 74, 223 N.W.2d 276 (1974); Rullo v. Rullo, 121 N.H. 299, 428 A.2d 1245 (1981). *But see* Karlson, *Criminal Judgments as Proof of Civil Liability*, 31 DEF. L.J. 173 (1982); Note, *Admissibility and Weight of a Criminal Conviction in a Subsequent Civil Action*, 39 VA. L. REV. 995 (1953).

[18]IND. CODE § 34-3-18-1 (1982).

[19]*Id.*

[20]*See id.*

[21]*See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(22)[01], at 803-73 (1981); 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 470, at 887-88 (1980).

[22]*See* FED. R. EVID. 803(22).

[23]FED. R. EVID. 803(22), as an exception to the hearsay rule, provides:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any

does not permit a prior conviction to be used in a criminal proceeding as evidence of a material fact upon which the conviction is based.[24]

One possible application of the new Indiana provision, however, should be rejected. A plea of guilty by an accused party is an admission that has traditionally been considered admissible against the accused in a subsequent civil proceeding.[25] By definition, an admission is proper evidence only when offered against the party making it.[26] However, Indiana's new statute would permit a convicted party to offer his own plea of guilty, embodied in a judgement of conviction, as evidence.[27] For example, the beneficiary of a life insurance policy could offer as evidence his conviction for reckless homicide to show that he is entitled to receive the proceeds of the policy, which are prohibited when the beneficiary intentionally kills the insured.

Thus, in light of the potential misuse, a conviction based upon a plea of guilty should be held inadmissible when tendered by the convicted party. Furthermore, because a guilty plea removes the necessity for offering evidence at the criminal proceeding, the reliability of the fact-finding process and the requirement of proof beyond a reasonable doubt, upon which the admission of a conviction is premised, do not exist. All that exists is a self-serving statement on the part of the convicted party.[28]

4. *Statements of a Co-conspirator.*—In *Wallace v. State*,[29] the Indiana Supreme Court upheld the evidentiary use of statements made by a co-conspirator after the offense that was the object of the conspiracy had been committed. At the defendant's trial, a witness linked the defendant to the murder of her husband by relating several statements made by the defendant to a co-conspirator who did not testify. Some of these statements were made after the murder in question had been completed. If the conspiracy ended with the murder,

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fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

[24]*See supra* note 16.

[25]*See, e.g.*, Hambey v. Hill, 148 Ind. App. 662, 269 N.E.2d 394 (1971); Hudson v. Otero, 80 N.M. 668, 459 P.2d 830 (1969) (dicta).

[26]*See* Jethroe v. State, 262 Ind. 505, 319 N.E.2d 133 (1974); Marsh v. Lesh, 164 Ind. App. 67, 326 N.E.2d 626 (1975); FED. R. EVID. 801(d)(2). *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 262, at 628 (2d ed. 1972) ("Admissions are the words or acts of a party-opponent, or his predecessor or representative, offered as evidence against him.").

[27]*See supra* note 16.

[28]*Cf.* Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) (negligent homicide conviction based on a plea of guilty not conclusive on issue of whether killing was committed with intent when offered by convicted party).

[29]426 N.E.2d 34 (Ind. 1981) (reversed and remanded on other grounds).

as some prior cases indicate, then statements made by a co-conspirator after that point are not admissible.[30]

In determining that the statements were properly received, the court in *Wallace* held that a conspiracy and its objectives do not necessarily end upon the successful commission of the underlying offense.[31] For purposes of the rule permitting the statements of one conspirator made in furtherance of the conspiracy to be admissible against all co-conspirators, the conspiracy does not end until all the objectives of the conspiracy are achieved.[32] In *Wallace*, one objective of the conspiracy was for the actual killers to be paid by the defendant from the proceeds of the deceased's life insurance policy.[33] Statements made concerning this payment were made in furtherance of the conspiracy's objectives and, therefore, were admissible even though the statements were made after the murder had taken place.[34]

This aspect of the *Wallace* opinion is correct and in accord with federal case law.[35] In light of *Wallace*, however, the admissibility of a statement under the co-conspirator exception to the hearsay rule will, in some cases, turn upon how the objectives of the conspiracy are described to the court. If the objectives are not described as extending beyond the commission of the underlying offense, then statements made after that point would be inadmissible. Artful counsel, however, who describe the ends of the conspiracy in broader terms may be able to greatly expand the evidentiary use of statements made by co-conspirators.

