The Illinois Rules of Evidence: A Color-Coded Guide

containing the codified rules,
the Committee's general and specific comments,
side-by-side comparison with the Federal Rules of Evidence,
and commentary on both evidence rules,
including relevant case law, statutes, and court rules

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Last Revised: January 1, 2023

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Preface to the January 1, 2021 Edition

This preface is offered as a comprehensive standalone guide for the differences between the federal and Illinois rules of evidence. It was originally published in the Illinois Bar Journal, Vol. 108 #1, January 2020.

BY GINO L. DiVITO

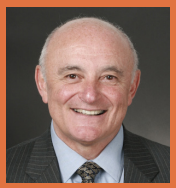
The Surprising Number of Differences Between the Federal and Illinois Rules of Evidence

The Federal and Illinois Rules of Evidence diverge in dozens of ways worth noting.

I'M NOT AWARE OF ANY FREESTANDING GUIDE ON THE DIFFERENCES BETWEEN the Federal Rules of Evidence (FRE) and the Illinois Rules of Evidence (IRE). Until now.

In my book, "The Illinois Rules of Evidence: A Color-Coded Guide" (see the "ISBA Resources" sidebar on page 32), every rule commentary begins with an explanation of the similarities and differences between the two rules. But recently—for my own personal enlightenment and use, and with misplaced confidence that the task would not be too time-consuming—I created a stand-alone guide of the differences. I was surprised to find more than three dozen examples—a reality that needs to be shared.

The IRE are based on the FRE. But they are not identical. In some instances, such as for subsequent remedial measures in FRE 407 or for learned treatises in FRE 803(18), there are no comparable Illinois codifications. Some differences are major, such as those involving Rules 404(b), 608, 702, and 801(d)(1). Most are minor. But all differences matter. Anyone serious about evidence—including all judges and most attorneys—must know the differences.



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TAKEAWAYS >>

Many differences between Federal and Illinois Rules of Evidence concern:

- hearsay exceptions;
- challenges to witness character traits and credibility; and
- the gatekeeping of expert witnesses.

Differences are provided below—in the sequential order of the rules—as summaries of relevant rules and their differences.

Preserving a claim of error for appeal

FRE 103(b), in both civil and criminal cases, does not require a renewal of an objection or an offer of proof to preserve a claim of error for appeal once the court rules "definitively" on the record either before or at trial.

IRE 103(b)(3), in contrast to its federal counterpart, requires the renewal of an objection or an offer of proof in civil cases to preserve a claim of error for appeal, even where the court rules *in limine* before or at trial on the record. But, consistent with **FRE 103(b)** regarding criminal cases, **IRE 103(b)(2)** does not require a renewal of an objection or an offer of proof to preserve a claim of error for appeal where the court rules before or at trial on the record.[1]

Victim and defendant character traits

FRE 404(a)(2)(B)(ii) provides that, in a criminal case where a defendant's offer of an alleged victim's relevant character trait is admitted into evidence, the prosecutor is allowed to also offer evidence of the defendant's same trait.

IRE 404(a)(2) does not allow a prosecutor to offer such evidence in similar circumstances.

Character and propensity

FRE 404(b) prohibits evidence of a crime, wrong, or other act to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" (i.e., to show the person's propensity to commit a crime, wrong, or other act). Note, however, that **FRE 413** allows, for propensity purposes, evidence of similar crimes in sexual assault cases; **FRE 414** allows, for propensity purposes, evidence of similar crimes in child molestation cases; **FRE 415** allows, for propensity purposes, evidence of similar acts in civil cases involving sexual assault or child molestation.

IRE 404(b) provides the same general prohibition as its federal counterpart, which, like the federal rule, includes an exception for common-law allowances that provide admissibility for specific purposes, such as for proof of motive or intent, but not to prove propensity. But, in contrast to the federal rule, the Illinois rule also allows evidence of other crimes, wrongs, or acts—as provided in certain specified statutes[2]—"to show action in conformity therewith" (i.e., for propensity purposes).

Character and conduct

FRE 405(a) allows a character witness to be cross-examined on relevant specific instances of conduct of the person whose character evidence has been provided when evidence of a person's character or character trait is admissible.

IRE 405(a) has not adopted that federal rule provision. Thus, in Illinois, unless the character witness has testified concerning the conduct of a person where character or a character trait is an essential element of a charge, claim, or defense under IRE 405((b)(1), the witness may not be cross-examined about specific instances of conduct of the person whose character evidence has been provided. Illinois' rejection of the federal rule's provision is similar to its rejection of FRE

1. *People v. Denson*, 2014 IL 116231, ¶ 23 (providing the rationale for this distinction in Illinois civil and criminal cases).
2. 725 ILCS 5/115-7.3 (involving sex-related offenses); *id.* § 5/115-7.4 (involving domestic violence-related offenses); *id.* § 5/115-20 (involving domestic violence-related offenses).

FOR MY OWN PERSONAL ENLIGHTENMENT AND USE, AND WITH MISPLACED CONFIDENCE THAT THE TASK WOULD NOT BE TOO TIME-CONSUMING—I CREATED A STAND-ALONE GUIDE OF THE DIFFERENCES [BETWEEN THE FEDERAL AND ILLINOIS RULES OF EVIDENCE]. I WAS SURPRISED TO FIND MORE THAN THREE DOZEN EXAMPLES—A REALITY THAT NEEDS TO BE SHARED.

608(b), which allows cross-examination on specific acts of conduct of a character witness concerning truthfulness or untruthfulness.

FRE 405(b) allows a person's character or character trait to be proved by relevant specific instances of the person's conduct, when that person's character or trait is an essential element of a charge, claim, or defense.

IRE 405(b)(1) is substantially identical to **FRE 405(b)**. But **IRE 405(b)(2)**, which has no codified federal counterpart, also allows proof of specific instances of an alleged victim's prior violent conduct in criminal homicide or battery cases "when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor."

Subsequent remedial measures

FRE 407 does not allow evidence of subsequent remedial measures to be admitted to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.

IRE 407 has been reserved. Sadly, there is no codified Illinois evidence rule for subsequent remedial measures. Appellate court opinions, some of which are conflicting, provide the principles to be applied where subsequent remedial measures have occurred.

Compromise negotiations

FRE 408(a)(2) prohibits evidence of conduct or a statement made during compromise negotiations about the claim—"except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."

IRE 408(a)(2) also prohibits evidence of conduct or a statement made during compromise negotiations about the claim, but it does not provide the exception that is included within the quotation marks of the federal rule provided above.

Discussions related to pleas & plea discussions

FRE 410(a) generally prohibits evidence of discussions related to pleas, plea discussions, and related matters where a guilty plea does not result. It applies in both civil and criminal cases. **FRE 410(b)** provides exceptions to its general rule of inadmissibility.

IRE 410 also prohibits evidence under similar circumstances, but it applies only in criminal cases. And it does not have a subdivision (b), so it provides no exceptions to its general rule of inadmissibility. The Illinois rule is based on Illinois Supreme Court Rule 402(f).

Other similar sex-related crimes

FRE 413 provides for the admission of evidence of other similar crimes in sexual assault cases.

IRE 413 also provides for the admission of evidence of another sex-related offense pursuant to a relevant statute[3] but, pursuant to other relevant statutes, it expands evidence admissibility by providing for the admission of evidence of another domestic violence-related offense[4] and for evidence of the defendant's conviction for another domestic violence-related offense against the same victim.[5]

Similar crimes in child molestation cases

FRE 414 provides that, where a defendant is accused of criminal child molestation, evidence of his commission of any other child molestation is admissible.

IRE 413(a) incorporates the provisions of FRE 414, so a separate rule is unnecessary.

Similar sex-related acts in criminal cases

FRE 415 allows evidence of similar sexual assaults or child molestations in civil cases involving a claim based on sexual assault or child molestation.

There is no codified Illinois counterpart to the federal rule in civil cases.

Attacking witness credibility

FRE 607 allows any party, including the party that called the witness, to attack the witness's credibility.

IRE 607 also allows any party, including the party that called the witness, to attack the witness's credibility. But, contrary to its federal counterpart and consistent with Illinois common law, the Illinois rule al-

3. See, *e.g.*, 725 ILCS 5/115-7.3.
4. See 725 ILCS 5/115-7.4.
5. See 725 ILCS 5/115-20.

ISBA RESOURCES >>

- Coming soon: Gino DiVito, *The Illinois Rules of Evidence: A Color-Coded Guide—2020 Edition*, ISBA Book Store, isba.org/store.
- Patrick M. Kinnally & Cindy G. Buys, *Pleading Guilty in Illinois Courts: A New Judicial Admonition Rule*, The Globe (Nov. 2019), law.isba.org/2sPXDQ3.
- Eli Litoff & Kelly Warner, *A New Federal Rule of Criminal Procedure Is Likely on the Way, But Will It Affect Practice in Illinois Federal Courts?*, Federal Civil Practice (May 2018), law.isba.org/37EG9P2.

lows the party calling the witness to attack the witness's credibility only by showing affirmative damage—except for statements that are substantively admissible under IRE 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803.

Cross-examining to determine character for truthfulness

FRE 608(b) allows a witness to be cross-examined on extrinsic evidence to prove specific instances of conduct of the testifying witness or another witness to attack or support the character for truthfulness of the testifying witness or other witness.

IRE 608 has not adopted the federal rule's subdivision (b). Consistent with Illinois common law, the Illinois rule does not allow cross-examination on specific instances of conduct to attack or support a witness's character for truthfulness.

Admission of past criminal convictions

FRE 609(a) allows evidence of a criminal conviction, for impeachment purposes, for an offense punishable by death or imprisonment for more than one year. Where the witness is not the defendant in a criminal case, it makes the admission of the conviction subject to Rule 403 (i.e., the evidence is excluded if its probative value is substantially outweighed by its unfair prejudicial effect). But for a defendant in a criminal case who was convicted of such offenses, the test for admission of evidence of the conviction is not determined by the Rule 403 balancing test, but by the more protective test of whether "the probative value of the evidence outweighs its prejudicial effect to that defendant." For any crime involving a dishonest act or false statement, there is no balancing test, and the evidence of conviction of any witness for such offenses must be admitted.

FRE 609(b) denies admission of the evidence of a criminal conviction if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. But the evidence of conviction is subject to discretionary admission by the court after that time period if its probative value substantially outweighs its prejudicial effect and the proponent gives an adverse party reasonable written notice of its intent to use it.

FRE 609(d) allows the admission of a juvenile adjudication, under certain conditions, if it is offered only in a criminal case and the adjudication was of a witness other than the defendant.

IRE 609(a) also allows evidence of a criminal conviction, for impeachment purposes, for an offense punishable by death or imprisonment for more than one year and for an offense involving a dishonest act or false statement. But, in contrast to the federal rule, such evidence is subject to the balancing test for the admission of evidence provided by Rule 403 in all cases. Thus, the balancing test provided by Rule 403 is applied to a mere witness and to a defendant in a criminal case, and that test also is applied to convictions involving a dishonest act or false statement.

IRE 609(b) also denies admission of the evidence of a criminal conviction if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. But, unlike the federal rule, it has no provision for allowing the discretionary admission of convictions that exceed that time period.

IRE 609(d) generally prohibits the admission of evidence of juvenile adjudications, but it allows judicial discretion to admit a juvenile adjudication of a witness other than the accused, in both criminal and civil cases.

Leading questions: adverse parties & hostile witnesses

FRE 611(c) provides that the court should allow leading questions "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

IRE 611(c) also provides for the allowance of leading questions for a party who calls a hostile witness or an adverse witness, and it adds the allowance for "an unwilling witness." But it does not adopt the federal rule's allowance of leading questions for "a witness identified with an adverse party." Rather, the Illinois rule applies the allowance to "an adverse party or an agent of an adverse party," thus rejecting the federal rule's broad inclusion of "a witness identified with an adverse party" while also conforming with section 2-1102 of the Code of Civil Procedure.[6]

Using a writing to refresh a witness's memory

FRE 612(a)(2) provides that, where a witness uses a writing to refresh his or her memory during or before testifying, the adverse party is entitled to have the writing produced at the hearings, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. But the rule adds a condition that applies only to witnesses who refresh their memories before testifying "if the court decides that justice requires the party to have those options." That condition does not apply to witnesses who refresh their memories while testifying.

IRE 612(2) provides the same entitlements to the adverse party concerning witnesses who use a writing to refresh their memories during or before testifying. But the Illinois rule does not contain the quoted portion of the federal rule given above. Thus, the Illinois rule does not require the condition that the court exercise discretion for allowing the options available to the opposing party for witnesses who refresh their memories before testifying.

Prior consistent statements

IRE 613(c), which addresses the admission of evidence of prior consistent statements under certain circumstances, not only does not exist in the federal rule, it is inconsistent with FRE 801(d)(1)(B)(i), which treats such statements as "not hearsay." The federal rule and its Illinois

6. 735 ILCS 5/2-1102.

counterpart are addressed *infra* in the discussion that leads with the federal rule.

