

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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It is now more than five years since the Indiana Rules of Evidence (the "Rules") went into effect on January 1, 1994. In that time, the Indiana courts have occasionally struggled to adjust to the changes in Indiana's evidence law wrought by the Rules. This past year saw a number of significant decisions under the Rules. Some of those decisions, however, raised as many questions as they answered.

This Article analyzes the major developments in Indiana evidence law during the period between October 1, 1997 and September 30, 1998. The organization of the Article parallels the structure of the Indiana Rules of Evidence.

I. SCOPE—RULE 101

A. Preemption of Common Law and Statutory Law

Rule 101(a) provides that the Indiana Rules of Evidence apply in all Indiana court proceedings "except as otherwise required by the Constitution of the United States or Indiana, by provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."¹ The Rule further provides that, if no Rule of Evidence covers a particular question, statutory or common law shall apply.² Although the Rule does not expressly preempt statutes that conflict with a provision of the Rules, such preemption is plainly implied, and the Indiana Supreme Court has held on several occasions that, where a statute and a Rule of Evidence conflict, the Rule of Evidence shall apply.³

In *McEwan v. State*,⁴ the Indiana Supreme Court addressed such a conflict. *McEwan* was a murder prosecution in which the defendant was accused of stabbing his girlfriend in the chest. During its case-in-chief, the prosecution offered evidence that, three months prior to the homicide, the defendant and the victim had engaged in a fight that had ended as the victim fled in the car of a friend and the defendant fired several gunshots at the car.⁵ The defendant argued that the introduction of this evidence constituted error because the prosecution had failed to comply with the notice provisions of Indiana Code section 35-37-4-14(d).⁶ The statute provides that, if the prosecution wishes to introduce evidence of a prior battery, the state must file a motion, together with an offer of proof, not less than ten days before the beginning of the trial.⁷ There was no question in

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1. IND. R. EVID. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996).

4. 695 N.E.2d 79 (Ind. 1998).

5. See *id.* at 84.

6. See *id.* at 88.

7. See *id.*; see also IND. CODE § 35-37-4-14(d) (1998).

McEwan that the prosecution failed to provide the notice required by the statute.⁸

On appeal, the supreme court analyzed whether the statute conflicted with the provisions of the Indiana Rules of Evidence. On the requirement of notice, the court found no conflict. Rule 404(b), covering the admission of other crimes, wrongs, or acts under the Rules, requires the prosecution to give notice to the accused only if the accused requests such notice.⁹ This provision, the court concluded, did not foreclose the statutory requirement that notice be given even in the absence of a request.¹⁰ The court noted, however, that other provisions of the statute did conflict with Rule 404(b). Specifically, the statute provided that “evidence of a previous battery is admissible into evidence in the state’s case-in-chief for purposes of proving motive, intent, identity, or common scheme and design.”¹¹ Although the purposes for which such evidence might be admissible were compatible with the purposes enumerated in Rule 404(b), the court found troublesome the statutory provision that such evidence “is admissible.”¹² The court noted that Rule 403 of the Indiana Rules of Evidence allowed for the admission of evidence only upon a balancing of probative value against the danger of unfair prejudice.¹³ Because the statute did not allow for consideration of prejudicial effect, but rather provided that evidence of prior batteries “is admissible,” the statute would appear to allow for the introduction of evidence that would be barred by the Indiana Rules of Evidence. The statute was therefore preempted on the point of conflict.¹⁴ Further, because the notice provisions could not be severed from the voided provisions of the statute, the notice provision was preempted as well.¹⁵

The implications of the *McEwan* decision are not entirely clear. Rule 403 applies generally to the admission of evidence under the Indiana Rules. *McEwan* therefore might be read to preempt any statutory provision that calls for the admission of evidence without weighing probative value against prejudicial effect. Interpreted this way, *McEwan*’s effect would be sweeping indeed. The decision, however, might properly be read more narrowly. In *Hicks v. State*,¹⁶ the Indiana Supreme Court incorporated Rule 403 balancing directly into the inquiry under Rule 404(b).¹⁷ *Hicks* suggests that Rule 403 balancing has a special role in determining whether evidence is admissible under Rule 404(b), above and beyond the role it plays generally. Taking *Hicks* into account, it is possible to read *McEwan* narrowly. Because the *McEwan* court did not cite *Hicks*, however, it is unclear how far the supreme court intended its decision to reach.

8. See *Williams*, 695 N.E.2d at 88.

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

10. *McEwan*, 695 N.E.2d at 88.

11. IND. CODE § 35-37-4-14(c).

12. *McEwan*, 695 N.E.2d at 88-89.

13. *Id.* at 87.

14. See *id.* at 89.

15. See *id.*

16. 690 N.E.2d 215 (Ind. 1997).

17. *Id.* at 219; see *infra* notes 77-78 and accompanying text.

If the ramifications of the supreme court's decision in *McEwan* are somewhat uncertain, the reasoning of the Indiana Court of Appeals in *State v. Walton*¹⁸ is little short of baffling. In *Walton*, the court addressed whether a defendant in a rape prosecution has the right to present evidence that the victim made a prior false accusation of rape. Prior to the adoption of the Rules, the Indiana Supreme Court had held that a defendant was entitled to present such evidence where (1) the victim admitted that her prior accusation was false, or (2) the prior accusation was "demonstrably false."¹⁹ At issue in *Walton* was whether this entitlement survived the adoption of the Rules.²⁰

The *Walton* court recognized that two Rules arguably addressed the admissibility of evidence of prior false accusations of rape: Rule 412, the so-called rape shield rule, prohibits the introduction, with narrow exceptions, of evidence of the victim's sexual history in prosecutions for rape or sexual misconduct,²¹ while Rule 608(b) regulates methods of attacking a witness's credibility, providing that, except for evidence of criminal convictions, a witness's credibility may not be attacked or supported through extrinsic evidence of specific instances of conduct.²² Although the court noted legal commentary that questioned whether the adoption of the Rules invalidated the decisions allowing the sexual offense defendant to show that the victim had made prior false accusations of rape,²³ the court concluded that neither Rule 412 nor Rule 608(b) served as a bar to the evidence. First, the court asserted, both Rule 412 and Rule 608(b) represented restatements of the prior law (common law in the case of Rule 608(b), common law and statutory law in the case of Rule 412).²⁴ As the exceptions existed at common law and were not foreclosed by statutory law, they remained in force under the Rules. Second, the court reasoned, Rule 608(b) did not cover the specific evidentiary issue presented by prior false accusations of rape; therefore, under Rule 101(a), prior common law remained in effect.²⁵

The court's reasoning is highly problematic. First, it is one thing to say that particular Indiana Rules of Evidence are consistent with the basic approach taken by the law as it existed prior to the adoption of the Rules, and quite another to say that, where such consistency exists, the Rules adopt *sub silencio* all the exceptions that were recognized under the prior law. Even the *Walton* court recognized, in a footnote, that where differences existed between Rule 412 and

18. 692 N.E.2d 496 (Ind. Ct. App.), *trans. granted*, 698 N.E.2d 496 (Ind. 1998).

19. *Stewart v. State*, 531 N.E.2d 1146, 1149 (Ind. 1988).

20. *Walton*, 692 N.E.2d at 499.

21. IND. R. EVID. 412.

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

23. *Walton*, 692 N.E.2d at 499 n.6 (citing Robert L. Miller, *Indiana Evidence*, IND. PRACTICE § 608.207, at 150 (2d ed. 1995)).

24. *Id.*

25. *Id.* at 500.

Indiana's Rape Shield Statute,²⁶ the Rule controlled.²⁷ Second, the conclusion that Rule 608(b) does not address the issue raised by evidence of prior false accusations of rape is simply untenable, given the rationale for allowing such evidence that the court asserts: The importance of credibility determinations in sexual misconduct cases. If the purpose of allowing the defendant to offer evidence that the victim of the alleged sexual misconduct made prior false accusations is to undermine the victim's credibility, then Rule 608(b) plainly and squarely applies: The Rule states that prior specific instances of conduct that go to such credibility may be inquired into on cross-examination but may not be established through extrinsic evidence. To state that Rule 608(b) does not take into account the particular concerns that might arise in the narrow context of prosecutions for sexual misconduct is no answer because this will always be true where the common law or statutory law has carved out a narrow exception to a general rule. But the approach to Rule 101(a) taken by the supreme court in *McEwan* forecloses this interpretation because in *McEwan* the supreme court held that a special statutory rule governing the admissibility of evidence of a prior battery was preempted by the general approach taken by Rule 404(b) to the admission of other acts as substantive evidence. This is true despite any special concerns presented by evidence of prior batteries that might have prompted the narrow statutory rule.²⁸

It might, under the Rules, be defensible to allow a defendant in a sexual misconduct prosecution to attack the charges against him by asking the alleged victim about prior false accusations of rape, and by introducing extrinsic evidence of the demonstrably false allegations if the victim denies them. It might, for example, be suggested that, in sexual misconduct prosecutions, a victim's history of fabrication does not simply go to the victim's credibility but rather constitutes direct evidence of a defense of fabrication,²⁹ and that Rule 608(b)'s limitations on extrinsic evidence therefore do not apply. Or it might be argued that the Confrontation Clause of the Sixth Amendment requires that the defendant be allowed to present extrinsic evidence of prior false accusations to impeach the victim's testimony.³⁰ But the approach taken by *Walton* is not tenable; indeed, it threatens to undo the primacy of the Rules that the Indiana Supreme Court has explicitly recognized.³¹ The Indiana Supreme Court has granted transfer in *Walton*, and it must be hoped that the court's resolution will

26. IND. CODE § 35-37-4-4 (1998).

27. *State v. Walton*, 692 N.E.2d 496, 500 n.7 (Ind. Ct. App.), *trans. granted*, 698 N.E.2d 496 (Ind. 1998).