B. Character Evidence

Two recent opinions, one from the Indiana Supreme Court and

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[30]*See* Marjason v. State, 225 Ind. 652, 75 N.E.2d 904 (1947); Kahn v. State, 182 Ind. 1, 105 N.E. 385 (1914); Walls v. State, 125 Ind. 400, 25 N.E. 457 (1890); Berridge v. State, 168 Ind. App. 22, 340 N.E.2d 816 (1976).

[31]426 N.E.2d at 43 (citing Hicks v. State, 213 Ind. 277, 11 N.E.2d 171 (1937), *cert. denied*, 304 U.S. 564 (1938)) (the disposition of the body in a murder conspiracy was in furtherance of the conspiracy).

[32]426 N.E.2d at 43. Indiana appears to follow the traditional view that the statement by the co-conspirator must have been made in furtherance of the conspiracy's objectives. *See* Patton v. State, 241 Ind. 645, 175 N.E.2d 11 (1961); Hicks v. State, 213 Ind. 277, 11 N.E.2d 171, *cert. denied*, 304 U.S. 564 (1938). See FED. R. EVID. 801(d)(2)(E) for the general rule. The Model Code of Evidence does not include this requirement. *See* MODEL CODE OF EVIDENCE RULE 508 (1942).

[33]426 N.E.2d at 43.

[34]*Id.*

[35]*See, e.g.*, United States v. Fortes, 619 F.2d 108, 117 (lst Cir. 1980); United States v. Schwanke, 598 F.2d 575, 581-82 (10th Cir. 1979); United States v. Hickey, 596 F.2d 1082, 1089-90 (1st Cir.), *cert. denied*, 444 U.S. 853 (1979); United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); *cf.* McDonald v. United States, 89 F.2d 128, 133-34 (8th Cir. 1937) (defendant held liable as co-conspirator even though he entered the conspiracy months after the substantive offense was committed).

one from the Indiana Court of Appeals, illustrate two different uses for evidence of a common scheme or plan in a criminal proceeding, and the different foundation needed for each use. In *Downer v. State*,[36] the supreme court correctly held that evidence, which showed an informant had been purchasing drugs from the defendant since 1975, was admissible in the prosecution for a 1980 drug sale. The evidence was admissible to prove the existence of a common scheme or plan to sell narcotics.[37] *Downer* should be contrasted with the decision of the court of appeals in *Byrer v. State*.[38]

The defendant in *Byrer* was charged with robbery while armed with a deadly weapon. The trial judge allowed the prosecution to offer evidence showing that when the defendant was apprehended two days after the robbery in question, he was planning another robbery. On appeal, the court held that this evidence was not admissible to prove a common scheme or plan on the defendant's part.[39] In order to be admissible as evidence of a common scheme or plan, the appellate court held that "the similarities between offenses or acts of misconduct must be so unusual and distinctive so as to be 'like a signature.' "[40]

It is a well settled rule of evidence that uncharged acts of misconduct may not be used to prove a defendant is a bad person and, therefore, probably guilty of the offense under consideration.[41] However, there are numerous other purposes for which the evidence may be offered.[42] One purpose is to demonstrate a common scheme or plan on the part of the accused.[43] If the common scheme or plan is to be used as circumstantial evidence to identify the accused as the person who committed the crime under consideration, the similarities between the acts of misconduct must be so distinctive as to give rise to a reasonable belief that the defendant committed both

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[36]429 N.E.2d 953 (Ind. 1982).