Gatekeeping expert testimony

FRE 702 incorporates what is referred to as the *Daubert* test.[7] It makes the trial court the gatekeeper for the admission of scientific expert witness testimony (later expanded to all expert witness testimony[8]), based on the criteria it provides in FRE 702(a), (b), (c), and (d).

IRE 702 adopts the general principles of the first paragraph of FRE 702 and FRE 702(a) concerning the qualifications for a witness to provide expert opinion testimony, but it does not adopt the remainder of the federal rule (FRE 702(b), (c), and (d)), thus denying gatekeeper status to the trial court. And it specifically requires, in the rule and in its accompanying committee comment, application of the *Frye* test,[9] which provides that where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion is required to show that "the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." Except for its adoption of the first paragraph of FRE 702 and FRE 702(a), the Illinois rule provides no guidance for admission of expert testimony other than that for a new or novel scientific methodology or principle.

Expert testimony: facts & data

FRE 703 allows facts or data, which would otherwise be inadmissible as evidence but are reasonably relied upon by an expert witness in forming an opinion, to be disclosed to the jury "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

IRE 703 also allows otherwise inadmissible facts or data reasonably relied upon by an expert witness in forming an opinion to be disclosed to the jury, but it does not use the balancing test provided by the federal rule in the quote above to determine whether the inadmissible facts or data should be disclosed to the jury. Because that federal balancing test has not been adopted, the appropriate balancing test for admission in Illinois is IRE 403, which prohibits disclosure to the jury only if the probative value of the facts or data in helping the jury evaluate the opinion is substantially outweighed by their unfair prejudicial effect.

Expert testimony: defendant's mental state

FRE 704, which allows admissibility of lay and expert opinions on an ultimate issue, adds a subdivision, FRE 704(b), to create an exception that makes inadmissible in a criminal case an expert witness's opinion "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."

IRE 704 is identical to its federal counterpart, but it has no 704(b) exception. Illinois common law allows an expert witness to testify to the mental state or condition of a criminal defendant.

Court-appointed expert witnesses

FRE 706 provides information about the appointment of expert witnesses, including the appointment process, the expert's role, the expert's compensation, the court's authorizing disclosure to the jury that the court appointed the expert, and that the rule does not limit the party in calling its own expert.

Illinois has not adopted the federal rule, nor has it codified any evidence rule on the subject. An Illinois Supreme Court rule, such as Rule 215(d) concerning the appointment of an impartial medical examiner, and Illinois statutes provide for the appointment of experts in various circumstances.

Substantive admissibility: prior statements

FRE 801(d)(1)(A) provides, in both civil and criminal cases, substantive admissibility as "not hearsay" of a witness's prior statement that is inconsistent with the witness's testimony, where the prior inconsistent statement "was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."

IRE 801(d)(1)(A)(i) also allows substantive admissibility of such statements, but only in criminal cases. The rule does not allow substantive admissibility of such inconsistent statements in civil cases.

IRE 801(d)(1)(A)(ii) expands its federal counterpart—in criminal cases, not civil cases—by allowing the substantive admissibility of a witness's prior statement that is inconsistent with the witness's testimony at the trial or hearing and "narrates, describes, or explains an event or condition of which the declarant [who also is the witness] had personal knowledge, and:

> (a.) the statement is proved to have been written or signed by the declarant; or
> (b.) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition; or
> (c.) the statement is proved to have been recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

FRE 801(d)(1)(B) allows, in both civil and criminal cases, substantive admissibility, as "not hearsay," of a witness's prior statement that is consistent with the witness's testimony and the statement is offered:

> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

IRE 613(c), as indicated *supra*, is a response to FRE 801(d)(1)(B)(i). Illinois has not adopted either FRE 801(d)(1)(B)(i) or (ii). Thus, in Illinois prior consistent statements of a witness are hearsay and are not subject to a hearsay exception or exclusion. IRE 613(c)—the counterpart to FRE 801(d)(1)

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7. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 379 (1993).
8. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
9. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

(B)(i)—adopts Illinois common law that allows, in both civil and criminal cases, the admission of prior consistent statements by a witness where they are "offered to rebut an express or implied charge that (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred." As IRE 613(c) makes clear, such statements are admitted only for rehabilitative purposes and not substantively as a hearsay exclusion or exception.

Substantive admissibility: witness's identification

FRE 801(d)(1)(C) allows, in civil and criminal cases, the substantive admission of a witness's identification of "a person as someone the declarant perceived earlier."

IRE 801(d)(1)(B) also allows the substantive admission of a witness's "identification of a person made after perceiving the person." But the Illinois rule applies only in criminal cases. It does not apply in civil cases.

Substantive admissibility: opposing party's statements

FRE 801(d)(2) provides for and lists the opposing party's statements that are admissible substantively.

IRE 801(d)(2) lists the same statements of a party opponent that are admissible substantively, but it provides an additional subdivision (F): "a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party."

"Present sense impression" statements

FRE 803(1) provides as an exception to the hearsay rule a "present sense impression" statement, which is a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

IRE 803(1) is reserved. Illinois has not adopted the "present sense impression" exception to the hearsay rule.

Hearsay: medical diagnosis & treatment exceptions

FRE 803(4) allows, as a hearsay exception, the admission of statements made for the purposes of medical diagnosis or treatment.

IRE 803(4)(A) also allows, as a hearsay exception, the admission of statements made for the purpose of treatment, but it allows the admission of statements of medical diagnosis only in contemplation of treatment. The rule specifically makes inadmissible "statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial," but it excepts Rule 703's allowance for information reasonably relied upon by an expert witness.

IRE 803(4)(B) adds a subdivision to the Illinois rule that gives broader admissibility to medical diagnosis than that provided by subdivision (A). It allows, in the prosecution of offenses specifically defined by statutes related to sexual offenses, the admission of "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Hearsay: "recorded recollection" exception

FRE 803(5) provides the "recorded recollection" exception to the hearsay rule. It provides that, if admitted, "the record may be read into evidence but may be received as an exhibit only if offered by an adverse party."

IRE 803(5) also addresses the recorded recollection exception. It does not contain the provision quoted above. Thus, consistent with Illinois common law, the recorded recollection report may be offered as an exhibit even by the proponent of the evidence.

Hearsay: business, medical, & public records

IRE 803(6), generally referred to as the business records exception to the hearsay rule, is identical in substance to FRE 803(6), except that, contrary to the federal rule and consistent with a relevant Illinois statute,[10] medical records in criminal cases are excluded from the hearsay exception.

IRE 803(8) is the public records exception to the hearsay rule. It differs from FRE 803(8) in excluding police accident reports, consistent with Illinois Supreme Court Rule 236(b), and medical records in a criminal case, consistent with 725 ILCS 5/115-5(c)(1).

Hearsay: learned treatise exception

FRE 803(18) is the learned treatise exception to the hearsay rule.

IRE 803(18) has been reserved. Illinois has not accepted this exception to the hearsay rule, nor has it codified a rule related to learned treatises. Consistent with Illinois common law, learned treatises are not substantively admissible through either direct examination or cross-examination. The absence of a codified rule on learned treatises reportedly results in differences in trial courts throughout Illinois as to whether and how juries should be informed of them.

Hearsay: receipts & paid-bill exceptions

IRE 803(24) provides a hearsay exception for a receipt or a paid bill. It makes a receipt or paid bill "*prima facie* evidence of the fact of payment and as *prima facie* evidence that the charge was reasonable." There is no FRE 803(24). A federal rule carrying that designation, which previously addressed other exceptions to the hearsay rule, has been transferred to FRE 807, which is the "Residual Exception" to the hearsay rule. There is no codified federal evidence rule that addresses the hearsay exception IRE 803(24) provides.

10. See 725 ILCS 5/115-5(c)(1).

Hearsay: former testimony exception

IRE 804(b)(1) is the "former testimony" exception to the hearsay rule. It differs from its federal counterpart based on Illinois' distinction between discovery and evidence depositions as they relate to admissibility, and its reference to Illinois Supreme Court Rule 212(a)(5), which allows admission of discovery depositions into evidence in limited circumstances.

Hearsay: dying declaration

FRE 804(b)(2), commonly referred to as the "dying declaration" exception to the hearsay rule, makes admissible, in a prosecution for homicide or in a civil case, a statement concerning the cause or circumstances of the death of a declarant who believes his or her death to be imminent.

IRE 804(b)(2) is identical to its federal counterpart, except in Illinois the hearsay exception does not apply in civil cases. It applies only in a prosecution for a homicide, meaning that, in contrast to the federal rule in civil cases, the declarant must have died for the statement to be admitted.

Hearsay: sufficient notice and residual exceptions

FRE 807 provides a residual exception to the hearsay rule. As amended effective Dec. 1, 2019, the rule provides that, if sufficient notice is given to the opposing party, "a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804"—if two conditions are met. The two conditions are:

> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Illinois has not adopted FRE 807. Nevertheless, despite the lack of a codified evidence rule, there are numerous statutes in the Code of Criminal Procedure of 1963 and in the Code of Civil Procedure that provide equivalent residual hearsay exceptions. In criminal cases, application of those statutes presents issues related to the defendant's constitutional right to confrontation.

Applying evidence rules when revoking probation

FRE 1101(d)(3) provides that the rules of evidence do not apply in proceedings "revoking probation."

IRE 1101(b)(3) does not include an exception for the rules of evidence for revoking probation. In contrast to federal proceedings, Illinois common law generally requires the application of evidence rules where the revocation of probation or conditional discharge is based on an alleged criminal offense.

Preface to the January 1, 2016 Edition

The three columns are gone. The two-column format returns. Here's why.

When this guide was introduced in December 2010, it featured two columns. One contained the then-current federal evidence rules; the other had the newly codified Illinois evidence rules with the effective date of January 1, 2011. This format simplified comparison of the two sets of the then-current rules—rules that had identical numbers and formatting, and that were often substantively identical and frequently employed exactly the same language.

Through side-by-side comparison and the use of color-highlighting, the frequent similarities and the occasional differences in the two sets of rules were easily illustrated.

Then, just one year later—on December 1, 2011—it was obvious that a change was required. That was the effective date of the amendments to the Federal Rules of Evidence—the date that introduced amendments made only for stylistic purposes and with no intended substantive effect, but with significant changes in titles of rules and subdivisions, in language, and in formatting. Greater clarity resulted.

For this reason, recent editions of the guide have featured three columns. To provide continued access to the amended federal evidence rules, they were placed in their own separate column. In the other two columns, side-by-side comparison of the pre-amended federal rules and the Illinois rules was retained. But this resulted in three narrow columns—with the more lengthy rules streaming for an undue length vertically down the page.

More significant, by this time it was clear that there was little interest in a comparison of the Illinois rules with the pre-amended (and otherwise mostly irrelevant) federal rules. Neither those familiar nor those unfamiliar with the federal evidence rules had any interest in the no-longer-current rules.

In short, having the Illinois rules side-by-side with the current federal rules had become more important than a side-by-side comparison of the Illinois rules with the now irrelevant pre-amended federal rules. That was especially so because the author's commentaries, which already explained differences and similarities, could satisfactorily be used to explain what side-by-side placement had illustrated.

So, starting with this edition of the guide, the following changes have been implemented:

(1) The current Federal Rules of Evidence are placed in the left column, side-by-side with the column containing the current Illinois Rules of Evidence. The pre-December 1, 2011 federal evidence rules that served as the substantive and formatting model

for the Illinois rules, are no longer provided. This ensures ready access to the current evidence rules—in a two-column format that allows use in federal and state courts, and should facilitate both easy use and comparison.

(2) The colors used in the text within the columns containing the rules— previously used to indicate substantive and non-substantive differences and the non-adoption of certain federal rules or parts of them—have been eliminated, resulting in clutter-free text in the columns containing both sets of rules.

(3) In lieu of color-coding within the rules themselves, in the very first part of the author's commentary on the Illinois evidence rules (often in the very first sentence or at least in the first paragraph), the similarities in and the differences between the two sets of rules are explained, the few substantive differences between the codified Illinois rules and rules that had their origin in Illinois common law are discussed, and the non-adoption of certain federal rules (or portions of them) is addressed.

(4) Except for two, the rules are provided at the top of a page, in their entirety—with all of their subdivisions. The two exceptions are the lengthy rules that provide hearsay exceptions, Rules 803 and 804. The various subdivisions of these two rules are best considered separately for commentary purposes.

(5) Color is used—only as background—in three instances: pink is used to identify the official Committee Comments that accompany the Illinois rules; yellow is used to indicate the author's commentaries on the Illinois evidence rules; and blue is used for the author's commentaries on the federal evidence rules. The use of yellow and blue as background color in the author's commentaries should serve to distinguish comments on the federal and the Illinois rules from each other, while distinguishing both commentaries from the rules themselves. Also, the addition of headings in the lengthier author's commentaries should enable easy navigation to relevant topics.

My partner Daniel Konieczny dedicated many hours and much-needed expertise to the difficult task of formatting these pages. I am deeply grateful for his significant contributions.