28. *McEwan v. State*, 695 N.E.2d 79, 88-89 (Ind. 1998); *see supra* notes 4-17 and accompanying text.

29. *See Manlove v. Sullivan*, 775 P.2d 237, 241 n.2 (N.M. 1989). The *Manlove* decision was itself highly problematic, as the Tenth Circuit explained in *Manlove v. Tansy*, 981 F.2d 473, 478 & n.5 (10th Cir. 1992).

30. *See Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996) (noting that this argument has never been adopted by the United States Supreme Court or by any federal court of appeals).

31. *See, e.g., Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997).

restore some sense of order to Rule 101(a) jurisprudence.

B. Applicability of the Rules in Particular Proceedings

Rule 101(c)(2) provides that the Rules of Evidence do not apply, *inter alia*, in “[p]roceedings relating to . . . sentencing, probation, or parole.”³² The Indiana Court of Appeals has struggled with the implications of this provision. In particular, the court has split over whether hearsay is admissible in probation revocation proceedings. The question first arose in *Greer v. State*.³³ In *Greer*, the court concluded that, because the Indiana Rules of Evidence did not apply, the court was bound by Rule 101(a) to look to applicable common law or statutory law.³⁴ Although no statutory provision applied, the common law in place prior to the 1994 adoption of the Indiana Rules of Evidence had not allowed the use of hearsay in probation hearings.³⁵ The court therefore reasoned that the combined effect of Rule 101(c)(2), Rule 101(a), and the common law meant that hearsay remained excluded from probation revocation hearings.³⁶

Greer might have resolved the issue, but the supreme court vacated the court of appeals’ opinion on jurisdictional grounds in 1997.³⁷ In the vacuum created by the vacating of *Greer*, the court of appeals has split. In *Sutton v. State*,³⁸ the court, in a curious twist of logic, concluded that by stating that the Indiana Rules of Evidence do not apply in probation revocation hearings, Rule 101(c)(2) itself overturned the common-law decision that barred the use of hearsay in such proceedings.³⁹ The *Sutton* court thus apparently read Rule 101(c)(2) to mean not only that the Indiana Rules of Evidence did not apply in the enumerated proceedings, but that *no* rules of evidence, whether derived from statutory or common law, applied in such proceedings. In reaching this conclusion, the *Sutton* court did not consider what effect, if any, Rule 101(a) might have.

In *Jones v. State*,⁴⁰ Judge Friedlander, in an opinion announcing the court’s result, cited *Sutton* with approval and without further comment.⁴¹ A majority of the *Jones* panel, however, refused to follow *Sutton*. Judge Sullivan, joined by Judge Kirsch, concluded that *Sutton* misread the import of the supreme court’s vacation of *Greer* on jurisdictional grounds, noting that the supreme court did not address the merits of *Greer*’s analysis of Rule 101.⁴² Judge Sullivan therefore

32. IND. R. EVID. 101(c)(2).

33. 669 N.E.2d 751 (Ind. Ct. App. 1996), *vacated*, 685 N.E.2d 700 (Ind. 1997).

34. *Id.* at 755.

35. *Id.* See *Payne v. State*, 515 N.E.2d 1141, 1144 (Ind. Ct. App. 1987).

36. *Greer*, 669 N.E.2d at 755. For further discussion of *Greer*, see Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049, 1049-51 (1997).

37. *Greer v. State*, 685 N.E.2d 700 (Ind. 1997).

38. 689 N.E.2d 452 (Ind. Ct. App. 1997).

39. *Id.* at 455.

40. 689 N.E.2d 759 (Ind. Ct. App. 1997).

41. *Id.* at 761.

42. *Id.* at 763.

concluded that hearsay should not be admitted in probation revocation proceedings.

A third panel also followed *Greer*. *Cox v. State*⁴³ involved revocation of placement in a work release center, rather than revocation of probation, but the court concluded that the same standards should apply in the two types of proceedings.⁴⁴ In *Cox*, as in *Jones*, the court looked beyond the bald statement of Rule 101(c)(2) that the Indiana Rules of Evidence do not apply to probation revocation proceedings, and looked to the underlying policy, first set forth ten years earlier in *Payne v. State*,⁴⁵ that probationers deserved no less protection from unreliable evidence than did civil litigants.⁴⁶ In an opinion issued shortly before this survey went to press, however, the Indiana Supreme Court reversed, and in doing so rejected its prior opinion in *Payne*.⁴⁷ The court concluded that the adoption of the Indiana Rules of Evidence, and Rule 101(c) in particular, meant that the rules against hearsay (regardless of their source) do not apply in either probation revocation proceedings or community corrections placement revocation proceedings.⁴⁸ Under the supreme court's decision, any relevant evidence, including hearsay, may be considered provided that it bears "some substantial indicia of reliability."⁴⁹

II. RELEVANCE

A. Rule 403: Probative Value Versus Prejudicial Effect

To be admissible under the Indiana Rules, evidence must be relevant—that is, it must make a material fact more or less probable than the fact would be in the absence of such evidence.⁵⁰ That evidence is relevant does not guarantee its admissibility, of course—the Rules set forth numerous limitations on the admissibility of relevant evidence and on the purposes for which it can be used. One overarching restriction applies to virtually all evidence: Rule 403 provides that, even if relevant, evidence should not be admitted "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."⁵¹

Photographs of crime victims and crime scenes frequently raise issues under Rule 403. The presentation of evidence through visual aids such as photographs has the potential to make an emotional impact on the jury—to elicit feelings of

43. 686 N.E.2d 181 (Ind. Ct. App. 1997), *rev'd*, 706 N.E.2d 547 (1999).

44. *Id.* at 184.

45. 515 N.E.2d 1141 (Ind. Ct. App. 1987).

46. *Cox*, 686 N.E.2d at 185.

47. *See Cox v. State*, 706 N.E.2d 547, 550-51 (Ind. 1999).

48. *See id.*

49. *Id.* at 551.

50. *See* IND. R. EVID. 401, 402.

51. IND. R. EVID. 403.

disgust, outrage, fear, or revulsion—that witness testimony frequently cannot match. The potential for a potent visceral reaction is particularly strong where the photographs depict gruesome wounds and injuries. Because a visceral reaction is not a proper basis for a jury decision,⁵² exclusion of such evidence is sometimes warranted. Gruesome photographs are not excluded *per se* under Rule 403,⁵³ but a careful weighing of probative value is important to ensure that the photographs are being presented for a proper purpose, and not simply “to inflame the jury against [the defendant].”⁵⁴

In two recent decisions, the Indiana Supreme Court addressed the use of photographs depicting crime victims; in each case, the court rejected the defendant’s challenge to the photographs’ admission. In *Robinson v. State*,⁵⁵ a murder prosecution, the state offered photographs depicting the victim’s body as it was found, badly decomposed and partially eaten by animals, three weeks after the crime. The court first suggested that, despite the grisly nature of the photographs, their admission was justified to explain “why the State had to resort to extraordinary methods to identify the body, and that the body was identified as [the murder victim].”⁵⁶ It is unclear how the photographs could have served the latter purpose, however, because the state’s own forensic pathologist testified that the body was so badly decomposed that it could not be identified through ordinary means.⁵⁷ As to the former point, the photographs were cumulative, because the state also presented a videotape of the crime scene (to which the defendant did not object).⁵⁸ Rather than analyze the probative value and prejudicial effect further, however, the court simply stated in conclusory fashion that any error in admitting the photographs was harmless.⁵⁹ At no point did the court make a serious effort to discern the degree of unfair prejudice that the defendant might have suffered.⁶⁰

In *Young v. State*,⁶¹ the court again found no reversible error in the admission of a gruesome photograph depicting a victim at the crime scene, even though the

52. See *United States v. Fawley*, 137 F.3d 458, 466 (7th Cir. 1998).

53. See *Robinson v. State*, 693 N.E.2d 548, 553 (Ind. 1998).

54. *Gomez v. Ahitow*, 29 F.3d 1128, 1139-40 (7th Cir. 1994) (quoting *Ferrier v. Duckworth*, 902 F.2d 545, 548 (7th Cir.), *cert. denied*, 498 U.S. 988 (1990)).

55. 693 N.E.2d 548 (Ind. 1998).

56. *Id.* at 553.

57. *Id.* The victim was identified through DNA analysis. *Id.*

58. See *id.* at 553-54.

59. *Id.* at 554.