[37]*Id.* at 955.

[38]423 N.E.2d 704 (Ind. Ct. App. 1981).

[39]*Id.* at 708-09.

[40]*Id.* at 708 (quoting Williams v. State, 417 N.E.2d 328, 332 (Ind. 1981)).

[41]*See* Biggerstaff v. State, 266 Ind. 148, 361 N.E.2d 895 (1977); Schnee v. State, 254 Ind. 661, 262 N.E.2d 186 (1970). *See also* FED. R. EVID. 404. *But see* Fox v. State, 413 N.E.2d 665 (Ind. Ct. App. 1980) (evidence of depraved sexual conduct admissible); Omans v. State, 412 N.E.2d 305 (Ind. Ct. App. 1980) (acts tending to indicate a depraved sexual instinct are admissible).

[42]*See, e.g.*, Henderson v. State, 403 N.E.2d 1088, 1090 (Ind. 1980) (identity); Quinn v. State, 265 Ind. 545, 546-47, 356 N.E.2d 1186, 1187 (1976) (motive); Franks v. State, 262 Ind. 649, 657, 323 N.E.2d 221, 226 (1975) (intent); Bennett v. State, 416 N.E.2d 1307, 1311 (Ind. Ct. App. 1981) (res gestae); Samuels v. State, 159 Ind. App. 657, 660-61, 308 N.E.2d 879, 881-82 (1974) (knowledge).

[43]Manuel v. State, 267 Ind. 436, 438, 370 N.E.2d 904 (1977); Perry v. State, 393 N.E.2d 204, 207 (Ind. Ct. App. 1979); Ingle v. State, 176 Ind. App. 695, 707, 377 N.E.2d 885, 892 (1978).

acts. More is needed than merely demonstrating the repeated commission of a crime of the same class, such as repeated murders or assaults.[44]

Common scheme or plan evidence may, however, be used to show that the crime in question was part of a larger plan or a continuing scheme of criminal conduct.[45] When it is used for this purpose, there is no need to prove that the uncharged acts and the crime under consideration are uniquely similar. The only foundational requirement is that the evidence be sufficient to give rise to a reasonable belief that the offense under consideration was not an isolated event, but that it was part of a larger plan or part of a continuing course of criminal conduct.[46]

Because the court in *Downer* did not require that the evidence of prior drug sales, which was offered to prove a common scheme or plan, be similar to the sale charged, *Downer* and *Byrer* appear to conflict. However, the two opinions are not in disagreement. The evidence in *Downer* was used to show a continuing plan or scheme on the part of the defendant to deal in drugs; his identity was not in issue.[47] Prior Indiana decisions have recognized that a drug sale is often part of a larger scheme or plan to peddle drugs.[48] In *Byrer*, however, evidence of the accused's arrest while planning another robbery did not show the existence of a larger, ongoing plan or scheme to commit robbery. Rather, the evidence was offered to prove the identity of the defendant. Therefore, in order for the evidence to be admissible in *Byrer*, the circumstances surrounding the two offenses would have to identify the accused as the person who committed the robbery in question. The court of appeals was correct in holding that, to be admissible for

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[44]McCormick, *supra* note 26, § 190, at 448-49. Indiana opinions appear to combine two exceptions within the common scheme or plan exception; one use is to show the crime in question is part of a larger plan. *See* Perry v. State, 393 N.E.2d 204, 207 (Ind. Ct. App. 1979). Another use is to show the identity of the accused by the similarity between the two crimes. *See* Biggerstaff v. State, 266 Ind. 148, 152, 361 N.E.2d 895, 897 (1977). When used for this purpose it should be referred to as modus operandi. *See* United States v. Oliphant, 525 F.2d 505, 507 (9th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976); United States v. McCord, 509 F.2d 891, 895 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975); United States v. Castro, 476 F.2d 750, 753 (9th Cir. 1973); Riddle v. State, 264 Ind. 587, 598, 348 N.E.2d 635, 641 (1976).