As always, I invite reader-input concerning every aspect of the guide: substantive and minor errors; formatting; relevant statutes, rules, or cases that have been overlooked; and any other matter related to accuracy and increased utility.

After all, this guide continues to be—like the rules of evidence and the decisions that apply them—a work always in progress.

Gino L. DiVito
Tabet DiVito & Rothstein LLC
January 1, 2016

Preface to the December 2010 Edition

On November 24, 2008, the Illinois Supreme Court announced the appointment of a broad spectrum of judges, lawyers, law professors, and legislators to serve on its newly created Special Supreme Court Committee on Illinois Evidence. The Court directed the Committee to draft a comprehensive code of evidence for the state based upon Illinois statutes, rules, and common law. After a year-long process, the Committee presented the Court its proposals for the codification of Illinois evidence rules.

The Court then invited written comments from the bar and scheduled public hearings for oral presentations in Chicago and Springfield in May 2010. After considering both the written comments and those made at the public hearings, the Committee reconvened to revise some of its initial proposals and to add comments to a few individual rules as well as a general commentary. These were then submitted to the Court. On September 27, 2010, the Court approved and promulgated the Committee's proposals, setting January 1, 2011 as the effective date for the codified rules. Referred to in Rule 1102 as the Illinois Rules of Evidence, the new rules are modeled on and similar to, but not wholly identical to, the Federal Rules of Evidence. They contain the same numbering system and address evidence issues in similar fashion.

This guide begins with the Committee's general commentary to the rules and provides all of the newly adopted rules – the Illinois Rules of Evidence (IRE) – including the individual comments that the Committee provided for five of the rules. It presents the new rules in a side-by-side comparison with the Federal Rules of Evidence (FRE), along with additional relevant commentary. The guide's goals are to: (1) enable a direct comparison of the two evidence rules; (2) offer commentary concerning the new rules, with relevant case and statutory citations and explanations; (3) point out substantive and non-substantive differences between the federal and the Illinois rules; (4) indicate explicit rejection of certain federal rules or portions of them; and (5) highlight substantive changes from former Illinois evidence law. To achieve these objectives, the guide employs colored highlights:

- Yellow is used for the author's commentary, in what is a work always in progress.
- Pink is used for comments provided by the Committee for five of the rules.
- Blue underlining is used to indicate both substantive and non-substantive differences between the FRE and the IRE that do not represent a change in Illinois law.
- ~~Red strikethrough is used to indicate a federal rule or a portion of it that was not adopted.~~ The strikethrough reflects non-adoption, not deletion.
- Green is used to indicate a substantive change from prior Illinois law, regardless of whether there is a difference between the FRE and the IRE. As stated above, mere differences between the FRE and the IRE – even those that are substantive but do not reflect a change in Illinois law – are shown with blue underlining.

Although the guide is intended to be viewed in color, a reader who does not have a color copy nevertheless will be able to discern the various types of highlighting from the context or style of the highlight. For example:

- Commentary is in a different typeface, and the author's commentary always is preceded by an appropriate title to distinguish it from the committee commentary.
- Rule differences not representing a change in Illinois law always are underlined.
- ~~Federal rules that were not adopted always are marked with strikethrough.~~
- Substantive changes in Illinois law are the only shaded text in the Illinois rules themselves.

Thus, the guide can be utilized even if printed in grayscale.

Every effort has been made to ensure that the rules and commentary in the guide are current as of the date stated below and as of the date of the last revision shown on the cover page. Note that there are minor variations in the various published editions of the Federal Rules of Evidence, mostly in the use of upper or lower case letters in subheadings. This guide follows the Federal Rules of Evidence printed for the use of the Committee on the Judiciary of the United States House of Representatives and dated December 1, 2009, which is currently available on the website of the United States federal courts.

In response to reader feedback, I have added appendices containing the full text of related statutes and Supreme Court Rules that are discussed in the commentary.

The guide is intended to assist legal practitioners to understand and apply the new rules. It is not a substitute for legal or other professional services. If legal or other professional assistance is required, the services of a competent attorney or other professional should be sought.

My partner Daniel Konieczny dedicated many hours and much-needed expertise to the difficult task of formatting these pages. I am deeply grateful for his significant contributions.

As stated above, my commentary is a work always in progress. For that reason, I welcome any comments related to the guide's accuracy and utility.

Gino L. DiVito
Tabet DiVito & Rothstein LLC
December 23, 2010

In the Supreme Court of the State of Illinois

MR 24138

In re Illinois Rules of Evidence

At the November 2008 Term, this Honorable Court established a Special Supreme Court Committee on Evidence and charged that committee with codifying the law of evidence in the state of Illinois. Through the dedication, active participation, and contributions of the members of the Special Committee, the law of evidence in the State of Illinois has now been codified. Trial proceeding for litigants and the judiciary will, as a result, become even more efficient. As Chief Justice of the Illinois Supreme Court, and on behalf of the Court, I hereby direct the Clerk of this Court to spread of record the Court's appreciation for the work of the Committee and acceptance of the Committee's rules and commentary.

Further, I hereby direct the Clerk of this honorable Court to enter into record the attached Illinois Rules of Evidence, to be effective in the courts of this state on January 1, 2011.

Thomas R. Fitzgerald

Honorable Thomas R. Fitzgerald
Chief Justice
Illinois Supreme Court

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SUPREME COURT CLERK

ILLINOIS RULES OF EVIDENCE

Committee Commentary

On January 1, 2011, by order of the Illinois Supreme Court, the Illinois Rules of Evidence will govern proceedings in the courts of Illinois except as otherwise provided in Rule 1101.

On November 24, 2008, the Illinois Supreme Court created the Special Supreme Court Committee on Illinois Evidence (Committee) and charged it with codifying the law of evidence in the state of Illinois.

Currently, Illinois rules of evidence are dispersed throughout case law, statutes, and Illinois Supreme Court rules, requiring that they be researched and ascertained from a number of sources. Trial practice requires that the most frequently used rules of evidence be readily accessible, preferably in an authoritative form. The Committee believes that having all of the basic rules of evidence in one easily accessible, authoritative source will substantially increase the efficiency of the trial process as well as expedite the resolution of cases on trial for the benefit of the practicing bar, the judiciary, and the litigants involved. The Committee further believes that the codification and promulgation of the Illinois Rules of Evidence will serve to improve the trial process itself as well as the quality of justice in Illinois.

It is important to note that the Illinois Rules of Evidence are not intended to abrogate or supersede any current statutory rules of evidence. The Committee sought to avoid in all instances affecting the validity of any existing statutes promulgated by the Illinois legislature. The Illinois Rules of Evidence are not intended to preclude the Illinois legislature from acting in the future with respect to the law of evidence in a manner that will not be in conflict with the Illinois Rules of Evidence, as reflected in Rule 101.

Based upon the charge and mandate to the Committee, and consistent with the above considerations, the Committee drafted the Illinois Rules of Evidence in accordance with the following principles:

(1) Codification: With the exception of the two areas discussed below under "Recommendations," the Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years. Thus, Rule 702 retains the *Frye* standard for expert opinion evidence pursuant to the holding in *Donaldson v. Central Illinois Public Service Co*., 199 Ill. 2d 63, 767 N.E.2d 314 (2002). The Committee reserved Rule 407, related to subsequent remedial measures, because Appellate Court opinions are sufficiently in conflict concerning a core issue that is now under review by the Supreme Court. Also reserved are Rules 803(1) and 803(18), because Illinois common law does not recognize either a present sense impression or a learned treatise hearsay exception.

(2) Statute Validity: The Committee believes it avoided affecting the validity of existing statutes promulgated by the Illinois legislature. There is a possible conflict between Rule 609(d) and section 5–150(1)(c) of the Juvenile Court Act (705 ILCS 405/5–150(1)(c)) with respect to the use of juvenile adjudications for impeachment purposes. That possible conflict, however, is not the result of promulgation of Rule 609(d) because that rule simply codifies the Illinois Supreme Court's adoption of the 1971 draft of Fed. R. Evid. 609 in *People v. Montgomery,* 47 Ill.2d 510, 268 N.E.2d 695 (1971). As noted in the Comment to Rule 609(d), the present codification is not intended to resolve the issue concerning the effect of the statute. Moreover, the Illinois Rules of Evidence permit the Illinois legislature to act in the future with respect to the law of evidence as long as the particular legislative enactment is not in conflict with an Illinois Supreme Court rule or an Illinois Supreme Court decision. See Ill. R. Evid. 101.

(3) Modernization: Where there was no conflict with statutes or recent Illinois Supreme Court or Illinois Appellate Court decisions, and where it was determined to be beneficial and uniformly or almost uniformly accepted elsewhere, the Committee incorporated into the Illinois Rules of Evidence uncontroversial developments with respect to the law of evidence as reflected in the Federal Rules of Evidence and the 44 surveyed jurisdictions. The 14 instances of modernization of note are as follows:

(1) Rule 106. Remainder of or Related Writings or Recorded Statements.

Rule 106 permits the admission contemporaneously of any other part of a writing or recording or any other writing or recording which "ought in fairness" be considered at the same time. Prior Illinois law appears to have limited the concept of completeness to other parts of the same writing or recording or an addendum thereto. The "ought in fairness" requirement allows admissibility of statements made under separate circumstances.

(2) Rule 406. Habit; Routine Practice.

Rule 406 confirms the clear direction of prior Illinois law that evidence of the habit of a person or 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 person or organization on a particular occasion was in conformity with the habit or routine practice.

(3) Rule 408. Compromise and Offers to Compromise.

Prior Illinois law did not preclude admissibility of statements made in compromise negotiations unless stated hypothetically. Because they were considered a trap for the unwary, Rule 408 makes such statements inadmissible without requiring the presence of qualifying language.

(4) Rule 613(a). Examining Witness Concerning Prior Statement.

Rule 613(a) provides that a prior inconsistent statement need not be shown to a witness prior to cross-examination thereon. *Illinois Central Railroad v. Wade*, 206 Ill. 523, 69 N.E. 565 (1903), was to the contrary.

(5) Rule 801(d). Statements Which Are Not Hearsay.

Rule 801(d)(1)(A) codifies an Illinois statute (725 ILCS 5/115–10.1) that applies only in criminal cases. It makes admissible as "not hearsay" (rather than as a hearsay exception) a prior inconsistent statement of a declarant who testifies at a trial or a hearing and is subject to cross-examination, when the prior inconsistent statement was given under oath at a trial, hearing, or other proceeding, or in a deposition, or under other specified circumstances. The rule does not apply in civil cases. Rule 801(d)(1)(B) also codifies an Illinois statute (725 ILCS 5/115–12). It makes admissible as "not hearsay" a declarant's prior statement of identification of a person made after perceiving that person, when the declarant testifies at a trial or hearing in a criminal case and is subject to cross-examination concerning the statement. Rule 801(d)(2) provides substantive admissibility, as "not hearsay," for admissions of a party-opponent.

(6) Rule 801(d)(2)(D). Statement by a Party's Agent or Servant.

Rule 801(d)(2)(D) confirms the clear direction of prior Illinois law that a statement by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, constitutes an admission of a party-opponent.

(7) Rule 803(13). Family Records.

The requirement that the declarant be unavailable and that the statement be made before the controversy or a motive to misrepresent arose, *Sugrue v. Crilley*, 329 Ill. 458, 160 N.E. 847 (1928), have been eliminated.

(8) Rule 803(14), (15), (19), (20) and (23).

With respect to records of or statements in documents affecting an interest in property, reputation concerning personal or family history, and concerning boundaries or general history, and judgments as to personal, family or general history or boundaries, Illinois law in each area was sparse or nonexistent.

(9) Rules 803(16) and 901(b)(8). Statements in Ancient Documents.

The 30-year limitation to real property, *Reuter v. Stuckart*, 181 Ill. 529, 54 N.E. 1014 (1899), is relaxed in favor of 20 years without subject matter restriction.

(10) Rule 804(b)(3). Statement Against Interest.

Rule 804(b)(3) makes applicable to the prosecution as well as the defense the requirement that in a criminal case a statement tending to expose the declarant to criminal liability is not admissible as a hearsay exception unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(11) Rule 806. Attacking and Supporting Credibility of Declarant.

Rule 806 dispenses with the requirement of an opportunity to deny or explain an inconsistent statement or conduct of an out-of-court declarant under all circumstances when a hearsay statement is involved. Whether Illinois law had already dispensed with the requirement with respect to a deposition was unclear.

(12) Rule 902(11). Certified Records of Regularly Conducted Activity.

Self-authentication of business records is provided by Rule 902(11), following the model of Fed. R. Evid. 902(11) and 902(12) and 18 U.S.C. 3505.

(13) Rule 1004. Admissibility of Other Evidence of Contents.

Rule 1004 does not recognize degrees of secondary evidence previously recognized in Illinois. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315 (1874). In addition, it is no longer necessary to show that reasonable efforts were employed beyond available judicial process or procedure to obtain an original possessed by a third party. *Prussing v. Jackson*, 208 Ill. 85, 69 N.E. 771 (1904).