60. The court’s discussion is puzzling for another reason. In describing the analysis to be undertaken, the court stated: “The question is whether the probative value of the photograph outweighed its prejudicial effect.” *Id.* at 553 (citing *Isaacs v. State*, 659 N.E.2d 1036, 1043 (Ind. 1995)). This statement seems to stand Rule 403 on its head: Under Rule 403, evidence should only be excluded if its probative value is *substantially outweighed* by its prejudicial effect. See Ind. R. Evid. 403. The court’s formulation may not be entirely inconsistent with Rule 403, but it raises the possibility of unnecessary confusion.

61. 696 N.E.2d 386 (Ind. 1998).

photograph represented cumulative evidence on the point for which it was offered. *Young* was a murder prosecution in which the murder victim's two young children were found at the scene, each of them injured and covered in blood.⁶² At trial, the prosecution offered a photograph of one of the children, taken at the crime scene, to illustrate testimony concerning the child's injuries. On appeal, the supreme court acknowledged that the photograph was cumulative evidence, but concluded, again without discussing the precise nature of the photograph, that the photograph was not "so prejudicial as to improperly influence the jury."⁶³

Robinson and *Young* suggest that the Indiana Supreme Court is receptive to the use of photographs of crime victims, even where the probative value of the photographs is minimal (because the photographs are cumulative of other evidence) and the photographs' content is admittedly gruesome and therefore likely to incite an emotional response in the jury. The court's analysis may appear to give short shrift to Rule 403. It is not, however, entirely inconsistent with the approach taken by other courts.⁶⁴

B. Character of the Victim

Rule 404(a) provides that evidence of character is not admissible to prove action in conformity with that character, except in three instances.⁶⁵ First, an accused may offer evidence of a pertinent trait of his character; if he does so, the prosecution may offer character evidence in rebuttal.⁶⁶ Second, an accused may offer evidence of a pertinent character trait of a victim. The prosecution may again offer evidence of the victim's character in rebuttal; in addition, if the accused in a homicide prosecution asserts self-defense and claims that the victim was the first aggressor, the prosecution is entitled to introduce evidence of the victim's character for peacefulness.⁶⁷ Finally, evidence of the character of a witness may be admitted in accordance with Rules 607, 608, and 609.⁶⁸ Character is to be demonstrated by opinion or reputation testimony; only on cross-examination is inquiry into specific instances of conduct permitted, unless character forms an essential element of a charge, claim, or defense.⁶⁹

In *Coleman v. State*,⁷⁰ a case decided under the common-law scheme that predated the adoption of the Rules, the Indiana Supreme Court noted that, where

62. *Id.* at 388.

63. *Id.* at 389.

64. *Cf.* *United States v. Hall*, 152 F.3d 381, 400-02 (5th Cir. 1998) (allowing photographs of murder victim's exhumed body, in a state of decomposition, admissible as evidence of the victim's identity and cause of death, despite the defendant's willingness to stipulate to same).

65. IND. R. EVID. 404(a).

66. IND. R. EVID. 404(a)(1).

67. IND. R. EVID. 404(a)(2).

68. IND. R. EVID. 404(a)(3).

69. IND. R. EVID. 405.

70. 694 N.E.2d 269 (Ind. 1998).

a defendant asserts self-defense, evidence of the victim's violent character may be admitted under either of two theories: First, to show that the victim had a violent character and that the defendant therefore had reason for fear; or, second, to show that the victim initiated the violent incident for which the defendant is charged.⁷¹ On the first theory, evidence of prior acts of violence is admissible, provided the defendant can show that she was aware of the prior acts; on the second theory, however, only reputation evidence is admissible.⁷² The defendant here had attempted to show that she feared the victim, and in support of her claim had offered evidence that she had seen the victim carrying a gun on several occasions. Because this evidence was offered to show that the defendant feared the victim, and not simply to show that the victim was a violent man, the supreme court held that the evidence should have been admitted.⁷³

The distinction drawn in *Coleman* is solidly grounded in the difference between the two theories. Where the defendant's claim is that she had reason to fear the victim, the issue is her state of mind rather than simply the victim's character, and specific acts known by the defendant can properly have as great an impact, if not greater, on that state of mind as can the defendant's knowledge of the victim's reputation within the community. In contrast, use of specific acts as proof of character, to show action in conformity with that character, would require a two-step inference that would focus the jury's attention, not on conduct on the occasion in question, but on conduct on other occasions, and would create the danger of a jury deciding the case based on its judgment of the conduct on the other occasions. This double inference was prohibited at common law, and is forbidden under the Rules.⁷⁴ Thus, while *Coleman* was decided under the common law, the same result should obtain under the Rules.

C. Other Acts

Rule 404(b) provides that evidence of other acts by the defendant are not admissible to prove character, in order to prove action in conformity therewith.⁷⁵ The Rule states, however, that evidence of other acts may be admissible for other purposes; the Rule then sets forth a non-exclusive list of permissible purposes for which other act evidence may be admitted, including "proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁷⁶ Rule 404(b) creates difficulties in practice, because of the very real danger that, presented with evidence of unsavory acts by the defendant, the jury will, despite contrary instructions, leap to the forbidden inference that, because the defendant

71. *Id.* at 277 (quoting *Phillips v. State*, 550 N.E.2d 1290, 1297 (Ind. 1990)).

72. *See id.*

73. *Id.* The court further held, however, that the trial court's error was harmless, because the defendant had been allowed to introduce substantial other evidence to establish her fear of the victim. *Id.*

74. IND. R. EVID. 405.

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

76. *Id.*

engaged in the other acts, he must be a bad person, and because he is a bad person, he must have committed the crime with which he is charged. Since the adoption of the Indiana Rules of Evidence, Rule 404(b) has consistently proved one of the most troublesome in operation, and this year was no different.

In *Hicks v. State*,⁷⁷ the Indiana Supreme Court adopted a two-part test for the application of Rule 404(b): First, "the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act," and second, "the court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403."⁷⁸ Cases decided during the survey period raised questions under both prongs of the *Hicks* test.

1. *Motive*.—*Hicks* itself involved a claim that prior acts of violence between the defendant and the victim constituted evidence of motive for murder and therefore were not barred by Rule 404(b). In *McEwan v. State*,⁷⁹ the court relied upon *Hicks* in holding that evidence of a prior fight between the defendant and his girlfriend (the victim of the murder for which the defendant was being prosecuted) was relevant to show the defendant's hostility toward the victim, which constituted the "paradigmatic motive" for murder.⁸⁰

2. *Plan*.—In *Giles v. State*,⁸¹ the Indiana Court of Appeals analyzed the circumstances in which evidence of other acts may properly be admitted as evidence of a plan. In *Giles*, the defendant was charged with theft after cashing a bad check, payable to himself, styled as a payroll check, and drawn on an account that the defendant had created for a company he controlled. At trial, the prosecution offered evidence that, during the month the defendant allegedly cashed the bad check that formed the subject of the charge, he cashed fourteen other bad checks from the same account, each of which shared essential characteristics of the check that formed the subject of the charge.⁸² In concluding that the other fourteen checks were admissible as evidence of a plan, the court drew on pre-Rules precedent, requiring that the other acts "be so related in character, time and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime."⁸³

3. *Other Purposes*.—It bears repeating that the examples listed in Rule 404(b) of purposes for which other acts evidence may be admitted are not

77. 690 N.E.2d 215 (Ind. 1997).

78. *Id.* at 221. Although *Hicks* was decided within this year's survey period, it received extensive treatment in last year's survey article. See Sean P. O'Brien, *Survey of Recent Developments in Indiana Evidence Law*, 31 IND. L. REV. 589, 597-99 (1998). The author of this year's survey agrees with Mr. O'Brien's conclusion that some aspects of *Hicks* are problematic. In the interest of avoiding duplication, the reader is referred to Mr. O'Brien's article. *Id.*

79. 695 N.E.2d 79 (Ind. 1998).

80. *Id.* at 87-88.

81. 699 N.E.2d 294 (Ind. Ct. App. 1998).

82. See *id.* at 299.

83. *Id.* at 299-300 (citing *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992)).

exclusive. In *Parmley v. State*,⁸⁴ the Indiana Court of Appeals approved the admission of evidence of other acts by the defendant to explain actions by the victim, as a means of rebutting the defendant's attack on the victim's credibility. In *Parmley*, a child molestation case, the trial court admitted evidence that the defendant threatened and beat his wife and children, and that the defendant engaged in cross-dressing, bondage, and homosexual acts. The court of appeals concluded that, in light of the defendant's charge that the victim fabricated her allegations and was being improperly influenced by her mother, this evidence was properly admitted to explain, first, why the victim (the defendant's daughter) did not immediately raise her allegations of sexual abuse, and, second, why she had left her father's home for her mother's.⁸⁵

4. *Weighing Probative Value Against Prejudicial Effect.*—Pursuant to *Hicks*, the Indiana courts are expressly directed to engage in Rule 403 balancing of probative value against the danger of unfair prejudicial effect in situations where the admission of other acts evidence is sought. Of course, Rule 403 problems may arise with regard to virtually any kind of evidence, but problems are particularly likely to occur when evidence of other acts is offered under Rule 404(b), because of the lure of the forbidden inference.⁸⁶ This likelihood requires that courts take seriously their obligation to engage in careful balancing, to ensure that evidence of other acts is not admitted in situations in which the danger of unfair prejudice substantially outweighs the evidence's probative value.