[45]*See, e.g.*, Carbo v. United States, 314 F.2d 718 (9th Cir.), *cert. denied*, 377 U.S. 953 (1963).

[46]*See* United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975); Perry v. State, 393 N.E.2d 204 (Ind. Ct. App. 1979).

[47]429 N.E.2d at 955. Although the opinion is not at all clear, it appears the evidence of common scheme or plan was used as circumstantial evidence that the sale in question had taken place. *Id.*

[48]*See, e.g.*, Ingle v. State, 176 Ind. App. 695, 377 N.E.2d 885 (1978); Miller v. State, 167 Ind. App. 271, 338 N.E.2d 733 (1975).

identification, the two acts of misconduct must be unusual and distinctive in nature.[49]

C. *Evidence of Business Custom*

Business custom as proof of the mailing of important documents is the subject of the court's decision in *F & F Construction Co. v. Royal Globe Insurance Co.*[50] The plaintiff brought suit against its liability insurer alleging that the insurer had breached its contractual duty to defend the plaintiff. The trial court granted summary judgment for the defendant because the facts, as shown by the affidavits, depositions, and pleadings, were inadequate as a matter of law to permit a finding that the plaintiff had complied with the notice provisions of the insurance contract.[51]

The facts showed that the president of F & F had placed the papers relating to the suit on the desk of his office manager with orders that the documents be mailed. Normal office procedure provided for the office manager to give the papers to another employee for mailing. The office manager, and other employees, could not recall seeing the documents or mailing them. The court also found that the defendant, Royal Globe, never received the papers;[52] however, it is not clear on what evidence the court based this finding of fact.

On appeal, the main issue in *F & F Construction Co.* was whether the pleadings presented a factual issue, which would make the summary judgment contrary to law.[53] The appellate court, relying upon *United Farm Bureau Mutual Insurance Co. v. Adams*,[54] ruled that summary judgment was appropriate because "[n]ormal office procedure in preparing and dispatching outgoing mail is not sufficient to prove mailing, instead . . . testimony from one with direct and actual knowledge of the particular message in question is required to establish proof of mailing."[55] This holding is both bad law and a misapplication of *United Farm Bureau.*

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[49]423 N.E.2d at 708. *See* Riddle v. State, 264 Ind. 587, 348 N.E.2d 635 (1976); Layton v. State, 248 Ind. 52, 221 N.E.2d 881 (1966); Smith v. State, 215 Ind. 629, 21 N.E.2d 709 (1939).

[50]423 N.E.2d 654 (Ind. Ct. App. 1981). For a full discussion of the case, see Trimble, *Insurance, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 205, 214 (1983).

[51]423 N.E.2d at 655.

[52]*Id.*

[53]Summary judgment is appropriate only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IND. R. TR. P. 56(C).

[54]145 Ind. App. 516, 251 N.E.2d 696 (1969).

[55]423 N.E.2d at 656 (citing United Farm Bureau Mut. Ins. Co. v. Adams, 145 Ind. App. 516, 251 N.E.2d 696 (1969)).

The issue before the court in *United Farm Bureau* was not whether business custom was sufficient evidence of mailing to present a question of fact, but whether, as a matter of law, business custom established mailing *in light of conflicting evidence*.[56] To hold, as a matter of law, that business custom does not establish mailing when other evidence is in conflict is not to hold, as a matter of law, that business custom is insufficient to prove mailing. Reliance upon the opinion in *United Farm Bureau* by the court in *F & F Construction Co.* was clearly improper.

In addition to the misapplication of *United Farm Bureau*, the court's holding also brings Indiana evidence law into conflict with the Federal Rules of Evidence. Federal Rule of Evidence 406 provides that: "[E]vidence of . . . the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice."[57] The trend in the federal courts is to permit mailing to be proven by business routine and to not require the mail clerk to testify about the mailing of the particular objects in question.[58] Given the large number of documents mailed by a business organization in the normal course of business, it is unreasonable to demand that the mailing of each piece of mail be separately remembered or that a business record be made of its mailing.[59] The standard of proof imposed by the court in *F & F Construction Co.* is unrealistic and is not in accord with modern practices.