(14) Rule 1007. Testimony or Written Admission of Party.

The Rule 1007 provision that testimony or a written admission may be employed to prove the contents of a document appears never before to have been the law in Illinois. *Bryan v. Smith*, 3 Ill. 47 (1839).

(4) Recommendations: The Committee recommended to the Illinois Supreme Court a limited number of changes to Illinois evidence law (1) where the particularized evidentiary principle was neither addressed by statute nor specifically addressed in a comprehensive manner within recent history by the Illinois Supreme Court, and (2) where prior Illinois law simply did not properly reflect evidentiary policy considerations or raised practical application problems when considered in light of modern developments and evidence rules adopted elsewhere with respect to the identical issue. The Committee identified, and the Illinois Supreme Court approved, recommendations in only two areas:

(a) Opinion testimony is added to reputation testimony as a method of proof in Rule 405, when character evidence is admissible, and in Rule 608 with respect to character for truthfulness:

Rule 405.

METHODS OF PROVING CHARACTER

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

(b) Specific Instances of Conduct.

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct; and

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior violent conduct.

Rule 608.

EVIDENCE OF CHARACTER WITNESS

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Rule 803(3) eliminates the requirements currently existing in Illinois law, that do not exist in any other jurisdiction, with respect to statements of then existing mental, emotional, or physical condition, that the statement be made by a declarant found unavailable to testify, and that the trial court find that there is a "reasonable probability" that the statement is truthful:

RULE 803.

HEARSAY EXCEPTIONS;
AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> **(3) Then Existing Mental, Emotional, or Physical Condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:
>
> > (A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or
> >
> > (B) a statement of declarant's then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.

The initial reference in Illinois to "unavailability" and "reasonable probability" occurred in *People v. Reddock,* 13 Ill. App. 3d 296, 300 N.E.2d 31 (1973), adopting the position taken by the North Carolina Supreme Court in *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971), when dealing with statements of intent by a declarant to prove conduct by the declarant consistent with that intent. Subsequent cases simply incorporated the two qualifications without analysis, evaluation, critique, or discussion. No reference has been made to the fact that the two requirements were initially adopted solely to deal with the *Mutual Life Ins. v. Hillmon,* 145 U.S. 285 (1892), issue as to whether a statement of an out of court declarant expressing her intent to perform a future act was admissible as evidence to prove the doing of the intended act. Interestingly, the North Carolina version of Rule 803(3) in the North Carolina Rules of Evidence is in substance the same as Rule 803(3), *i.e.*, neither a requirement of "unavailability" nor "reasonable probability" is included.

Rule 803(3) permits admissibility of declarations of intent to do an act as evidence to establish intent and as evidence to prove the doing of the intended act regardless of the availability of the declarant and without the court finding a reasonable probability that the statement is truthful. Consistent with prior Illinois law, Rule 803(3)(B) provides that the hearsay exception for admissibility of a statement of intent as tending to prove the doing of the act intended applies only to the statements of intent by a declarant to prove her future conduct, not the future conduct of another person.

(5) Structural Change: A hearsay exception in Illinois with respect to both business and public records is recognized in civil cases by Illinois Supreme Court Rule 236, excluding police accident reports, and in criminal cases by section 115 of

the Code of Criminal Procedure (725 ILCS 5/115), excluding medical records and police investigative records. The Illinois Rules of Evidence in Rule 803(6), records of regularly conducted activity (*i.e.*, business records), and in Rule 803(8), public records and reports, while retaining the exclusions described above, removes the difference between civil and criminal business and public records in favor of the traditional and otherwise uniformly accepted division between business records, Rule 803(6), and public records and reports, Rule 803(8), both applicable in civil and criminal cases.

RULE 803(6)-(10).

HEARSAY EXCEPTIONS;
AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(6) Referenced Statutes: Numerous existing statutes, the validity of which are not affected by promulgation of the Illinois Rules of Evidence, Ill. R. Evid. 101, relate in one form or another to the law of evidence. The Committee felt it was inappropriate, unnecessary and unwise to refer specifically to the abundance of statutory authority in an Appendix or otherwise. Reference is, however, made in the body of the text of the Illinois Rules of Evidence to certain statutes by citation or verbatim incorporation. Such references and the reasons therefor are as follows:

(1) Rule 404(a)(2): Character testimony of the alleged victim offered by the accused is specifically made subject to the limitations on character evidence contained in the rape shield statute, 725 ILCS 5/115–7.

(2) Rule 404(b): The bar to evidence of other crimes, wrongs, or acts to prove character to show conformity is made subject to the provisions of 725 ILCS 5/115–7.3, dealing with enumerated sex-related offenses, along with 725 ILCS 5/115–7.4 and 725 ILCS 5/115–20, dealing with domestic violence and other enumerated offenses, all of which allow admissibility of other crimes, wrongs, or acts under certain circumstances.

(3) Rule 409: The parallel protection afforded by 735 ILCS 5/8–1901 with respect to payment of medical or similar expenses is specifically referenced in Rule 409 to preclude any possibility of conflict.

(4) Rule 611(c): 735 ILCS 5/2–1102 provides a definition of adverse party or agent with respect to hostile witnesses as to whom interrogation may be by leading questions.

(5) Rule 801(d)(1): The provisions of 725 ILCS 5/115–10.1, dealing with prior inconsistent statements in a criminal case, are incorporated nearly verbatim in Rule 801(d)(1)(A) in the interests of completeness and convenience. Similar treatment is given to prior statements of identification, 725 ILCS 5/115–12, in Rule 801(d)(1)(B).

(6) Rule 803(4)(B): 725 ILCS 5/115–13, dealing with statements by the victim to medical personnel in sexual abuse prosecutions, is included verbatim in recognition that the statute admits statements to examining physicians while the generally applicable provisions of Rule 803(4)(A) do not.

(7) Redundancy: Where redundancy exists between a rule contained in the Illinois Rules of Evidence and another Illinois Supreme Court rule, reference should be made solely to the appropriate Illinois rule of evidence.

Respectfully Submitted,

Honorable Donald C. Hudson, Chair
Honorable Warren D. Wolfson (retired), Vice-Chair
Professor Ralph Ruebner, Reporter
Professor Michael H. Graham, Advisor
Honorable Robert L. Carter
Honorable Tom Cross, Illinois State Representative
Honorable John J. Cullerton, President of the Illinois State Senate
Honorable Gino L. DiVito (retired)
Honorable Nathaniel R. Howse, Jr.
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Honorable Arthur J. Wilhelmi, Illinois State Senator

FEDERAL RULES OF EVIDENCE

Rule 101. Scope; Definitions

(a) Scope. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

ILLINOIS RULES OF EVIDENCE

Rule 101. Scope

These rules govern proceedings in the courts of Illinois to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court.

Committee Comment to Rule 101

Rule 101 provides that a statutory rule of evidence is effective unless in conflict with an Illinois Supreme Court rule or decision. There is no current statutory rule of evidence that is in conflict with a rule contained in the Illinois Rules of Evidence.

COMMENTARY

Author's Commentary on Ill. R. Evid. 101

Except for the difference in federal court proceedings and the acknowledgment that statutory rules of evidence are effective unless they are in conflict with a rule or a decision of the Illinois Supreme Court, IRE 101 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See also the fourth paragraph of the Committee's general commentary on page 1 of this guide. Note that the Illinois rule does not have a subdivision (b), nor does it contain the definitions now provided by FRE 101(b). That entire subdivision, with the definitions it provides, was added to the federal rule effective December 1, 2011.

"Rule 1101," referred to in IRE 101, reiterates—in IRE 1101(a)—that these evidence rules "govern proceedings in the courts of Illinois." It then provides—in IRE 1101(b) and (c)—the proceedings in which the evidence rules do not apply: in the court's determination of preliminary questions of fact for the admissibility of evidence (IRE 1101(b)(1); in grand jury proceedings (IRE 1101(b)(2); for various listed miscellaneous proceedings (IRE 1101(b)(3); and in small claims actions (IRE 1101(c).

Statutory Rules of Evidence

Regarding the ability of the General Assembly to provide for rules of evidence by statutory enactment, see *First National Bank of Chicago v. King*, 165 Ill. 2d 533, 542 (1995) (holding that "the legislature has the power to prescribe new rules of evidence and alter existing ones," and that such "action does not offend the separation-of-powers clause of our constitution"), and *People v. Orange*, 121 Ill. 2d 364, 381 (1988) (holding that the supreme court's previous refusal "to allow the substantive use of prior inconsistent statements [citation] did not preclude

the legislature from doing so"). See, also, Supreme Court Rule 1 (asserting that "[g]eneral rules apply to both civil and criminal proceedings" and that "[t]he rules on proceedings in the trial courts, together with the Civil Practice Law and the Code of Criminal Procedure, shall govern all proceedings in the trial court, except to the extent that the procedure in a particular kind of action is regulated by a statute other than the Civil Practice Law").

***Peterson*: Separation of Powers and the Supreme Court's Primary Constitutional Authority over Court Proceedings**

People v. Drew Peterson, 2017 IL 120331, offers a comprehensive explanation of the principles that support the separation of powers concerning the rules of evidence:

> "[The judicial power, which includes rulemaking authority to regulate the trial of cases,] necessarily extends to the adoption of rules governing the admission of evidence at trial, an authority this court has frequently exercised. See, *e.g., People v. Lerma*, 2016 IL 118496, ¶ 24 (recognizing that the research concerning eyewitness identification "is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony" at trial); *People v. Gard*, 158 Ill. 2d 191, 201, 204 (1994) (acknowledging that "[t]his court has consistently held evidence pertaining to polygraph examination of a defendant generally inadmissible" and holding that evidence of polygraph examination of a witness is also inadmissible); *Wilson v. Clark*, 84 Ill. 2d 186, 196 (1981) (adopting Federal Rules of Evidence 703 and 705 concerning expert opinions offered at trial); *People v. Montgomery*, 47 Ill. 2d 510, 516-19 (1971) (adopting then-proposed Federal Rule of Evidence 609, limiting the use of prior convictions to impeach the credibility of a witness).
>
> "¶ 30 The separation of powers clause, however, is not intended to achieve a "'complete divorce'" between the branches of government. *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 33 (2001) (quoting *In re J.J.*, 142 Ill. 2d 1, 7 (1991)); *Kunkel* [*v. Walton*], 179 Ill. 2d [519], at 528 [(1997)]. The separate spheres of authority exercised by each branch may "overlap." *Kunkel*, 179 Ill. 2d at 528; *Best* [*v. Taylor Machine Works*], 179 Ill. 2d [367] at 411 [(1997)]. The law of evidence is one area in which an overlap between the spheres of authority exercised by the judicial and legislative branches exists. Although this court is empowered to promulgate rules regarding the admission of evidence at trial, the General Assembly may legislate in this area without necessarily offending separation of powers. *First National Bank of Chicago v. King*, 165 Ill. 2d 533, 542 (1995) (citing *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 140 (1984)); accord Ill. Rs. Evid., Committee Commentary (eff. Jan. 1, 2011) ("Illinois Rules of Evidence are not intended to preclude the Illinois legislature from acting in the future with respect to the law of evidence"). Because the legislature is the branch of government charged with the determination of public policy, it has "the concurrent constitutional authority to enact complementary statutes." *People v. Walker*, 119 Ill. 2d 465, 475 (1988).
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> "¶ 31 Notwithstanding this overlap between the judicial and legislative branches, this court retains primary constitutional authority over court procedure. *Kunkel*, 179 Ill. 2d at 528. Accordingly, where an irreconcilable conflict exists between a legislative enactment and a rule of this court on a matter within the court's authority, the rule will prevail. *Id.* (citing *Walker*, 119 Ill. 2d at 475-76); see also Ill. R. Evid. 101 (eff. Jan. 1, 2011) ("statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court"). We agree with the State that, in this instance, the statute and the rule [concerning forfeiture by wrongdoing] cannot be reconciled and the statute must give way to the rule." *People v. Peterson*, 2017 IL 120331, ¶¶ 29-31.

Add to the foregoing quote from *Peterson*, the supreme court's relevant statement in *People v, Deroo*, 2022 IL 126120, ¶ 44, where the court altered an evidence rule by allowing medical records in a criminal case to be admitted in evidence as a hearsay exception:

> "Most importantly, we have an obligation to maintain the Illinois Rules of Evidence in a coherent way, regardless of the actions of the legislature (see Ill. R. Evid. 101 (eff. Jan. 1, 2011)), and Illinois Rule of Evidence 803(6) cannot be left in its present form."

Committee Comment and Its Amendment

When these rules were submitted to the supreme court, the Committee believed that there was no statutory rule of evidence that was in conflict with any rule contained in the codified Illinois Rules of Evidence, with the possible exception of section 5-1501(c) of the Juvenile Court Act of 1987 (705 ILCS 405/5-1501(c)). The original Committee Comment referred to the possibility of that exception. However, that possibility was removed with the supreme court's holding in *People v. Villa*, 2011 IL 110777, which made it clear that even that statute did not conflict with the newly adopted rules. Thus, effective January 6, 2015, the supreme court amended the Committee Comment by deleting the reference concerning the single possible conflict that may have existed when the rules were first adopted.