On at least one occasion during the survey period, the Indiana Court of Appeals failed to meet its obligation. In *Parmley*, it will be recalled, the court affirmed the trial court's decision to admit evidence that the defendant threatened and beat his wife and children and that he engaged in acts of cross-dressing, bondage, and homosexuality. Having concluded that this evidence was relevant for a purpose other than as evidence of character,⁸⁷ the court dismissed the Rule 403 argument out of hand, concluding that although the evidence might have been prejudicial, the prejudice was not unfair, and that even if it were, the unfair prejudice did not substantially outweigh the probative value of the evidence.⁸⁸

The *Parmley* court's analysis threatens to reduce Rule 403 to meaninglessness. The introduction of evidence of the defendant's prior acts of violence and unusual sexual proclivities, in a case involving an allegation of child molestation, raises a clear danger that the jury, outraged by the evidence of other acts, will conclude that the defendant is a vile individual who is likely to have committed the charged offense.⁸⁹ This is precisely the line of reasoning that

84. 699 N.E.2d 288 (Ind. Ct. App. 1998).

85. *Id.* at 293-94.

86. *See supra* note 76 and accompanying text.

87. *See supra* notes 84-85 and accompanying text.

88. *Parmley*, 699 N.E.2d at 294.

89. I wish to make clear that I do not in any way regard homosexuality, or engaging in homosexual acts, as evidence of "vile" character. The evidence presented against the defendant included evidence of unusual sexual practices that might easily have some tendency to incite disgust

Rule 404(b) prohibits. In light of this obvious danger, the *Parmley* court's conclusion that any prejudice to the defendant was not unfair is simply indefensible. This is particularly so because the *Parmley* decision does not note what limiting instructions, if any, the jury received regarding the evidence of the defendant's acts of violence and unusual sexual behavior. The absence of a strong limiting instruction would dramatically increase the likelihood that the jury would leap to the forbidden inference. It might be that, after engaging in a careful balancing of probative value against unfair prejudicial effect, and taking into account the limiting instructions, if any, that the jury received, a court could conclude in a review of *Parmley* that the danger of unfair prejudicial effect did not substantially outweigh the probative value of the other acts evidence, or that the trial court did not abuse its discretion in reaching such a conclusion. The decision in *Parmley*, however, reduced the Rule 403 analysis to a sham.

D. Habit and Routine Practice

Rule 406 provides that evidence of habit or routine practice is admissible to show that action on a particular occasion conformed with the habit or routine practice.⁹⁰ The theory underlying the admission of evidence of habit or routine practice is that when an individual repeatedly confronts a particular set of circumstances and responds to those circumstances in the same way, at some point the individual's response becomes virtually automatic. Because conscious thought is removed from the picture, it becomes reasonable to infer that on subsequent occasions in confronting the same situation, the individual responded in the same virtually automatic way. Evidence of habit and routine practice, which is admissible to prove action in conformity therewith, is distinguished from character, which is not admissible to prove action in conformity therewith, by both the specificity of the situations in which the habit comes into play and the specificity of the reaction to the particular situation. Thus, "John is a careful driver" is evidence of character, while "John always comes to a full stop at the corner of Nineteenth and Elm" is evidence of habit. The Indiana Court of Appeals, however, has cautioned against too narrow a reading of the situational prerequisite for evidence of habit or routine practice.

In *Fitch v. Maesch*,⁹¹ the court considered a contest to the probate of a will. At issue was whether the will had been properly executed. Only one of the witnesses to the execution remained alive at the time of the challenge, and she did not recall the specifics of the execution. The proponent of the will therefore offered the testimony of the secretary for the lawyer who prepared the will and supervised its execution. The secretary testified to the lawyer's normal practice in supervising the execution of wills, and further stated that she could not recall a single instance in which the lawyer had departed from his standard practice.⁹²

in the jury.

90. IND. R. EVID. 406.

91. 690 N.E.2d 350 (Ind. Ct. App. 1998).

92. See *id.* at 353. The secretary established a foundation for her testimony regarding the

The plaintiff objected that this testimony did not establish a habit or routine practice that was relevant to the case at hand, because the secretary's testimony only established the lawyer's habit or routine practice in circumstances in which the secretary served as a witness. The court of appeals rejected this argument, concluding that it was proper to consider the evidence as tending to establish a habit or routine practice with respect to the execution of wills generally, and not solely to the execution of wills on occasions in which the secretary was present.⁹³

E. Offer of Settlement

Under Rule 408, statements made during settlement negotiations, including offers of settlement, are inadmissible to establish either liability or a claim's lack of merit.⁹⁴ The Rule leaves open the possibility, however, that statements made during settlement negotiations may be admissible for other purposes. This point was brought home by the Indiana Court of Appeals' decision in *Vernon v. Acton*.⁹⁵ In that case, a negligence action arising out of an automobile accident, the defendants asserted as a defense that the plaintiffs had agreed to a settlement in a mediation that preceded the filing of the complaint. In support of their contention, the defendants offered testimony of the mediator and of the claims representative for the defendants' insurance company that the plaintiffs had agreed to settle their claims, although the agreement had not been reduced to writing and signed by the parties.⁹⁶ The plaintiffs objected that this evidence violated Rule 408, but the court of appeals disagreed. The court concluded that the evidence was not being offered on the merits of the underlying negligence claim, but rather to show that a settlement had been reached—an issue unrelated to the merits—and was therefore admissible.⁹⁷

III. PRIVILEGES

Like the Federal Rules of Evidence, the Indiana Rules of Evidence do not themselves establish evidentiary privileges. And like Federal Rule of Evidence 501, which calls on the federal courts, in suits arising under federal law, to develop a common law of privileges based on the dictates of experience and reason,⁹⁸ Indiana's Rule 501 permits the evolution of privileges through the

lawyer's habit by testifying that she had worked for the lawyer for sixteen years, had typed wills almost every day during that period, and had witnessed the execution of more than five hundred wills with the lawyer. *See id.*

93. *Id.*

94. IND. R. EVID. 408.

95. 693 N.E.2d 1345 (Ind. Ct. App. 1998).

96. *See id.* at 1348.

97. *Id.* at 1348-49. The court also noted that Indiana Rule of Alternative Dispute Resolution 2.11, which protects the confidentiality of the mediation proceeding, did not apply, because the mediation did not take place within the context of ongoing litigation but rather preceded the filing of the complaint. *Id.* at 1348.

98. FED. R. EVID. 501.

common law.⁹⁹ The courts have been reluctant, however, to draw on common-law principles in developing the law of evidentiary privileges. Instead, the courts have followed a path of strict construction of statutorily-created privileges, and have declined to recognize additional privileges, even in those circumstances in which the courts have concluded that public policy concerns support the recognition of a privilege.¹⁰⁰

A. Physician-Patient Privilege

The Indiana Code creates a privilege protecting communications by patients to physicians in the course of professional business and advice given in the course of such business.¹⁰¹ In *Ley v. Blose*,¹⁰² the Indiana Court of Appeals construed this privilege narrowly, concluding that normally the privilege applied only to physicians and not to hospitals or other medical facilities.¹⁰³ As a result, the privilege did not protect a patient's medical records that were maintained by a hospital or other medical facility, rather than personally by a doctor.¹⁰⁴

The result reached in *Ley* suggests an overly strict approach to the interpretation of statutory privileges that yields arbitrary results and threatens to undermine the rationale behind the privileges. Making the privileged status of communications set forth in medical records turn on the fortuity of whether a doctor maintains her own patient records within her own office, or relies on hospital personnel to do so, bases the privilege on a factor that will hardly occur to most patients seeking medical treatment. Moreover, the approach taken in *Ley* seems contrary to the general principle that the privilege belongs to the patient, not to the physician, and that therefore only the patient can effectively waive the privilege. Under that principle, even if the maintenance of patient records by a hospital represented disclosure by the physician to third parties who were not themselves within the statutory privilege, the privilege should remain in effect, provided that the patient herself does not disclose the confidential communications.

Most jurisdictions that recognize the physician-patient privilege extend the privilege to medical records maintained by hospitals or other medical facilities, at least insofar as those records contain communications between patients and physicians.¹⁰⁵ It may be, in these jurisdictions, that some records that do not

99. IND. R. EVID. 501(a).

100. See *Deasy-Leas v. Leas*, 693 N.E.2d 90, 99 (Ind. Ct. App. 1998), discussed *infra* at notes 109-18 and accompanying text.

101. IND. CODE § 34-46-3-1(2) (1998).

102. 698 N.E.2d 381 (Ind. Ct. App. 1998).

103. *Id.* at 383.