D. Judicial Notice

In denying the defendants' appeal in *Freson v. Combs*,[60] the court of appeals limited the use of judicial notice by Indiana courts. During

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[56]145 Ind. App. at 519, 251 N.E.2d at 698 ("The main issue before this court is whether the evidence that Appellant mailed the notice of cancellation is undisputed, without conflict and can lead only to the conclusion that Appellants did in fact mail the notice.").

[57]FED. R. EVID. 406.

[58]*See* United States v. Joyce, 499 F.2d 9, 15-16 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); United States v. Fassoulis, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); Webb v. United States, 347 F.2d 363, 364 (10th Cir. 1965); Whiteside v. United States, 346 F.2d 500, 504 (8th Cir. 1965), *cert. denied*, 384 U.S. 1023 (1966). *Contra* United States v. Wolfson, 322 F. Supp. 798, 813-14 (D. Del. 1971), *aff'd on other grounds*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972); Annot., 86 A.L.R. 541 (1933); Annot., 25 A.L.R. 9 (1923).

[59]United States v. Matzker, 473 F.2d 408, 411 (8th Cir. 1973).

[60]433 N.E.2d 55 (Ind. Ct. App. 1982). For a discussion of the case, see Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 285 n.4 (1983).

a quiet title action, the defendants requested that the court take judicial notice of a related suit and its proceedings. The request was made after each side had rested their case. In holding that the trial court's refusal to grant the request was not error, the court of appeals ruled that a trial court may not take judicial notice of its own record in a related cause of action.[61] In addition, the appellate court found that the trial court properly exercised its discretion by holding that a request for judicial notice should have been made before the requesting party rested its case.[62] Both of these rulings are in conflict with the use of judicial notice in federal courts[63] and are unnecessary restraints upon the use of judicial notice.

The doctrine of judicial notice provides an alternative to the formal presentation of evidence.[64] When judicial notice is taken of a fact, the parties need not present evidence to establish that fact, and the trial judge informs the jury of its existence.[65] Because judicial notice is a substitute for the usual presentation of evidence, a court is not bound by the normal rules of evidence in determining the existence of a fact that is to be judicially noticed.[66] Federal Rule of Evidence 201(f) permits judicial notice to be taken at any stage in the proceeding.[67] Furthermore, on its face, Federal Rule of Evidence 201(d) requires that judicial notice be taken if a proper request is made.[68] Indiana law similarly recognizes that judicial notice may be taken for

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[61]433 N.E.2d at 59.

[62]*Id.* at 60.

[63]*See* FED. R. EVID. 201.

[64]S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 43-44 (3d ed. 1982).

> Both at common law and in the evidentiary system envisioned by the Federal Rules, most proof is presented by means of testimonial evidence or by the offering of demonstrative evidence. But there has traditionally been an exception to the requirement that a party who relies upon a certain proposition must prove it; the exception is judicial notice.

Id.

[65]FED. R. EVID. 201(g).

[66]*See* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 58, at 449-51 (1977); *see also* United States v. 1078.27 Acres of Land, 446 F.2d 1030, 1034 (5th Cir. 1971), *cert. denied, sub nom.* Galveston City Co. v. United States, 405 U.S. 936 (1972) (judge did independent research into historical facts).

[67]FED. R. EVID. 201(f); *see* Mills v. Denver Tramway Corp., 155 F.2d 808 (10th Cir. 1946). *But see* United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (judicial notice of an adjudicative fact may not be taken for the first time on appeal in a criminal prosecution). For a discussion on what constitutes an adjudicative fact, see Annot., 35 A.L.R. FED. 440 (1977).