Examples of Statutory Evidence Rules

The Dead-Man's Act (735 ILCS 5/8-201; see the *Author's Commentary on Ill. R. Evid 601* for more on that Act) is an example of a statutory rule of evidence, as are the statutes contained in the Evidence Act (735 ILCS 5/8-101, *et seq.*) and in Article 115 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-1, *et seq.*).

Other examples of statutory rules of evidence include section 115-7 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7, the rape shield law), referenced in IRE 412(a); section 8-2801 of the Code of Civil Procedure (735 ILCS 8/8-2801, the civil version of the rape shield law), referenced in IRE 412(b); in the Code of Criminal Procedure of 1963, section 115-7.3, (725 ILCS 5/115-7.3, allowing evidence of certain sex offenses in prosecutions for specified sex-related offenses); 115-7.4 (725 ILCS 5/115-7.4, allowing evidence of domestic violence offenses in prosecutions for domestic violence-related offenses); section 115-20 (725 ILCS 5/115-20, allowing evidence of prior convictions for any of the type offenses it lists); and the statutes that create hearsay exclusions and exceptions in criminal cases, referenced in the *Author's Commentary on Non-Adoption of Fed. R. Evid. 807; Illinois Statutory Hearsay Residuary Exceptions; Application of Crawford's "Testimonial Hearsay" in Criminal Cases*.

Retroactive Application

Note that, although the codified Illinois Rules of Evidence became effective January 1, 2011, because they represent changes affecting matters of procedure and not substantive rights, they apply retroactively to pending cases. *See Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 22 (holding that the rules apply retroactively as procedural changes, citing *Niven v. Siqueira*, 109 Ill. 2d 357, 364 (1985) ("[a] new law which affects only procedure generally applies to litigation pending when the law takes effect"), and *Schweicker v. AG Services of America, Inc.*, 355 Ill. App. 3d 439, 442 (2005) ("a procedural change in the law prescribes a method of enforcing rights or involves pleadings, evidence and practice").

But note that, as pointed out in *People v. Hunter*, 2017 IL 121306, ¶ 37, "new procedural rules only apply to ongoing proceedings 'so far as practicable,'" citing section 4 of the Statute on Statutes (5 ILCS 70/4). For that reason, "application of the amended statute [which occurred well after the trial court proceedings were completed] [was] not practicable." *Id.* See also *People v. Brown*, 2021 IL App (3rd) 170621, ¶ 37 (citing *Hunter*, in holding that the amendment to IRE 902(12) had taken place after the trial had taken place and thus could not be retroactively applied on appeal).

Aids for Interpreting These Codified Rules of Evidence

The need to rely on supreme and appellate court interpretation of the codified rules of evidence is self-evident. It sometimes occurs, however, that application of a given rule is not clear and that there are no Illinois decisions that offer guidance. Such was the case in the supreme court decision in *People v. Thompson*, 2016 IL 118667. There, the court noted

that it had "never addressed the admissibility of lay opinion identification testimony under Rule of Evidence 701 or whether a law enforcement officer may offer such testimony under the rule." *Thompson*, at ¶ 40. The remedy, the supreme court said, was that "[b]ecause Rule of Evidence 701 is modeled after Federal Rule of Evidence 701 (Fed. R. Evid. 701), we may look to federal law, as well as state decisions interpreting similar rules for guidance." *Id*. The court then embarked on a thorough examination of federal and other-state decisions to answer the issues it confronted, ultimately applying standards derived from that examination to the issues under review. To be sure, the supreme court frequently has applied the same procedure in other situations when construing a statute that is modeled after a federal law. But it is comforting to have a direct answer to the frequently asked question of whether it is proper to consult and cite federal or other out-of-state authority interpreting evidence rules similar to those adopted in Illinois.

Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

COMMENTARY

Author's Commentary on Ill. R. Evid. 102

IRE 102 is identical to the wording in its federal counterpart before the amendments to the federal rules solely for stylistic purposes that became effective on December 1, 2011.

Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 103. Rulings on Evidence

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Preserving a Claim of Error for Appeal.

(1) Civil and Criminal Cases. In civil and criminal trials where the court has not made a previous ruling on the record concerning the admission of evidence, a contemporaneous trial objection or offer of proof must be made to preserve a claim of error for appeal.

(2) Criminal Cases. In criminal trials, once the court rules before or at trial on the record concerning the admission of evidence, a contemporaneous trial objection or offer of proof need not be renewed to preserve a claim of error for appeal.

(3) Civil Cases. In civil trials, even if the court rules before or at trial on the record concerning the admission of evidence, a contemporaneous trial objection or offer of proof must be made to preserve a claim of error for appeal.

(4) Posttrial Motions. In all criminal trials and in civil jury trials, in addition to the requirements provided above, a claim of error must be made in a posttrial motion to preserve the claim for appeal. Such a motion is not required in a civil nonjury trial.

(c) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was

offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(d) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(e) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMENTARY

Author's Commentary on Fed. Rs. Evid. 103(a) and 103(b)

FRE 103(a)

FRE 103(a), like IRE 103(a), provides that, to preserve error for review, a timely objection or an offer of proof is required. In addition to that requirement, in criminal jury cases see Federal Rule of Criminal Procedure 33, and in civil jury cases see Federal Rule of Civil Procedure 50. See also *Ortiz v. Jordan*, 131 S. Ct. 884 (2011) (absent a Rule 50 motion, "we have repeatedly held, an appellate court is 'powerless' to review the sufficiency of the evidence after trial"), quoting *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* 546 U.S. 394 (2006) ("A postverdict motion is necessary because '[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'").

FRE 103(b)

In 2000, a paragraph was added to FRE 103(a). That paragraph was converted into FRE 103(b) as a result of the amendments that were made to the federal rules for stylistic purposes effective December 1, 2011. Under current FRE 103(b), in a federal court proceeding there is no need to renew an objection or an offer of proof to preserve a claim of error for appeal once the court makes a "definitive" ruling that admits or excludes evidence. That portion of the federal rule was not adopted in Illinois, because a renewal of an objection or an offer of proof is required in *civil* cases in Illinois, even where there was a previous definitive ruling by the court (generally, in a pretrial ruling on a motion *in limine*). See the *Author's Commentary on Ill. R. Evid. 103(a)*, as well as the *Author's Commentary on Ill. R. Evid. 103(b)*.

The issue of what is a "definitive" ruling occasionally is a disputed issue in federal cases. In *Wilson v. Williams*, 182 F. 3d 562 (7th Cir. 1999), a case decided while the amendment to the rule was pending before Congress and before its adoption, the Seventh Circuit Court of Appeals, sitting *en banc*, offered guidance as to what is meant by a "definitive" ruling. The court succinctly pointed out that definitive rulings "do not invite reconsideration." *Wilson*, 182 F.3d at 566. The court made that statement after explaining that,

> "if the judge's ruling is tentative—if, for example, the judge says that certain evidence will be admitted unless it would be unduly prejudicial given the way the trial develops—then later events may lead to reconsideration, and the litigant adversely affected by the ruling must raise the subject later so that the judge may decide whether intervening

events affect the ruling." *Wilson*, 182 F.3d at 565-66.

The court also pointed out that "[a] pretrial ruling is definitive only with respect to subjects it covers" (*id.* at 568), and, because in the case at bar there was no objection to the misuse of evidence admitted by the trial court, the issue had been forfeited on appeal. From *Wilson* and subsequent federal circuit court decisions, it is clear that trial court rulings that do not satisfy the rule's requirement of "definitive" are those that are tentative or conditional, or made without prejudice, or made with the court's statement that it is willing to reconsider its ruling, or address only a limited subject matter that does not cover trial error alleged to have been made. Where those circumstances are present, to preserve an issue for appeal, a renewal of an objection or an offer of proof must be made.

For an example of the application of FRE 103(b)'s definitive ruling requirement, see *United States v. Bradford*, 905 F.3d 497 (7th Cir. 2018) (holding that, though defendant had made a motion *in limine*, the motion had not been made with specificity as required by FRE 103(a)(1)(B) for it did not cite Rules 404(b) or 403, both of which defendant relied upon on appeal and the trial court's ruling had not been definitive, and further holding—under plain error review—that the challenged other crimes evidence was properly admitted as relevant to prove the charged offense of conspiracy).

Author's Commentary on Ill. R. Evid. 103(a)

IRE 103(a) is identical to its counterpart federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the omission of what was then the last sentence (which constituted the final paragraph) of pre-amended FRE 103(a). That sentence—which excuses the renewal of a contemporaneous trial objection or offer of proof after a "definitive" *in limine* ruling in *all* cases—is now in its own subdivision, FRE 103(b), as a result of the December 1, 2011 amendments. The Illinois version of Rule 103(b)—which differs substantively from its federal counterpart—is discussed below in the *Author's Commentary on IRE 103(b)*.

IRE 103(a) provides the requirements for assigning a claim of error in admitting or excluding evidence: (1) the requirement that a substantial right is affected, and (2) the requirement that the error is called to the attention of the trial court, to enable it to take appropriate action, through a timely objection or a motion to strike when evidence is admitted, or through an offer of proof when evidence is excluded. The latter requirement also enables the opposing party to take proper corrective measures when required.

General Principles Related to Objections (IRE 103(a)(1))

"When a party has stated no basis for an objection and the trial court has sustained the objection but provided no reason for its ruling, this court presumes that the trial court ruled on the grounds of relevancy." *People v. Boston*, 2016 IL App (1st) 133497, ¶ 61, citing *People v. Upton*, 230 Ill. App. 3d 365, 372 (1992). The same rule applies when the trial court, without providing a basis for its ruling, has overruled an objection that stated no basis. *People v. Martin*, 2017 IL App (4th) 150021, ¶ 16. For an example of an appellate court's application of the rule that both an objection and a ruling made without stating a basis is based on relevancy, see *North Spaulding Condominium Assn. v. Cavanaugh*, 2017 IL App (1st) 160870, ¶¶ 27-31 (holding that the trial court's rulings were correct because the questions "were not relevant to any issue being tried" (*id.* at ¶ 31)).

An objection based upon a specified ground waives all grounds not specified, and a ground of objection not presented at trial will not be considered on review. *People v. Landwer*, 166 Ill. 2d 475, 498 (1995) (holding that general objections are insufficient to preserve an error for review); *People v. Casillas*, 195 Ill. 2d 461, 491 (2000) (objection on the grounds of hearsay did not preserve an objection on the grounds of unreliability); *People v. Lewis*, 165 Ill. 2d 305, 335-36 (1995) (objection based on lack of foundation prohibits assertion of hearsay on appeal); *People v. Barrios*, 114 Ill. 2d 265 (1986) ("Objections at trial on specific grounds, of course, waive all other grounds of objection."); *People v. Canaday*, 49 Ill. 2d

416, 423-24 (1971) (objection based on best evidence rule did not preserve objection based on admission of photographs of stolen television sets); *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008) ("A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court.").

The takeaway from the principles embodied in the above-cited cases: Attorneys must take care to present the proper basis or bases for objections. Objecting without stating a basis allows the trial and reviewing courts to assume that the objection was based on relevance, and allows them to rule accordingly. And failure to state a proper basis for objection allows the trial court to rule on the basis provided and the reviewing court to consider the propriety of the trial court's ruling based on the grounds provided, which in both cases risks forfeiture of an otherwise proper basis.

Decisions on Offers of Proof (IRE 103(a)(2))

Regarding the requirement of an offer of proof, see *People v. Peeples*, 155 Ill. 2d 422 (1993) (need for offer of proof when evidence is refused by trial court); and *People v. Lynch*, 104 Ill. 2d 194 (1984) ("if a question shows the purpose and materiality of the evidence, is in a proper form, and clearly admits of a favorable answer, the proponent need not make a formal offer of what the answer would be, unless the trial court asks for one"). *See also People v. Andrews*, 146 Ill. 2d 114, 420-21 (1992) ("It is well recognized that the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court."); *People v. Thompkins*, 181 Ill. 2d 1, 9-10 (1998) ("Trial courts are required to permit counsel to make offers of proof, and a refusal to permit an offer generally is error. *** The two primary functions of an offer of proof are to disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action, and to provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful.").

For a post-codification case that stressed the need for offers of proof in order to determine a claim on appeal, see *People v. Shenault*, 2014 IL App (2d) 130211 (holding that failure of the defendant to make offers of proof as to testimony of two witnesses concerning their excluded testimony made it "impossible to determine whether its exclusion could have resulted in any prejudice to defendant."). *Shenault*, at ¶ 12. See also *People v. Cibbs*, 2016 IL App (1st) 140785, ¶¶ 35-37 (holding that failure to make a formal or informal offer of proof was fatal; citing supreme court decisions in pointing out that an offer of proof that merely summarizes the witness's testimony in a conclusory manner is inadequate, that counsel must explicitly state what the excluded testimony would reveal, and that an offer of proof must be considerably detailed and specific).