104. See *id.* at 383 & n.2.

105. See, e.g., *State v. Henneberry*, 558 N.W.2d 708, 709 (Iowa 1997); *State v. McElroy*, 553 So. 2d 456, 459-60 (La. 1989); *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. 1997) (en banc); *People v. Carkner*, 623 N.Y.S.2d 350, 353-54, *app. denied*, 629 N.Y.S.2d 730 (1995); *Prince v. Duke Univ.*, 392 S.E.2d 388, 390 (N.C. 1990); *Shamburger v. Behrens*, 380 N.W.2d 659,

contain such communications will fall outside the privilege.¹⁰⁶ The distinction there seems to rest, however, on the contents of the particular records at issue, not on the location in which those records are maintained. Given the arbitrary result approved in *Ley* and the questionable rationale underlying that result, the scope of the patient-physician privilege merits reconsideration by future courts confronted with the issue.

B. Patient-Psychotherapist Privilege

The Indiana Code also recognizes a privilege for patient-psychotherapist communication. In *Kavanaugh v. State*,¹⁰⁷ the Indiana Court of Appeals emphasized that the privilege only protects statements made in a therapeutic setting. In *Kavanaugh*, a prosecution for child molesting, the prosecutor sought to introduce testimony from the defendant's therapist concerning admissions that the defendant made in a meeting with the therapist, the defendant's lawyer, and the mother of the victim. The court noted that the meeting "was conducted for non-therapeutic reasons, outside the scope of a normal therapist-client relationship," and that statements by the defendant within the meeting therefore were not protected by the patient-psychotherapist privilege.¹⁰⁸

C. No Privilege for Communications Between Child and Guardian ad Litem

In *Deasy-Leas v. Leas*,¹⁰⁹ a child custody proceeding, the guardian ad litem sought to quash a discovery request that would have required him to turn over his file relating to the child. On interlocutory appeal, the court of appeals considered whether a privilege existed to protect communications between a guardian ad litem and the child whose interests the guardian ad litem was appointed to protect. As a starting point, the court noted that there was no statutory privilege for communications between guardians ad litem and their wards, and that the court itself lacked the authority to create such a privilege.¹¹⁰ Despite the absence

662 (S.D. 1986).

106. See *McElroy*, 553 So. 2d at 459-60; *Carkner*, 623 N.Y.S.2d at 353-54; *Prince*, 392 S.E.2d at 390.

107. 695 N.E.2d 629 (Ind. Ct. App. 1998).

108. *Id.* at 631.

109. 693 N.E.2d 90 (Ind. Ct. App. 1998).

110. *Id.* at 94-95. As a preliminary matter, the court noted that a recently-passed statute provided that when a guardian ad litem was appointed to perform an investigation and prepare a report for the court, the report must be made available to other parties to the custody proceeding. See IND. CODE § 31-17-2-12 (1998). The court concluded that this provision was inapplicable to the case before it because it did not appear that the guardian ad litem in the case had been appointed to perform an investigation and prepare a report, nor was it apparent that the other statutory prerequisites had been met. *Deasy-Leas*, 693 N.E.2d at 93-94. Because the statute that expressly provided for disclosure was not applicable, the court found it necessary to consider more broadly the question of whether a privilege or other protections barred or limited the disclosure sought in the case before it.

of an express privilege, the court found some indication that the legislature meant certain communications by and about children to be afforded some level of confidentiality. For example, the custody statutes allow a court to prevent the record of any interview, report, or investigation from becoming part of the public record if the court deemed such protection in the best interest of the child.¹¹¹ Rule 26 of the Indiana Rules of Trial Procedure similarly provide for the possibility of protective orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹¹² Finally, certain communications are subject to recognized privileges, including communications between a student and a school counselor.¹¹³ These provisions and others create what the court called a “specter of confidentiality” surrounding materials contained in a guardian ad litem’s file.¹¹⁴ Despite its apparent conviction that public policy reasons favored at least a limited privilege, however, the court declined to recognize such a privilege in the absence of a statutory command. Any protection would have to come from the general confidentiality provisions of the custody statutes and Indiana Trial Rule 26(c).¹¹⁵

The court’s reluctance to recognize a privilege protecting communications between a guardian ad litem and his charge is certainly understandable, given the small number of jurisdictions that recognize such a privilege and the uncertainties surrounding the role of the guardian ad litem in protecting the best interests of the child.¹¹⁶ Privileges obscure the pursuit of truth at trial by keeping relevant and otherwise admissible evidence from the factfinder; thus, courts generally tend to read privileges narrowly, to confine them within the bounds of their underlying rationales, and are wary when pressed to recognize new privileges. Yet the court’s absolutist position that it lacked the authority to recognize a privilege in the absence of a statutory mandate appears inconsistent the Rules, which recognize the possibility of privileges created “by principles of common law in light of reason and experience.”¹¹⁷ The *Deasy-Leas* court relied on pre-Rules caselaw for the proposition that it lacked authority to find privileges that were not embodied in statutory law;¹¹⁸ in light of the plain text of Rule 501(a), that reliance seems unwarranted.

D. No Qualified Privilege for the Press

Privileges may of course be based on constitutional provisions, as well as statutes, rules, and common law decisions. The privilege against self-

111. IND. CODE § 31-17-2-2 (1998).

112. IND. R. TRIAL P. 26(c).

113. IND. CODE § 20-6.1-6-15 (1998).

114. *Deasy-Leas*, 693 N.E.2d at 97.

115. *See id.* at 99.

116. *Id.* at 94, 98.

117. IND. R. EVID. 501(a).

118. *Deasy-Leas*, 693 N.E.2d at 94-95 (citing *Scroggins v. Uniden Corp. of Am.*, 506 N.E.2d 83, 85 (Ind. Ct. App. 1987)).

incrimination under the Fifth Amendment of the United States Constitution is perhaps the most obvious example. The news media, for years, has argued that the First Amendment creates a privilege for news gatherers, and some federal courts of appeals have accepted their contentions.¹¹⁹ The Indiana Supreme Court, however, has declined to follow their lead. In *In re WTHR-TV*,¹²⁰ the court was asked to accept a qualified reporter's privilege that would protect information gathered by reporters from disclosure unless "(1) the information is 'clearly material and relevant' to the party's claim or defense; (2) the information is 'critical to the fair determination of the cause'; and (3) the party has 'exhausted all other sources for the same information.'"¹²¹ Rather than rely on the federal appellate decisions that had recognized the proposed privilege, the court turned to *Branzburg v. Hayes*,¹²² in which the U.S. Supreme Court held that the First Amendment did not create a qualified privilege that would allow a reporter to withhold the identity of sources from a grand jury. The *WTHR* court noted that the three-part test for a qualified privilege proposed by the station had been set forth in the dissent in *Branzburg*. The court thus declined to read *Branzburg* as requiring a test that the *Branzburg* majority itself rejected.

The supreme court's rejection of the three-part test was unnecessary for its resolution of the case because the court concluded that even if the privilege existed in the abstract, it would not apply to the facts of the case before it.¹²³ Nevertheless, given the force with which the court stated its rejection of the First Amendment privilege, the issue may be regarded as settled, at least as a practical matter, for the foreseeable future.

IV. IMPEACHMENT

A. Vouching

Though not expressly stated in any of the Rules of Evidence, Indiana law has long held that the government may not expressly vouch for the credibility of its witnesses in a criminal prosecution. In *Bouye v. State*,¹²⁴ the Indiana Supreme Court reasserted this general rule, although its application to the case at hand was curious. *Bouye* was a prosecution for murder, conspiracy to commit robbery, and carrying a handgun without a license. Bouye's co-defendant accepted a plea and

119. See, e.g., *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983).

120. 693 N.E.2d 1 (Ind. 1998).

121. *Id.* at 10.

122. 408 U.S. 665 (1972).

123. *In re WTHR-TV*, 693 N.E.2d at 15. In *WTHR*, a defendant in a murder prosecution sought to compel the television station to turn over unedited tapes of an interview the station had conducted with her. The court concluded that under these circumstances, disclosure did not threaten to chill news gathering and the use of confidential sources because the individual seeking the disclosure was herself the source of the materials the disclosure of which she sought. *Id.* at 13.

124. 699 N.E.2d 620 (Ind. 1998).

agreed to testify against Bouye at trial. On cross-examination, Bouye's counsel asked whether the terms of the plea agreement required that the witness's testimony be truthful. In voicing his objection, the prosecutor stated: "There's no question about the fact that he's required to testify truthfully. If he does not then I certainly will move the Court to set aside the plea agreement and that he be tried. . . . I certainly wouldn't ask a witness to tell anything but the truth."¹²⁵ On defense counsel's objection to this commentary, the court admonished the jury that the word "truthfully" did not appear in the plea agreement and that the jury must disregard any statements to the contrary.¹²⁶ Bouye was then convicted.

On appeal, Bouye argued that the prosecutor's statement constituted improper vouching for the prosecutor's witness. The supreme court rejected the argument, concluding that the prosecutor's comments were prompted by the cross-examination and represented only a general assertion that the government would not ask any witness to lie, with no mention of the particular witness who was testifying.¹²⁷ The court's conclusion is a bit confusing because the prosecutor's comments, taken as a whole, certainly mentioned the particular witness. The general comment, taken in conjunction with the statements concerning the particular witness, easily could be read as an assertion that the government would not ask this particular witness to lie. The court thus seems to take an extremely narrow approach to improper vouching.