[68]FED. R. EVID. 201(d). FED. R. EVID. 201(f) read with FED. R. EVID. 201(d) would appear to require that judicial notice be taken on appeal, if the court is supplied with the necessary information. However, such an interpretation has been characterized as "unwise" and in conflict with the policy embodied in FED. R. EVID. 103. 1 D. LOUISELL & C. MUELLER, *supra* note 66, § 59, at 482.

the first time on appeal.[69] Thus, because judicial notice may be taken on appeal, there is no reason to require that a request for judicial notice be made before the party who desires it rests in the trial court.[70]

Indiana law conflicts on the question of whether a court should be permitted to take judicial notice of its own records in a related suit. *Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg*,[71] cited in *Freson*,[72] requires that the record of proceedings from another suit be formally introduced into evidence before the trial court may consider it. However, other opinions permit an appellate court to take judicial notice of its own records in a related case.[73]

Making the introduction of formal proof of the proceedings in a related suit a precondition for the same court's consideration of those proceedings is inconsistent with one of the two theories upon which judicial notice may be based. Modern law, illustrated by Federal Rule of Evidence 201(b), recognizes two grounds for judicial notice.[74] Judicial notice is appropriate if the fact is one that is generally known within the territorial jurisdiction of the court[75] or that is capable of accurate and ready determination by reference to sources of indisputable accuracy.[76] Although the proceedings before the same court in a related

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[69]*See* Roeschlein v. Thomas, 258 Ind. 16, 280 N.E.2d 581 (1972); *In re* Holovachka, 245 Ind. 483, 198 N.E.2d 381 (1964), *cert. denied*, 379 U.S. 974; Bromley v. City of Indianapolis, 119 Ind. App. 184, 85 N.E.2d 93 (1949).

[70]A court in Indiana has discretion in deciding whether to take judicial notice of a fact, "for even though the court may, it is not bound, to take judicial notice of all matters of fact of which it may take notice." Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 196 Ind. 118, 134-35, 147 N.E. 524, 530 (1925). In this aspect, Indiana law differs from FED. R. EVID. 201(d) which requires judicial notice be taken if a proper request is made. In deciding whether to exercise its discretion, a court may consider whether a timely request has been made. Lack of a timely request, however, should not be a bar to determining if there has been an abuse of discretion by a court's refusal to take judicial notice. *Cf.* 1 D. LOUISELL & C. MUELLER, *supra* note 66, § 59, at 482-92.

[71]196 Ind. 118, 147 N.E. 524 (1925).

[72]433 N.E.2d at 59.

[73]*See* Chandler v. State, 261 Ind. 161, 300 N.E.2d 877 (1973); State *ex rel.* Indiana State Bar Ass'n v. Moritz, 244 Ind. 156, 191 N.E.2d 21 (1963); Robbins v. State, 197 Ind. 304, 149 N.E. 726 (1925).

[74]FED. R. EVID. 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* C. MCCORMICK, *supra* note 26, §§ 329-30, at 760-66.

[75]*See* School City of Gary v. State *ex rel.* Gary Artists' League, Inc., 253 Ind. 697, 256 N.E.2d 909 (1970) (judicial notice of assessed property valuation proper); Belcher v. Buesking, 371 N.E.2d 417 (Ind. Ct. App. 1978) (judge in bench trial involving auto accident may draw upon his experience as a driver).

[76]*See* Lippeatt v. Comet Coal and Clay Co., 419 N.E.2d 1332 (Ind. Ct. App. 1981) (judicial notice of public documents and statistics compiled by state geologists).

suit are not a matter generally known within the territorial jurisdiction of the court, the proceedings are clearly capable of ready and accurate determination by resort to the court's own records. To require that formal proof be made of matters so easily proven from indisputable sources is a waste of a court's time. Federal courts recognize this fact and take judicial notice of their own records.[77] Indiana courts also should be permitted to do so.