In *People v. Staake*, 2017 IL 121755, a prosecution for second degree murder, the State moved *in limine* to preclude the defendant from presenting evidence and argument regarding the victim's refusal to accept medical treatment as the intervening cause of the victim's death—rather than the knife wound that the defendant had inflicted on the victim. In response to the motion *in limine*, the trial court ruled that, before the defendant could ask specific questions on cross-examination or make an argument to the jury concerning the alleged intervening cause of death, he had to make a proffer through an offer of proof to show that there was a factual basis, rather than speculation, for the questioning or argument. On review of the defendant's failure to make the required offer of proof, the supreme court pointed out: (1) that the defendant was not categorically prohibited from cross-examining State witnesses on the issue of causation nor from arguing to the jury that the victim's refusal of medical treatment was an intervening cause of death; (2) that the defendant could have explained, outside the jury's presence, what testimony he expected to elicit; and (3) that, even after testimony was given at trial, the defendant could have requested permission to argue to the jury that the State had failed to prove causation based on the "ample evidence" that had been unknown when the trial court made its ruling on the motion *in limine*. Based on those considerations, the supreme court concluded that the defendant's failure to provide the required offer of proof properly resulted in the forfeiture of his right to cross-examine witnesses on the issue of the intervening cause of death or to present argument on that topic.

People v. Wright, 2017 IL 119561, ¶¶ 79-84, illustrates that, after an offer of proof, the proffer of evidence subject to the offer needs to occur at the proper time for the evidence to be admitted. In *Wright*, during the State's case-in-chief, the *pro se* defendant made an offer of proof that a detective would testify that his codefendant said that he had committed the charged offense of armed robbery with a BB gun. The trial court sustained the State's objection to the defendant's attempt to elicit the codefendant's statement on cross-examination. Later, in a hearing outside the jury's presence, the codefendant invoked his fifth amendment right not to testify. Thus, the codefendant was then deemed unavailable for purposes of IRE 804(b)(3). However, there was no indication that the defendant sought to call the codefendant for examination concerning his statement, or that he otherwise sought to obtain the statement's admission. Because those efforts had not occurred after the codefendant was deemed unavailable to testify, the supreme court held that the trial court had properly denied admission of the codefendant's statement.

In *In re Estate of John W. McDonald III*, 2022 IL 126956, a 4 to 3 deeply divided supreme court, provided an example of the occasional difficulty in determining whether an offer of proof is necessary. In that case, a majority of the court determined that the respondent's failure, in this heirship case, to make an offer of proof concerning the validity of her purported marriage to the decedent resulted in her failure to preserve alleged error, so that the trial court's error was not preserved for review. The majority reasoned that "we find that, not only did [the respondent] fail to preserve the error by failing to make an offer of proof, but any testimony that [the respondent] might have offered could not have established [the decedent's] capacity to enter into a valid marriage." *Id.* at ¶ 86. Pointing out that "an offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced" (*id.* at ¶ 124), the dissenting justices reasoned that "an offer of proof was not necessary because it was clear that [the respondent] would be testifying regarding the circumstances surrounding her purported marriage to [the decedent], which was the core issue at trial." *Id.*

Author's Commentary on Ill. R. Evid. 103(b)

The current version of IRE 103(b) was added by the Illinois Supreme Court effective October 15, 2015. It replaced the rule that previously was designated as IRE 103(b), which addressed (and continues to address) a different topic. The replaced rule is now designated IRE 103(c). For reasons provided below, current IRE 103(b), which provides the Illinois standards for preserving a claim of error for appeal, differs substantially from FRE 103(b).

Non-Adoption of FRE 103(b)

Illinois has adopted its own version of Rule 103(b). FRE 103(b) has not been adopted for it is inconsistent with Illinois law because, *in a civil case*, Illinois requires the making of a contemporaneous trial objection or an offer of proof to preserve an error for appeal—even after an *in limine* ruling. *See, e.g., Ill. State Toll Highway Auth. v. Heritage Standard Bank and Trust Co.*, 163 Ill. 2d 498, 502 (1994) ("the law is well established that the denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial. The moving party remains obligated to object contemporaneously when the evidence is offered at trial."). See also the following examples of supreme and appellate court decisions in civil cases: *Simmons v. Graces*, 198 Ill. 2d 541, 569 (2001); *Thornton v. Garcini*, 237 Ill. 2d 100 (2009); *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003); *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 471 (2001); *Romanek-Golub & Co. v. Anvan Hotel Corp.*, 168 Ill. App. 3d 1031 (1988).

See particularly *People v. Denson*, discussed in the following paragraphs, and the decision in *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶¶ 107-112, where the appellate court held that the defendants' objections based only on foundation did not preserve their motion *in limine* objections to the testimony of the plaintiffs' expert witness that had been based on two other grounds.

Also, in considering *Denson* and the non-adoption of FRE 103(b), the highly relevant decision in *Arkebauer v. Springfield Clinic*, 2021 IL App (4th) 190697, provides ample evidence for the absolute need for a contemporary objection in a *civil* jury trial where an *in limine* motion has been denied. In that

case, the plaintiff's pretrial motions *in limine* to exclude certain evidence had been denied by the trial court, but the plaintiff in this civil case failed to make a contemporaneous objection during the jury trial. To overcome the application of forfeiture on appeal, the plaintiff contended "that the court's denial of her motions in this case were so definite and controlling that she was not required to raise trial objections to preserve her evidentiary challenges." *Id.* at ¶ 62. The appellate court disagreed with that assertion, and found that no such "exception" to the forfeiture rule existed. *Id.* Rejecting the contrary pre-codification decision in *Cunningham v. Millers General Insurance Co.*, 227 Ill App. 3d 201 (1992), "to the extent it holds a trial court's ruling on a motion *in limine* may be found to be 'so definite and unconditional' that it obviates the need for a subsequent trial objection" (*Arkebauer* at ¶ 68), the appellate court reasoned that "applying the "exception" in these circumstances would result in its swallowing the contemporaneous objection rule, rendering the rule meaningless." *Id.* at ¶ 67.

People v. Denson

In contrast to a civil case, the standard requiring *renewal* of an objection does not apply in criminal cases. That was made manifestly clear in the supreme court's decision in *People v. Denson*, 2014 IL 116231, which supplies the rationale and the impetus for the adoption of Illinois' version of Rule 103(b). In *Denson*, the supreme court: (1) rejected the appellate court's holding that distinguished a defendant's raising an issue by *filing* a motion *in limine* from his *responding* to or *opposing* such a motion, which led to the appellate court's erroneous holding that the defendant had forfeited an issue on appeal by merely *responding to* the State's motion; and (2) pointed out that in all its prior decisions in *criminal cases* it had held that the renewal of an objection, through a contemporaneous trial objection after an adverse ruling on a motion *in limine*, is not a prerequisite to preserving an issue for appeal, as long as the issue is raised in a posttrial motion.

***Denson*'s Rationale for Distinguishing Criminal and Civil Cases**

After acknowledging the general rule that a contemporaneous trial objection is necessary in both civil and criminal cases for "preserving routine trial error" where a motion *in limine* had not previously been made (*People v. Denson*, 2014 IL 116231, ¶ 21), the supreme court explained the difference between civil and criminal cases—where a motion *in limine* had previously been ruled upon—as well as the rationale for its holding, as follows:

> "Again, with respect to issues litigated *in limine*, the civil and criminal forfeiture rules are different, and it is not simply that the former requires a contemporaneous trial objection while the latter does not. The difference is that the civil rule requires a contemporaneous trial objection, whereas the criminal rule requires that the issue be raised in the posttrial motion. In other words, both the civil rule and the criminal rule require the objecting party to bring the *in limine* issue to the trial court's attention one additional time. In civil cases, that is through a contemporaneous trial objection. In criminal cases, that is through the posttrial motion. And this distinction makes perfect sense because, while posttrial motions are a mandatory prerequisite to raising an issue on appeal in criminal cases ([*People v.*] *Enoch*, 122 Ill. 2d [176,] at 186 [(1988)]), they are not in many civil cases (Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994))." *People v. Denson*, 2014 IL 116231, ¶ 23.

Supreme Court Rule 366(b)(3)(ii), referred to in the quote from *Denson* above, provides that in a *nonjury civil case* "[n]either the filing of nor the failure to file a post judgment motion limits the scope of review." Also, section 2-1203 of the Code of Civil Procedure, 735 ILCS 5/2-1203, allows for (it does not require) the filing of motions after judgment in non-jury civil cases.

On the other hand, section 2-1202 of the same Code, 735 ILCS 5/2-1202, sets forth the *requirement* for the filing of post-trial motions in civil jury cases. And Supreme Court Rule 366(b)(2)(iii) provides that, in a civil jury case, "[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion."

For a comprehensive review of the relevant statutes, supreme court rules, and case law on the requirement to make or not

make a posttrial motion in a civil case, see *Arient v. Shaik*, 2015 IL App (1st) 133969.

In criminal cases, section 116-1(b) of the Code of Criminal Procedure of 1963, 725 ILCS 5/116-1(b), requires that "[a] written motion for a new trial shall be filed by the defendant within 30 days following entry of a finding or the return of a verdict" (*i.e.*, in both bench and jury trials).

Crim v. Dietrich: Focus on the Necessity for a Posttrial Motion in a Civil Jury Trial and the Effect of Not Filing Such a Motion

In the medical malpractice case of *Crim v. Dietrich*, 2020 IL 124318, plaintiffs, the mother and father of the injured newborn baby, alleged that defendant, the doctor who delivered the baby: (1) failed to obtain the mother's informed consent to perform a natural birth rather than a Caesarean section, despite possible risks associated with the baby's large size; and (2) was guilty of professional negligence during the delivery, resulting in the baby's injuries.

At the close of plaintiffs' case during a jury trial, the trial court granted a partial directed verdict for defendant on the informed consent allegations. But the jury trial continued—limited to the remaining professional negligence allegations—resulting in a verdict for defendant on those allegations. Plaintiffs did not file a posttrial motion on the jury's verdict. They instead appealed the circuit court's ruling on the partial directed verdict on the informed consent allegations. The appeal resulted in the appellate court's reversing the directed verdict ruling and remanding the case to the circuit court "for such other proceedings as required by order of this court." *Crim*, at ¶ 50.

On remand, the parties disputed whether the appellate court's mandate allowed for a trial *de novo* on all issues, including the allegations concerning professional negligence, which were determined by the jury. To resolve that issue, the trial court certified a question for the appellate court under Ill. S. Ct. R. 308. The certified question asked whether the appellate court's remand required a trial *de novo* on all claims. On this second review, the appellate court granted the interlocutory appeal, answering the certified question in the affirmative. The supreme court then granted defendant's petition for leave to appeal.

In its review—with a recently appointed justice not participating, another justice writing in special concurrence, and a third justice dissenting—a four-justice majority of the supreme court first analyzed relevant supreme and appellate court decisions and the requirements of section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202), and it: (1) held that the appellate court's review and reversal of the trial court's grant of partial directed verdict on the informed consent allegations was proper without a posttrial motion, because the filing of such a motion was not necessary to preserve appellate review on that issue, for the ruling was not based on a jury's verdict; (2) cited "sound policy reasons behind the requirement that a litigant file a post-trial motion following a jury case" (*id*. at ¶ 34), in holding that "[t]he plain language of the statute and case law interpreting section 2-1202, requires a litigant to file a post-trial motion in order to challenge the jury's verdict even when the circuit court enters a partial directed verdict as to other issues in the case" (*id*. at ¶ 35); (3) held that the mere filing of a notice of appeal concerning a jury verdict where there had been no posttrial motion "lies in direct contradiction with the statutory requirements of section 1202" (*id*. at ¶ 39); and (4) held that "the proposition that, '[w]hen a court of review does not determine the merits of a case but merely reverses and remands without specific directions, the judgment of the court below is entirely abrogated and the cause stands as if no trial had occurred,'" did not apply in this case because "the appellate court's mandate could not remand the matter for a new trial on an issue never raised and not considered." *Id.* at ¶ 40.

Crim provides two significant takeaways. It emphatically confirms the need for a posttrial motion in civil jury trials to preserve appellate issues, as required by section 2-1202 and by precedential reviewing court decisions interpreting and applying that statute. And it emphasizes the forfeiture effect of failing to file a posttrial motion after a civil jury trial, where an appeal is taken on the trial court's alleged error in granting summary judgment or a partial directed verdict. The consequence of not filing a posttrial motion in those instances, is that, even if the appeal is successful, any issue determined by the jury is forfeited and not subject to retrial.