B. Impeachment by a Prior Conviction—Rule 609(b)

Rule 609 allows prior convictions for enumerated crimes to be used for impeachment purposes.¹²⁸ Rule 609(b) limits the use of stale convictions, requiring that when the prosecution wishes to impeach a criminal defendant with a conviction that is more than ten years old, the prosecution must provide advance written notice of the prosecution's intent to use the conviction; in addition, the prosecution must convince the judge that the probative value of the stale conviction substantially outweighs its prejudicial effect.¹²⁹

In *Giles v. State*,¹³⁰ the court of appeals addressed the scope and purpose of Rule 609(b)'s requirement of advance notice. In *Giles*, the state sought to impeach the defendant with a twenty-year-old conviction for uttering a forged

125. *Id.* at 622.

126. *See id.* at 623.

127. *Id.* at 625.

128. Rule 609(a) provides that a witness may be impeached through evidence of conviction for "murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury," or any "crime involving dishonesty or false statement." IND. R. EVID. 609(a). In its enumeration of crimes, the Indiana Rule differs from the Federal Rule, which allows impeachment not only through evidence of conviction for crimes involving dishonesty or false statement but also through evidence of conviction for any crime "punishable by death or imprisonment in excess of one year." FED. R. EVID. 609(a).

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

130. 699 N.E.2d 294 (Ind. Ct. App. 1998).

instrument. It was undisputed that the state failed to provide advance written notice of its intent to use this conviction.¹³¹ The state contended, however, that its filing of an habitual offender charge, which included the stale conviction, provided the defendant with adequate actual notice. The court of appeals disagreed. Drawing on the commentary to Rule 609(b), the court suggested that the notice required by Rule 609(b) should include four elements: the date of the conviction, the jurisdiction in which the conviction occurred, the offense, and the “specific facts and circumstances” on which the prosecution relies to justify admission.¹³² The purpose for this last requirement, the court concluded, was not simply to put the defendant on notice of the existence of the older conviction (about which the defendant was presumably aware even in the absence of notice), but to allow the defendant the opportunity to prepare to meet the prosecution’s arguments concerning probative value and prejudicial effect. Because the habitual offender charge did not provide the defendant with the required notice of the facts and circumstances on which the prosecution intended to rely in support of admission, the prior conviction was improperly admitted.¹³³

In reaching this conclusion, the court disagreed with *United States v. Sloman*,¹³⁴ in which the Sixth Circuit, interpreting the parallel provision in the Federal Rules of Evidence, concluded that any failure to provide advance notice was harmless error if the defense counsel knew of the stale conviction. The *Giles* court argued that the Sixth Circuit misunderstood the surprise that the required advance notice was intended to prevent: “[T]he surprise to be avoided is the surprise associated with being unprepared to argue probative value and prejudicial effect, not surprise associated with mere knowledge of the conviction.”¹³⁵

C. Cross-examination

It is axiomatic that the use of leading questions is, in most instances, an appropriate method of cross-examination, and Rule 611(c) so states.¹³⁶ Interesting issues arise, however, where the witness being cross-examined is the lawyer’s own client, called as a hostile witness by the other side. In such situations, cross-examination by leading questions raises the unseemly image of “the client . . . parroting words put in his mouth by his lawyer.”¹³⁷ The Advisory

131. *See id.* at 297.

132. *Id.*

133. *See id.* The court further noted that the prosecution had failed to make the required showing that the probative value of the conviction substantially outweighed its prejudicial effect, and the trial court had failed to engage in the required balancing of probative value against prejudicial effect before admitting the conviction. *Id.* at 298.

134. 909 F.2d 176 (6th Cir. 1990).

135. *Giles*, 699 N.E.2d at 297 n.3.

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

137. William F. Harvey, *Rules of Procedure Annotated*, 3 IND. PRACTICE § 43.3, at 205 (2d ed. 1988).

Committee note on Federal Rule of Evidence 611(c), recognizing the problem, suggests that cross-examination by leading questions is inappropriate “when the cross-examination is cross-examination in form only and not in fact, as for example the ‘cross-examination’ of a party by his own counsel after being called by the opponent.”¹³⁸

In *Bonadies v. Sisk*,¹³⁹ however, the court of appeals concluded that Rule 611(c) does not automatically bar cross-examination of a party by the party’s lawyer. Although the court acknowledged the potential difficulties posed by a lawyer leading her own client, it noted that Indiana’s Trial Rule 43 expressly contemplated that where one party calls a hostile witness, the other side may cross-examine by leading questions.¹⁴⁰ Ultimately, the court concluded, the trial court has the power, in the exercise of its discretion, to regulate the scope, method, and manner of cross-examination. Because the cross-examination here remained within the scope of the direct examination, the trial court did not abuse its discretion.¹⁴¹

V. EXPERT WITNESSES

In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals*,¹⁴² the United States Supreme Court addressed the standards, under Federal Rule of Evidence 702, for the admission of expert scientific testimony. The *Daubert* decision emphasized the importance of the trial court’s role as gatekeeper in ensuring the reliability and relevance of scientific evidence placed before the jury. In performing this function, the trial court may consider any number of factors that bear on reliability; among these factors, in appropriate cases, are (1) whether the theory or technique underlying the expert’s testimony has been tested, (2) whether the theory or technique has undergone peer review and publication, (3) whether the theory or technique yields a known or potential rate of error, and (4) whether the theory or technique is generally accepted within the pertinent scientific community.¹⁴³ The *Daubert* decision has significantly altered the analysis that federal courts perform in deciding whether to admit expert scientific testimony. *Daubert* did, however, leave some questions unanswered, among them: (1) how is the court to distinguish scientific testimony from testimony that simply draws on “technical, or other specialized knowledge”; (2) of what significance (if any) is the distinction;¹⁴⁴ and (3) in assessing reliability, to what extent may the court look beyond the methods used by the expert and evaluate

138. FED. R. EVID. 611, note c.

139. 691 N.E.2d 1279 (Ind. Ct. App. 1998).

140. *Id.* at 1281.

141. *See id.* at 1282.

142. 509 U.S. 579 (1993).

143. *See id.* at 593-94.

144. The U.S. Supreme Court has granted *certiorari* in a case that raises these first two issues. *See Carmichael v. Samyang Tire Co.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998).

the reliability of the conclusions derived from the application of those methods?¹⁴⁵

The Indiana Court of Appeals addressed this last question in *Lytle v. Ford Motor Co.*¹⁴⁶ *Lytle* arose out of an accident in which a woman was thrown from the pickup truck in which she was riding; she sustained serious head injuries as a result. The plaintiffs claimed that the injuries suffered in the accident were exacerbated by the failure of the injured woman's seatbelt. In support of this claim, the plaintiffs sought to present the expert testimony of two engineers, who would testify that the seatbelt released either inertially or through inadvertent contact, and that the seatbelt's failure under these circumstances constituted a design defect.¹⁴⁷ The trial court refused to allow either expert to testify, and the court of appeals affirmed.

As to the first expert, the court of appeals concluded that his testimony regarding inadvertent release did not rest on scientific principles, and thus did not invoke the explicit reliability requirement of Rule 702(b).¹⁴⁸ The court nevertheless determined that the expert had failed to perform sufficient tests to support his conclusion, and that the trial court therefore had not abused its discretion by barring the expert's testimony.¹⁴⁹ The first expert's testimony about inertial release likewise was flawed, according to the court: Although this testimony did involve scientific principles, the expert relied on a testing method that both government regulators and the Society of Automotive Engineers had rejected. The testimony therefore was properly excluded as unreliable.¹⁵⁰

The court of appeals' discussion of the second expert's testimony, however, raises some difficult issues. In analyzing the admissibility of the expert's testimony, the court assessed not only the reliability of the expert's methods but also the reliability, according to scientific principles, of the expert's conclusions. The legal analysis undertaken by the court is consistent with the United States Supreme Court's approach to Federal Rule 702. Although the *Daubert* Court stated that the trial court's "focus . . . must be solely on principles and methodology, not on the conclusions that they generate,"¹⁵¹ the Court later qualified its seemingly unequivocal statement:

145. Indiana's courts, when addressing problems under the Indiana Rules of Evidence, are of course not bound by decisions of the Federal courts interpreting the parallel Federal Rules. And unlike the Federal Rule, Indiana's Rule 702 by its terms calls upon the trial judge to admit expert scientific testimony "only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Ind. R. Evid. 702(b). Nevertheless, the Indiana Supreme Court, while declining to adopt the *Daubert* test expressly, has stated repeatedly that the Indiana courts should be guided by *Daubert* in their application of Rule 702(b). See *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995).

146. 696 N.E.2d 465 (Ind. Ct. App. 1998).

147. See *id.* at 467-68.

148. *Id.* at 470.

149. *Id.* at 470-71.

150. See *id.* at 471.

151. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993).