E. Cross-Examination

In *Razo v. State*,[78] two men who were convicted of rape challenged the propriety of the trial court's limitation on their cross-examination of the prosecutrix. During cross-examination, the prosecutrix testified that at the time of the rape she was in the process of enrolling in school. Counsel for the appellants then asked if she was just getting out of the Indiana Girls School about the time of the rape. The trial court sustained an objection to this question, and the appellate court found the trial court's ruling to be a proper exercise of its discretion. The appellate court's decision was correct because the question did not seek information that was relevant to any issue before the court or that was inconsistent with the prosecutrix's testimony that she was enrolling in another school.[79]

In upholding the trial court's ruling, however, the court of appeals incorrectly referred to the rule that prohibits impeachment by proof of a collateral matter.[80] The appellate court stated: "More importantly, however, is the fact that a collateral matter cannot be made the basis for impeachment."[81] The court's application of the collateral issue rule to a question asked on cross-examination was improper and not supported by the authority cited in the opinion. *Brown v. State*,[82] cited in *Razo*,[83] did not deal with the propriety of a question asked during cross-examination. Rather, *Brown* involved the use of extrinsic

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[77]*See, e.g.*, Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434, 441 (6th Cir. 1981); Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975); Saxton v. McDonnell Douglas Aircraft Co., 428 F. Supp. 1047, 1049 (C.D. Cal. 1977); United States v. Webber, 270 F. Supp. 286, 289 (D. Del. 1967), *aff'd*, 396 F.2d 381, 386 (3d. Cir. 1968); *see also* 1 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 63, at 134-36 (12th ed. 1955). *But see* Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 509-10 (4th Cir.), *cert. denied*, 434 U.S. 1020 (1977).

[78]431 N.E.2d 550 (Ind. Ct. App. 1982).

[79]*Id.* at 553.

[80]*See* Bush v. State, 189 Ind. 467, 482, 128 N.E. 443, 448 (1920); 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1006 (Chadbourn rev. 1970).

[81]431 N.E.2d at 553.

[82]417 N.E.2d 333 (Ind. 1981).

[83]431 N.E.2d at 554.

evidence, in the form of a deposition, to contradict what the defendant believed would be the testimony of a prosecution witness. Because the contradiction shown by the extrinsic evidence went merely to a collateral matter, the court in *Brown* correctly ruled it was inadmissible.[84] The holding in *Brown*, however, does not mean that it is improper to ask a witness about a collateral matter on cross-examination.

The general rule, followed in Indiana[85] and in other jurisdictions,[86] permits a cross-examiner to ask questions on collateral matters, which are designed to create inconsistencies in a witness' testimony, in an attempt to cast doubt upon the accuracy of the testimony. This questioning is permissible even though the inconsistencies relate only to collateral matters.[87] The cross-examiner is, however, bound by the witness' answer and may not offer extrinsic evidence that the answer to a question dealing with a collateral matter is in fact false.[88] The object of the rule that prohibits impeachment by introducing extrinsic evidence on collateral issues is to prevent confusion of issues and unfair surprise.[89] As stated by Professor Wigmore, "it follows that the cross-examiner may at least *question upon even collateral points*, subject always to the general discretion of the trial court . . . ."[90] Notwithstanding *Razo*, Indiana law is in accord with Professor Wigmore's statement.[91]

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[84]417 N.E.2d at 339. *See* J. WIGMORE, *supra* note 80, §§ 1000-03.

[85]*See* Bush v. State, 189 Ind. 467, 482, 128 N.E. 443, 448 (1920); Miller v. State, 174 Ind. 255, 261, 91 N.E. 930, 932 (1910); Dunn v. State, 162 Ind. 174, 182, 70 N.E. 521, 524 (1904).

[86]*See* J. WIGMORE, *supra* note 80, § 1006.

[87]*Id.* § 1006(2).

[88]*Id.* §§ 1000-03.

[89]*Id.* § 1002.

[90]*Id.* § 1006(2).

[91]*See* Gutierrez v. State, 395 N.E.2d 218, 223 (Ind. 1979) (the scope of cross-examination on collateral matters is within the discretion of the trial court).