Crim did not address whether the appellate court's reversal of the trial court's partial directed verdict was proper. Its significance is in its holding that, because the directed verdict occurred by virtue of the trial court's ruling and not a jury determination, the informed consent issue was properly appealed and properly remanded for trial. But, because of the absence of a posttrial motion, there could be no *de novo* trial on the professional negligence issues determined by the jury. In sum, although on remand defendant could be tried on the informed consent issues, plaintiffs had forfeited the opportunity to pursue on remand the retrial of their claims related to defendant's alleged professional negligence during the delivery of the baby.

Doe v. Parrillo: Need for a Record of Proceedings for Appellate Review

The supreme court's recent decision in *Doe v. Parrillo*, 2021 IL 126577, where defense counsel knowingly did not participate in the jury trial and did not provide a court reporter of the proceedings, provides numerous examples of the non-reviewability of appellate arguments where the record on appeal contains no trial transcript of proceedings related to the numerous issues presented to the reviewing court. The opinion illustrates the importance of supplying a court reporter in civil proceedings.

Summary of IRE 103(b)'s Requirements for Preserving Issues for Appeal after an *In Limine* Ruling

In sum, in an Illinois courtroom, to preserve an issue for appeal where there has been a prior *in limine* ruling:

> (1) in all civil trials, a contemporaneous renewal of an objection or offer of proof is necessary (IRE 103(b)(3));
>
> (2) in all criminal trials, a contemporaneous renewal of an objection or offer of proof is not necessary (IRE 103(b)(2));
>
> (3) in all criminal trials and in all civil jury trials, a posttrial motion is necessary (IRE 103(b)(4)); and
>
> (4) in all civil non-jury trials, a posttrial motion is not necessary (IRE 103(b)(4)).

Of course, a contemporaneous trial objection or offer of proof is necessary to preserve an issue for review in all civil and criminal trials where there has been no prior *in limine* ruling (IRE 103(b)(1)). See also *People v. Sebby* 2017 IL 119445, ¶ 48 ("To preserve a purported error for consideration by a reviewing court, a defendant [in a criminal case] must object to the error at trial and raise the error in a posttrial motion. [Citation.] Failure to do either results in forfeiture.").

Motions *in Limine*

Although both federal and Illinois' version of Rule 103(b) refer to rulings made before trial without employing the phrase "motion *in limine*," a phrase nowhere to be found in the codified evidence rules, such motions are commonplace in felony prosecutions and in high-stake civil cases. The Latin contained in the phrase is often misinterpreted to mean a motion to limit the evidence. But *in limine* means "at the start" or "on the threshold." So, the motion is designed to be made before evidence is offered—usually well before the start of trial, but sometimes during trial but before the evidence is offered. And the motion is not limited to excluding evidence deemed to be inadmissible, although that is the basis for its most frequent application. When used for that purpose, the intent is to prevent the opposing party from even initiating questions on topics considered inadmissible, especially areas that might be unduly prejudicial to the moving party's case. But the motion also may be used to ensure the admissibility of evidence. Its use before trial for that purpose provides an opportunity for both sides to argue and/or to offer briefs on close or questionable evidence questions and allows the court an opportunity to consider proper rulings that will provide an evidence blueprint for the trial and avoid disputes during trial, especially at its outset during opening statements.

In *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill.2d 545 (1981), a decision solely related to whether motion *in limine* orders had been violated during a jury trial, the supreme court made the following pronouncements about a motion *in limine* made to exclude evidence:

> "An *in limine* motion permits a party to obtain an order before trial excluding inadmissible evidence and prohibiting interrogation concerning such evidence without the necessity of having the questions asked and objections thereto made in front of the jury. Thus, the moving party will be

> protected from whatever prejudicial impact the mere asking of the questions and the making of the objections may have upon a jury. [Citation]. The ability to restrict interrogation makes the *in limine* order a powerful weapon. This power, however, also makes it a potentially dangerous one. Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case. Because of this danger, it is imperative that the *in limine* order be clear and that all parties concerned have an accurate understanding of its limitations." *Reidelberger*, 83 Ill.2d at 549-50.

People v Zimmerman, 2018 IL App (4th) 170695, offers a comprehensive discussion of the rationale for motions *in limine* (as well as for offers of proof), and it offers suggestions for implementing such motions, both for the admission and for the exclusion of evidence:

> "A motion *in limine* is addressed to a court's inherent power to admit or exclude evidence. These motions are designed to call to the attention of a trial court, in advance of trial, some evidence that is potentially irrelevant, inadmissible, or prejudicial and to obtain a pretrial ruling from the court excluding or permitting the evidence. The utility of motions *in limine* comes from the fact that they are typically ruled on significantly in advance of trial. As a result, motions *in limine* often achieve great savings of time and judicial efficiency, and if they resolve difficult evidentiary issues prior to trial, they can greatly encourage settlement or guilty pleas and streamline preparations for trial. Seeking a ruling in advance of trial also greatly assists the trial court by giving it adequate time to review and consider the evidentiary issue, research the matter, and consider whether to hold an evidentiary hearing. For these and other reasons, we strongly encourage litigants to take advantage of motions *in limine*.
>
> "The Illinois Supreme Court has called motions *in limine* powerful and potentially dangerous weapons because of their ability to restrict evidence. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill.2d 545, 550, 416 N.E.2d 268, 271 (1981). Accordingly, such motions must be specific and allow the court and the parties to understand what evidence is at issue. Written motions are strongly preferred, especially whenever complicated or sensitive evidence is at issue. This allows the movant to carefully identify the evidence sought to be excluded and articulate his or her argument in support, preventing confusion and misunderstanding by defining the evidence at issue and capturing the movant's arguments. If nothing else, a written motion allows the parties and court to refer to a fixed version of the movant's request.
>
> "Likewise, rulings on motions *in limine* should be in writing so as to prevent confusion and misunderstanding. Trial judges should attempt to enter narrow *in limine* orders, anticipate proper evidence that might be excluded by the orders, and make the orders clear and precise so that all parties concerned have an accurate understanding of their limitations. An unclear order *in limine* is worse than no order at all. Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case.
>
> "One difficulty common to all motions *in limine* is that they occur—by definition—out of the normal trial context, and resolving such a motion requires the trial court to determine what that context will be. Thus, the court must receive offers of proof consisting either of live testimony or counsel's representations that the court finds sufficiently credible and reliable. ***
>
> "An offer of proof serves dual purposes: (1) it discloses to the court and opposing counsel the nature of the offered evidence, thus enabling

the court to take appropriate action, and (2) it provides the reviewing court with an adequate record to determine whether the trial court's action was erroneous. An offer of proof may be formal or informal, but an informal offer of proof must identify the complained-of evidence with particularity. An offer of proof is inadequate if it is a mere summary or offers unsupported speculation about the evidence. While an offer of proof assists the parties, the trial court, and a reviewing court in determining the evidence at issue, a court is disadvantaged in ruling on a motion *in limine* because it is considered in a vacuum, before the presentation of the full evidence at trial that may justify admission or require exclusion.

"The rules for offers of proof apply with equal force to motions *in limine*.

"Depending upon the nature of the evidentiary issue before it, the court has vast discretion as to how it will conduct the hearing on a motion *in limine*—that is, requiring live witnesses or representations, affidavits, or whatever—and the court has vast discretion as to how detailed such a hearing will be, as well." *People v Zimmerman*, 2018 IL App (4th) 170695, ¶¶ 134-138 (internal citations, except for the first *Reidelberger* citation, and all internal quotation marks omitted).

Need for Contemporaneous Trial Objection Where There Has Been No *In Limine* Ruling—Even in Bench Trials

A caveat for criminal defense attorneys: the holding in *Denson* that excuses the *renewal* of an objection in a criminal trial after an unfavorable ruling on a motion *in limine* is limited. *Denson* does not excuse the failure to make a contemporaneous trial objection in a criminal case—jury or non-jury—where there has been no prior *in limine* ruling.

And note that there is no exception for procedural default in bench trials. The proposition that, in a bench trial, the trial judge is presumed to consider only admissible evidence does not excuse the need to make a contemporaneous trial objection when needed. *See People v. A Parcel of Property Commonly Known as 1945 North 31st Street*, 217 Ill. 2d 928 (2005) ("this proposition [that the trial judge is presumed to consider only admissible evidence] has never been used by a court as a means of excusing a party from the type of procedural default at issue here; indeed, in the absence of such an objection, an issue, even in a criminal bench trial, has been consistently deemed procedurally defaulted.").

Note, too, that a posttrial motion has been held to be necessary to preserve an issue for review in a criminal case, even after a bench trial, long before the holding in *Denson*. See, for example, section 116-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-1) and *People v. Enoch*, 146 Ill. 2d 44 (1991).

Rationale for Posttrial Motion and Need for Court Order to Obtain an Extension of Time for Filing Posttrial Motion

As noted above, a posttrial motion is unnecessary in a civil nonjury trial. For those cases where such a motion is necessary, the supreme court has provided the following rationale:

"The purpose of the post-trial motion specificity rule is threefold. First, it allows the decision maker who is most familiar with the events of the trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes that his earlier decision was incorrect. [Citations.] Second, by requiring the statement of the specific grounds urged as support for the claim of error, the rule allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings. Third, by requiring the litigants to state the specific grounds in support of their contentions, it prevents them from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. [Citations.] The rule***has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals." *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349-50 (1980).

People v. Hall, 2017 IL App (1st) 150918, provides an illustration of how time requirements for filing a posttrial motion under section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202(c)) can be violated or extended. The takeaways from *Hall* are: (1) the opposing party cannot agree to or waive the 30-day jurisdictional requirement for filing a posttrial motion, and (2) in order to obtain an extension of time for filing a posttrial motion, the trial court must enter an order granting the extension.

Claims Not Subject to Forfeiture in Criminal Cases, with Focus on Constitutional-Issue Exception to the Forfeiture Rule

The supreme court has held that in criminal cases "three types of claims are not subject to forfeiture for failing to file a posttrial motion: (1) constitutional issues that were properly raised at trial and may be raised later in a postconviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain errors." *People v. Cregan*, 2014 IL 11360, ¶16.

The plain-error exception to forfeiture is addressed in the *Author's Commentary on Ill. R. Evid. 103(e)*, *infra*. The constitutional-issue exception is explained by the supreme court in *Cregan*:

> "[T]he constitutional-issue exception recognized in [*People v.*] *Enoch*[, 122 Ill. 2d 176 (1988)] is based primarily in the interest of judicial economy. The Post-Conviction Hearing Act provides a mechanism for criminal defendants to assert that a conviction or sentence resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a) (West 2008). Postconviction proceedings permit inquiry into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. English*, 2013 IL 112890, ¶22. If a defendant were precluded from raising a constitutional issue previously raised at trial on direct appeal, merely because he failed to raise it in a posttrial motion, the defendant could simply allege the issue in a later postconviction petition. Accordingly, the interests in judicial economy favor addressing the issue on direct appeal rather than requiring defendant to raise it in a separate postconviction petition." *Cregan*, at ¶18.

Note that, under *Cregan*, the constitutional-issue exception to forfeiture *on direct appeal* applies only where the issue was "properly raised at trial," but not raised in a posttrial motion. Nevertheless, a constitutional issue not raised at trial may be raised in a postconviction proceeding.

For appellate court decisions addressing the constitutional-issue exception, see *People v. Burnett*, 2015 IL App (1st) 133610, ¶¶74-82 (holding that defendant, who did not raise the constitutional issue at trial, could not invoke the exception, but holding that the issue could be addressed nevertheless because on appeal defendant raised an as-applied constitutional challenge to a statute, a challenge that could be raised at any time); *People v. Davis*, 2019 IL App (1st) 160408, ¶¶52-55 (where defendant contended the improper admission of other-crimes gun evidence violated his due process right to a fair trial and thus eliminated the need for a posttrial motion, noting that every defendant has a constitutional right to a fair trial protected by due process, but that "not every error that could potentially deprive a defendant of that right establishes constitutional error" and, pointing out that the supreme court has regularly distinguished between evidentiary and constitutional errors and that it found no case "suggesting that the question of the admissibility of evidence subsumes constitutional magnitude," holding that the constitutional-issue exception did not apply and finding no error in its determination of error under the second prong of the plain-error test and for ineffective assistance of counsel).

Preference for Renewal of Objection or Offer of Proof

In Illinois, even in criminal cases where it is unnecessary to make a contemporaneous trial objection after the denial of a motion *in limine* (and in federal cases because of possible uncertainty as to whether a prior court ruling is "definitive"), it is advisable for trial attorneys who receive adverse pretrial rulings to renew contemporaneously an objection or an offer of proof, as a matter of course and outside the presence of the jury. That is so because the immediate goal at trial is to admit favorable evidence and to bar unfavorable evidence. The renewal of an

objection or an offer of proof, not only assuredly preserves the issue for appeal, it presents another opportunity (this time, with the benefit of context from admitted evidence) to persuade the trial court to alter its ruling, and it creates an opportunity to make what might be a better record than may have been made during the previous effort to admit or bar the evidence. Also, if the effort to persuade the trial court to alter its ruling fails, a request should be made that the record reflect a continuing objection to the admission or non-admission of the disputed evidence, especially in civil cases where a contemporaneous trial objection or offer of proof is required—with the explicit concurrence of the trial court—so that there is no need to make continuous objections in the presence of the jury. *See Fleming v. Moswin*, 2012 IL App 103475-B, ¶¶ 95-98 (discussing issues related to continuing objections).