But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* nor in the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.¹⁵²

Under *Daubert* and its progeny (and bearing in mind the Indiana courts' qualified acceptance of the *Daubert* framework), therefore, it was proper for the *Lytle* court to analyze the scientific soundness of the expert's conclusions as well as his methodology.¹⁵³

In undertaking this analysis, however, a court must take care not to intrude on the jury's role in weighing competing evidence and assessing the credibility of witnesses, an intrusion that is more likely when the soundness of conclusions is assessed than it is when only methodology is at issue. In *Lytle*, the court of appeals accepted that the second expert's methods were reliable; it questioned only whether the results of the expert's tests supported his conclusions. In affirming the trial court's rejection of the plaintiff's expert's conclusions, the court relied principally on evidence presented by the defendant, including tests performed by the defendant's own experts. The circumstances thus resembled the battle of experts before the jury that typically lies at the heart of a design defect case. As Judge Riley noted in her concurring and dissenting opinion in *Lytle*, the trial court's gatekeeping function under *Daubert* is not meant to usurp the function of the jury in weighing competing evidence presented through the adversary system.¹⁵⁴ Yet the majority concluded that the plaintiff's expert's testimony was properly kept from a jury.¹⁵⁵ The majority's decision in *Lytle* arguably was defensible, because the plaintiff's expert's opinion not only was contrary to the evidence submitted by the defendant's experts but also was inconsistent with results reached separately by the National Highway Traffic Safety Administration and the Society of Automotive Engineers.¹⁵⁶ Still, courts should be wary of a broad reading of *Lytle*, lest they inappropriately invade the jury's province.

152. *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 519 (1997).

153. Judge Riley, concurring in part and dissenting in part in *Lytle*, cited only the *Daubert* Court's unqualified statement that the focus should be only on methodology, not conclusions; she did not take note of the U.S. Supreme Court's subsequent decision in *Joiner*. See *Lytle*, 696 N.E.2d at 474-75 (Riley, J., concurring in part and dissenting in part).

154. See *Lytle*, 696 N.E.2d at 475 (Riley, J., concurring in part and dissenting in part) (citing *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

155. *Id.* at 474.

156. See *id.* at 472.

VI. HEARSAY

A. Purpose: Truth of the Matter Asserted

Fundamental to the hearsay rules is the principle that a statement is only considered hearsay if it is being offered to prove the truth of the matter asserted.¹⁵⁷ If the purpose for which the statement is offered does not depend on the statement's truth, the hearsay bar does not apply.

A case perhaps more remarkable for its long and tangled history than for its final result illustrates the need for care when a judge assesses a claim that an out-of-court statement is being offered for a purpose other than its truth. *Mason v. State*¹⁵⁸ was a second direct appeal, following a first, unsuccessful direct appeal,¹⁵⁹ an unsuccessful petition for post-conviction relief,¹⁶⁰ and a successful habeas corpus petition in federal court.¹⁶¹ At the trial in *Mason*, the prosecution presented the testimony of a police witness, who on two occasions informed the jury, over the defendant's hearsay objection, of the content of an informant's tip that led the police to investigate the defendant.¹⁶² The defendant contended that this testimony constituted impermissible hearsay. The prosecution countered that the testimony was properly offered, not to establish the truth of what the informant said, but to explain why the police launched their investigation of the defendant. On the second direct appeal, the supreme court rejected the prosecution's argument concluding that the reasons for the police investigation were not a proper issue in the case and that, in any event, the jury had not received an instruction that it was not to consider the informant's statement for its truth.¹⁶³ In the absence of a proper purpose, not dependent on the truth of the matter asserted, the content of the informant's tip was inadmissible hearsay.¹⁶⁴

B. Purpose: Effect on the Listener

Among the more common purposes argued to remove a statement from the ambit of the hearsay rule is that the statement is being offered not to prove the truth of the matter asserted, but rather to show the statement's effect on the listener.

The Indiana Supreme Court underscored this principle in two cases during

157. See IND. R. EVID. 801(c).

158. 689 N.E.2d 1233 (Ind. 1997).

159. *Mason v. State*, 532 N.E.2d 1169 (Ind. 1989), *cert. denied*, 490 U.S. 1049 (1990).

160. *Mason v. State*, 634 N.E.2d 100 (Ind. Ct. App. 1994), *trans. denied*.

161. *Mason v. Hanks*, 97 F.3d 887 (7th Cir. 1996).

162. See *Mason*, 689 N.E.2d at 1236. The informant himself did not testify, and his identity remained confidential.

163. *Id.*

164. See *id.* at 1236-37 (citing *Glover v. State*, 251 N.E.2d 814, 818 (1969)). Because *Mason*'s trial took place in 1986, nearly eight years before the Indiana Rules of Evidence became effective, the supreme court decided *Mason*'s appeal under common law. The court noted, however, that the result it reached would have been the same under the Rules. *Id.* at 1237.

the survey period. In *Sylvester v. State*,¹⁶⁵ a murder prosecution, the defendant asserted that his offense was manslaughter, not murder, because it had been committed in sudden heat, based on the defendant's fear that his wife was having an affair.¹⁶⁶ In support of his position, the defendant attempted to introduce evidence of a discussion between the defendant and his wife, in which his wife denied having an affair. The trial court excluded the wife's statement as hearsay, but the Indiana Supreme Court concluded that this was error: The statement was not offered to prove the truth of the matter asserted, but rather to show its effect on the defendant in giving rise to sudden heat.¹⁶⁷

*Hirsch v. State*¹⁶⁸ presented a slightly more complicated scenario. In *Hirsch*, the defendant and the victim were involved in a jailhouse brawl, in which the defendant inflicted injuries on the victim that ultimately proved fatal.¹⁶⁹ At trial, the defendant claimed self-defense. In support of his claim, he sought to testify that, during the fight, he urged the victim to cease fighting but the victim stated that he would not. The defendant also presented the testimony of several bystanders who would have corroborated his testimony. In each instance, the trial court sustained the prosecution's objection that the victim's statement was hearsay.¹⁷⁰ The supreme court concluded that this was error. The court noted that, pursuant to Indiana's self-defense statute, the victim's stated refusal to stop fighting was relevant to the defendant's claim of self-defense regardless of whether the statement was true.¹⁷¹

C. Prior Consistent Statements

Rule 801(d)(1)(B) provides that a witness's prior statement is non-hearsay if it is consistent with the witness's trial testimony and is "offered to rebut a charge of recent fabrication or improper influence or motive, and made before the motive to fabricate arose."¹⁷² In *Parmley v. State*,¹⁷³ the Indiana Court of Appeals concluded that, where multiple charges of recent fabrication or improper influence or motive are made, a prior consistent statement is admissible as non-hearsay, provided that it predated any one of the charged improper influences or motives.¹⁷⁴ *Parmley* was a prosecution for child molesting. On cross-examination of the child victim (the defendant's daughter), the defendant's questioning raised several possible motives for fabrication, including: a desire for attention, unhappiness with the defendant for remarrying and bringing his

165. 698 N.E.2d 1126 (Ind. 1998).

166. *See id.* at 1127.

167. *Id.* The court concluded that the error was harmless. *Id.* at 1130.

168. 697 N.E.2d 37 (Ind. 1998).

169. *See id.* at 38.

170. *See id.* at 38-39.

171. *Id.* at 40.

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

173. 699 N.E.2d 288 (Ind. Ct. App. 1998).

174. *Id.* at 293.

new wife into the home, and the influence of the victim's mother.¹⁷⁵ The prosecutor then presented three witnesses to testify regarding the victim's prior consistent statements. The defendant argued that these statements were inadmissible because the statements did not predate the alleged motives to fabricate. The court concluded, however, that all three prior statements predated the victim's questioning by the police,¹⁷⁶ an occasion on which, the defendant suggested, the victim fabricated her story as a means of gaining attention.

D. Statements of Co-conspirators

Pursuant to Rule 801(d)(2)(E), a statement of a co-conspirator is not considered hearsay if it is made during the existence of and in furtherance of the conspiracy.¹⁷⁷ An obvious prerequisite for the application of Rule 801(d)(2)(E) is the existence of a conspiracy. The issue then arises, what proof is necessary to demonstrate the existence of the conspiracy before the co-conspirator's statement will be admitted? Prior to the adoption of the Rules, the Indiana Supreme Court rejected the boot-strapping argument that the co-conspirator statement, admission of which was sought, could itself provide sufficient evidence of the existence of the conspiracy; instead, the court required that there be independent evidence, either direct or circumstantial, of the existence of the conspiracy.¹⁷⁸ In *Lott v. State*,¹⁷⁹ the Indiana Supreme Court made clear that the requirement of independent evidence remained in effect under the Rules.¹⁸⁰ The testimony of a co-conspirator, describing the conspiracy, easily meets this requirement.¹⁸¹

175. *See id.*

176. *Id.*

177. IND. R. EVID. 801(d)(2)(E).

178. *Lott v. State*, 690 N.E.2d 204, 209 (Ind. 1997).

179. *Id.* at 204.

180. *Id.* at 209.

181. *See id.*; *see also* *Wright v. State*, 690 N.E.2d 1098, 1106 (Ind. 1997). In neither *Lott* nor *Wright* did the court address the question of whether the co-conspirator statement itself could serve as some evidence, though not sufficient evidence, of the existence of the conspiracy. Federal Rule 801(d)(2) was amended, effective December 1, 1997, to provide expressly that the statement at issue may be considered in determining the existence of a conspiracy, though it is not itself sufficient to establish the point. *See* FED. R. EVID. 801(d)(2). This amendment adopted the approach taken by the federal courts of appeals that had addressed the issue. *See, e.g.*, *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993); *United States v. Gambino*, 926 F.2d 1355, 1361-62 & n.5 (3d Cir. 1991); *United States v. Torres*, 908 F.2d 1417, 1425 (9th Cir. 1990); *United States v. Whalen*, 844 F.2d 529, 532-33 (8th Cir. 1988); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988). In *Wright*, the Indiana Supreme Court noted that the Federal Rule was a "mirror image" of Indiana's Rule 801(d)(2)(E) and concluded that, in the absence of countervailing Indiana policies, consideration of federal cases in the interpretation of Indiana's Rule was appropriate. *Wright*, 690 N.E.2d at 1105 n.7. The Indiana Rule, however, has not yet been amended to incorporate the new

E. Excited Utterances

Rule 803(2) creates an exception to the hearsay rule for statements made while under the influence of a startling event that relate to the startling event. The theory underlying the exception is that the influence of the startling event eliminates the possibility of reflection that raises the danger of insincerity and loss of memory. Unlike the exception for present sense impressions, which requires that the statement be made while perceiving the event described or immediately thereafter,¹⁸² the exception for excited utterances does not have a strict temporal component—the exception continues to apply for as long as the excitement generated by the startling event persists. Thus, in *Carter v. State*,¹⁸³ a prosecution for robbery and attempted murder, the Indiana Supreme Court allowed the introduction of a statement made by the victim in the emergency room, shortly after the attack, because at the time of the statement the victim was still under “the stress of excitement from the startling event.”¹⁸⁴

Carter is also significant in its limitation of the supreme court’s pre-Rules decision in *Modesitt v. State*.¹⁸⁵ In *Modesitt*, the supreme court held that, where the declarant testifies and cannot recall making a prior statement, the prior statement is inadmissible.¹⁸⁶ In *Carter*, the shooting victim did testify at trial, but, having been shot in the head three times during the incident in question, did not recall his emergency room statement. The *Carter* court held, however, that *Modesitt* does not bar admission of statements that fall within the hearsay exception for excited utterances.¹⁸⁷

F. State of Physical or Mental Condition

Rule 803(3) excludes from the hearsay bar a declarant’s description of a then-existing physical, mental, or emotional condition.¹⁸⁸ The exception only applies to then-existing conditions; it does not permit the introduction of retrospective descriptions of a previously existing condition and expressly excludes from the exception statements of memory or belief offered to prove the

provisions of the Federal Rule.

182. IND. R. EVID. 803(1). In *Jackson v. State*, 697 N.E.2d 53 (Ind. 1998), the Indiana Supreme Court held that a statement describing a crime, made several hours after the crime, cannot qualify under the exception for present sense impressions, because the statement was not made during or immediately after the crime. *Id.* at 54.

183. 686 N.E.2d 834 (Ind. 1997).

184. *Id.* at 837.

185. 578 N.E.2d 649 (Ind. 1991).

186. *Id.* at 652.

187. *Carter*, 686 N.E.2d at 837.

188. IND. R. EVID. 803(3).

fact remembered or believed.¹⁸⁹ Thus, in *Jackson v. State*,¹⁹⁰ the Indiana Supreme Court held that the exception did not encompass the defendant's statement, made three hours after the defendant shot the victim, that the defendant had not meant to kill the victim.¹⁹¹ This statement, the court concluded, did not describe the defendant's intent at the time of the statement, but rather represented a statement of a fact remembered or believed, offered to prove that fact.¹⁹²

Of course, even if a statement fits within the Rule 803(3) exception, it may only be admitted if the declarant's then-existing physical, mental, or emotional condition is an issue in the case. In *Wrinkles v. State*,¹⁹³ the Indiana Supreme Court concluded that, in a typical murder prosecution, the murder victim's state of mind is not at issue and therefore a victim's statement describing her then-existing state of mind should not be admitted.¹⁹⁴ This decision would be unremarkable but for the fact that in *Bacher v. State*,¹⁹⁵ a majority of the supreme court concluded, over a strong dissent by Justice Boehm (in which Justice Dickson joined) that evidence of a murder victim's state of mind could be introduced.¹⁹⁶ While it is true that the *Bacher* court did not allow the victim's statement to be used as evidence of the defendant's subsequent conduct, the court implicitly concluded that the victim's state of mind was a relevant issue in the trial, even though no argument as to that relevance appears to have been made.¹⁹⁷ The *Wrinkles* decision did not cite *Bacher*. Given the lack of citation, it is not clear whether the court now intends to cabin *Bacher* as a narrow decision that does not open the door generally to admission of victims' statements of state of mind in murder prosecutions, or whether *Wrinkles* is itself aberrational.

G. Business Records

Rule 803(6) permits the introduction of business records that are made at or near the time of the events recorded, derived from information provided by a person with knowledge, and regularly kept in the course of business.¹⁹⁸ In *Schlott v. Guinevere Real Estate Corp.*,¹⁹⁹ the Indiana Court of Appeals confronted the question of whether Rule 803(6) permitted the introduction of

189. *Id.*

190. 697 N.E.2d 53 (Ind. 1998).

191. *Id.* at 54-55.

192. *Id.*

193. 690 N.E.2d 1156, 1159 (Ind. 1997).

194. *Id.* at 1159.

195. 686 N.E.2d 791 (Ind. 1997). *Bacher*, which was decided near the beginning of this survey period, received extensive treatment in last year's survey. See O'Brien, *supra* note 78, at 614-16.

196. *Bacher* was a highly problematic decision for reasons that are thoroughly explained in last year's survey. See O'Brien, *supra* note 78, at 615-16.

197. *Bacher*, 686 N.E.2d at 797.

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

199. 697 N.E.2d 1273 (Ind. Ct. App. 1998).

medical records containing medical opinions and diagnoses. *Schlott* involved a slip-and-fall accident. The plaintiff attempted to introduce her medical records, which reflected the extent of her injuries following her fall. The court of appeals concluded that the admission of the records was error on two grounds. First, the court concluded that compliance with Rule 803(6) did not itself guarantee admissibility. Compliance with other rules was required as well, and Rule 702 required testimony for the admission of expert opinion.²⁰⁰ Second, the court suggested that, even if the requirements of Rule 702 were left aside, the medical records should not be admitted as business records under Rule 803(6). In so concluding, the court relied on *Fendley v. Ford*,²⁰¹ a 1984 case in which the court of appeals had refused to admit medical records on the grounds that such records, standing alone, did not have sufficient indications of trustworthiness; the accuracy of the records could not be tested in the absence of cross-examination.²⁰² The court recognized that *Fendley* predated the adoption of the Indiana Rules of Evidence by a decade, but concluded that its rationale remained persuasive under the Rules.²⁰³

Schlott raises an interesting interpretive issue. On one level, the court's conclusion seems sound. A medical diagnosis from a particular set of observed facts may well involve the formation of opinions as to which reasonable physicians might differ. Given that reality, the presentation of a medical diagnosis through a business record, without the possibility of cross-examination, seems problematic. Indeed, courts in a number of states have concluded that records containing medical opinions, rather than factual observations, do not meet the requirements of the business record exception and are therefore inadmissible hearsay.²⁰⁴ On the other hand, Rule 803(6) appears to contemplate, by its terms, that medical opinions, if regularly generated and kept, may qualify as business records: The Rule's description of what items may constitute business records includes both "opinions" and "diagnoses."²⁰⁵ The *Fendley* court's conclusion that documents containing medical diagnoses cannot qualify as business records, therefore, would appear now to be foreclosed by the text of the rule itself.²⁰⁶ A better ground for the *Schlott* court's decision would seem to be its reference to Rule 702, which provides for the presentation of expert

200. *See id.* at 1277.

201. 458 N.E.2d 1167 (Ind. Ct. App. 1984).

202. *Schlott*, 697 N.E.2d at 1277 (citing *Fendley*, 458 N.E.2d at 1171 n.3).

203. *Id.*

204. *See, e.g.,* *Durant v. United States*, 551 A.2d 1318, 1323-24 (D.C. 1988); *State v. Garlick*, 545 A.2d 27, 32 (1988) (quoting *Gregory v. State*, 391 A.2d 437, 454 (1978)); *State v. Key*, 284 S.E.2d 781, 783 (1981).

205. IND. R. EVID. 803(6). At least one federal court has concluded, on the basis of the identical passage in the parallel federal rule, that Rule 803(6) does permit the introduction, as business records, of records incorporating medical opinions. *See Manocchio v. Moran*, 919 F.2d 770, 779 (1st Cir.), *cert. denied*, 500 U.S. 910 (1990).

206. *Cf. Manocchio*, 919 F.2d at 779 (finding that by its terms, Federal Rule of Evidence 803(6) permits the introduction of medical records containing diagnoses).

opinion through live testimony. The question remains, however, why Rule 803(6) would include references to “opinions” and, especially, “diagnoses” if the drafters of the Rules believed that opinions and diagnoses required the testing of cross-examination per se to be admissible. In light of these uncertainties, further consideration of the issues addressed in *Schlott* seems necessary.