Consistent with the advice provided in the above paragraph, the appellate court in *People v. Zimmerman*, 2018 IL App (4th) 170695, ¶ 149, offered this sage advice:

> "The interlocutory nature of motions *in limine* is why parties should reraise the issues during trial. The trial court is always free to reconsider and reassess its interlocutory rulings as the trial unfolds and context is provided."

Author's Commentary on Ill. R. Evid. 103(c)

IRE 103(c) is identical to what had been FRE 103(b) before the amendments of the federal rules solely for stylistic purposes effective December 1, 2011. The 2011 amendments resulted in the federal rule's re-designation as FRE 103(c). Similarly, the addition of a substantively different IRE 103(b) on October 15, 2015, resulted in the Illinois rule that had previously been designated as IRE 103(b) now having the same 103(c) designation as its federal counterpart. Both rules authorize the court to make a relevant statement about its ruling, and to direct an offer of proof through questions and answers.

Indirectly related to the rule, judges and attorneys need to be aware of Supreme Court Rule 323(c), which provides the procedure for the creation of a bystander's report where no verbatim transcript of proceedings is available. For a decision addressing the rule and its requirements, see *In re Parentage of G.E., a/k/a G.O., a Minor*, 2016 IL App (2d) 150643 (holding that the record was inadequate for review because the proposed bystander's report did not comply with the requirements of Rule 323(c)).

Author's Commentary on Ill. R. Evid. 103(d)

IRE 103(d) is identical to what was FRE 103(c) before the amendments of the federal rules solely for stylistic purposes effective December 1, 2011, which resulted in its re-designation as FRE 103(d). The addition of a new IRE 103(b) on October 15, 2015 resulted in the Illinois rule previously designated as IRE 103(c) having the same 103(d) designation as its federal counterpart. Both the Illinois and the federal rule require the trial court to take measures to prevent the jury from hearing statements or inadmissible evidence based on contentions of the attorneys.

Author's Commentary on Fed. R. Evid. 103(e)

Effective December 1, 2011, the revisions of the Federal Rules of Evidence, solely for stylistic purposes, created FRE 103(e), replacing and rewording without substantive change what had been FRE 103(d), which likewise had addressed the issue of plain error.

Plain Error Review in Civil Cases

Plain error review in civil cases differs from such review in criminal cases. In the Seventh Circuit, such review is described as follows:

> "Plain error review of a forfeited evidentiary issue in a civil case is available only under extraordinary circumstances when the party seeking review can demonstrate that: (1) exceptional circumstances

exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied." J*imenez v. City of Chicago*, 732 F.3d 710, 720 (7th Cir. 2013) (citing *Estate of Moreland v. Dieter*, 395 F.3d 747, 756 (7th Cir. 2005), citing *Stringel v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 415, 421 (7th Cir. 1996)).

Almost identical sentiments were expressed by the Seventh Circuit in yet another case also decided in 2013:

> "In most civil cases, plain error review is unavailable; if a party fails to object at trial, the issue cannot be raised on appeal. [Cite.] A narrow exception to this general rule permits review where a party can demonstrate that (1) exceptional circumstances exist, (2) substantial rights are affected, and (3) a miscarriage of justice will result if the doctrine is not applied." *Perry v. City of Chicago*, 733 F.3d 248, 254 (7th Cir. 2013).

Also, note that plain error review for closing arguments in a civil case is not available. See *Black v. Wrigley*, 997 F.3d 702 (7th Cir. 2021), where the Seventh Circuit stated:

> "when a party in a civil case fails to object to improper statements in closing argument, we have steadfastly refused to review even for plain error. *Kafka v. Truck Ins. Exch.*, 19 F.3d 383, 385 (7th Cir. 1994) ('[N]o plain error doctrine exists [in civil cases] to remedy errors which are alleged to have occurred during closing argument.' (alteration in original) (quoting *Deppe v. Tripp*, 863 F.2d 1356, 1364 (7th Cir.1988)))." *Black v. Wrigley*, 997 F.3d, at 711.

Plain Error Review in Criminal Cases

In criminal cases, the plain error doctrine is provided by Federal Rule of Criminal Procedure 52(b): "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *See also United States v. Olano*, 507 U.S. 725 (1993) (holding that forfeited error may be noticed if there was (1) an error, (2) that was plain, (3) that affected the defendant's substantial rights, and, when the other three conditions have been met, (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

In *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010), quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009), the United States Supreme Court explained the application of plain error review in criminal cases in this fashion:

> "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"

Application of *Olano* in Cases Involving Error in Increasing Sentencing Guideline Range

In *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), the United States Supreme Court reviewed a case where, in relying on a presentence investigation report, the district court had erroneously double-counted a misdemeanor conviction of the defendant. That error resulted in a sentencing guidelines range higher than it otherwise would have been. Noting that the sentence imposed on the defendant was merely one month higher than the minimum sentence for the erroneous guidelines range and at the mid-to-lower end of the correct range, the Fifth Circuit Court of Appeals, in applying the fourth *Olano* prong provided above, had denied plain error reversal of the defendant's sentence, based on its view that "the types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *Rosales-Mireles*, 138 S. Ct. at 1905.

In its review, the Supreme Court noted that the first three *Olano* conditions had been satisfied and that it was the fourth condition it was asked to clarify and apply. The Court rejected the Fifth Circuit's application of the fourth condition, holding that "[i]n articulating such a high standard, the Fifth Circuit

substantially changed *Olano's* fourth prong." *Id.* at 1907. In addressing the issue of the burden of persuasion concerning the fourth condition, the Court stated in a footnote that, "in the ordinary case, proof of a plain Guidelines error that affects the defendant's substantial rights is sufficient to meet the burden [of satisfying the fourth condition]." *Id.* at note 4. In reversing the Fifth Circuit's decision and remanding the case for renewed sentencing procedures and stressing that "a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings" (*id.* at 1907), the Court held that:

> "the Fifth Circuit abused its discretion in applying an unduly burdensome articulation of *Olano*'s fourth prong and declining to remand Rosales-Mireles' case for resentencing. In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Id.* at 1911.

The Supreme Court's decision in *Rosales-Mireles* is consistent with its earlier holding in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). There, the defendant's sentencing guidelines range in his presentence report was reported as 77 to 96 months, when, because of an error in calculation, it should have been 70 to 87 months. Referring to the error in calculating the sentencing range and in remanding for resentencing, the Court held that

> "in most cases the Guidelines range will affect the sentence. When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b) [which addresses the plain error rule]." *Molina-Martinez*, 136 S.Ct. at 1349.

For a Seventh Circuit decision that distinguishes *Rosales-Mireles* and *Molina-Martinez* on the basis that the error in calculating the defendant's sentencing range was not affected by a miscalculation, see *United States v. Thomas*, which is discussed in the second paragraph under the heading immediately following.

Other Decisions Applying *Olano*

In two cases subsequent to *Olano*, the United States Supreme Court addressed whether the plain error rule applies to the ruling at trial or to the error that is "plain" at the time of review. In *Johnson v. U.S.*, 520 U.S. 461 (1997), the Supreme Court held that, where a trial court's decision was *clearly correct* under circuit law when it was made (here, under circuit precedent, that the materiality of a false statement was for the trial court to determine), but at the time of review the decision had become plainly erroneous due to an intervening authoritative legal decision (a Supreme Court decision that materiality was for the jury's determination), the law at the time of review is to be applied, because "it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 468. Later, in *Henderson v. U.S.*, 568 U.S. 266, 133 S. Ct. 1121 (2013), the Supreme Court likewise held that where the law is *unsettled* at the time of the trial court error (here, whether an increased sentence could be imposed to enable an offender to complete a treatment program or otherwise to promote rehabilitation) but plain at the time of review (a Supreme Court decision that such sentencing was error), the plain error at the time of review satisfies the second part of *Olano's* four-part test.

For examples of Seventh Circuit decisions where the defendant did not object at trial but failed to satisfy the requirements of plain error review, see *United States v. Thomas*, 897 F.3d 807, (7th Cir. 2018) (though conceding error in sentencing guideline calculations, holding there was no plain error requiring a remand for resentencing, because a remand would result in the same sentence of life imprisonment and, outside the rule established in the Supreme Court's decisions in *Molina-Martinez* and *Rosales-Mirales*, the final guideline range for sentencing calculated by the trial court was correct); *United States v. Seifer*, 200 F.3d 328 (7th Cir. 2015) (where, in violation of Fed. R. Crim. P. 24(c), the district court erroneously allowed

the defendant to randomly select an alternate juror from among the 13 jurors chosen, the convicted defendant, who had not objected to that procedure, could not satisfy his burden to show that he was prejudiced under plain error review); *United States v. Breshers*, 684 F.3d 699 (7th Cir. 2012) (in the absence of an objection, finding there was no plain error and upholding restitution order that was based on a federal statute (18 U.S.C. § 3663A) that was ambiguous about whether physical injury was necessary, where there was no physical injury, despite two other circuit courts of appeal having held that physical injury was necessary under the statute); *United States v. Kirklin*, 727 F.3d 711 (7th Cir. 2013) (defendant unable to establish plain error concerning trial court's imposition of mandatory minimum penalty for brandishing a firearm without a jury's determination on that issue, because jury would likely have found that element due to totality of evidence and defendant could not satisfy the fourth *Olano* requirement, that "the error seriously affected the fairness, integrity or public reputation of judicial proceedings.")

Distinction Between Waiver and Forfeiture

In *United States v. Doyle*, 693 F.3d 769 (7th Cir. 2012), the Seventh Circuit Court of Appeals provided this succinct statement concerning the difference between waiver, which precludes plain error review, and forfeiture, which permits such review:

> "The difference between waiver and forfeiture is that waiver precludes review, whereas forfeiture permits us to correct an error under a plain error standard. *United States v. Olano*, 507 U.S. 725, 732–34, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). Forfeiture occurs by accident, neglect, or inadvertent failure to timely assert a right. *Id.*; *United States v. Cooper*, 243 F.3d 411, 415–16 (7th Cir. 2001). Waiver occurs when a defendant or his attorney manifests an intention, or expressly declines, to assert a right. *Cooper*, 243 F.3d at 415–16."

Distinction Between Plain Error and Harmless Error

The principles related to plain error review are discussed above. Harmless error analysis is different. Where a defendant in a criminal case has laid the foundation for preserving error at trial (*i.e.*, there was no forfeiture) and a reviewing court determines that error indeed had occurred, the reviewing court must then determine whether the error was harmless beyond a reasonable doubt.

A long line of United States Supreme Court decisions has established the test to be applied in harmless error analysis. Some of those decisions, which reflect the Court's focus on the effect of the error and with quotes that supply the applicable standard, include: *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision.***The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."); *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.)); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.").

In *United States v. Barber*, 937 F. 3d 965, (7th Cir. 2019), a prosecution involving stealing firearms from a federally licensed firearm dealer, the Seventh Circuit found that the district court had erred in admitting authenticating documents prepared by ATF agents—to establish the element that the firearm dealer was currently licensed—in violation of the holdings in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). But, after citing and applying *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011), the court held that the error was harmless, holding that, in "a Confrontation Clause case, the harmless-error inquiry rests on a variety of factors, including 'the importance of the witness' testimony in the prosecution's case, whether

the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecutor's case.'" *Barber*, 937 F.3d at 969. Noting that the owner of the firearm dealership produced a current federal license and testified that the license was current, the court held that any error in admitting the ATF records was harmless.

Author's Commentary on Ill. R. Evid. 103(e)

IRE 103(e) is identical to pre-amended FRE 103(d), which now bears the designation of FRE 103(e) as a result of the amendments to the federal evidence rules solely for stylistic purposes that became effective December 1, 2011. The addition of IRE 103(b) on October 15, 2015 resulted in the re-designation of IRE 103(d) as IRE 103(e), the same 103(e) designation as its federal counterpart.

The plain-error rule is designed to allow otherwise forfeited appellate review of unpreserved error "affecting substantial rights" in the limited circumstances described in this commentary.

Relevant Supreme Court Rules

Two supreme court rules have relevance to this codified evidence rule. Illinois Supreme Court Rule 451(c), which addresses instructions given by the trial court in criminal cases and is not, strictly speaking, an evidence-related rule, provides that "substantial defects [in instructions] are not waived by failure to make timely objections thereto if the interests of justice require." For an appellate court decision applying this rule in reversing convictions for attempted first degree murder and aggravated battery, see *People v. Cacini*, 2015 IL App (1st) 130135, ¶¶ 32-59 (holding that where the defense of self-defense was raised, the trial court erred in not instructing the jury that the State bore the burden of proving beyond a reasonable doubt that defendant's use of force was not justified, and further holding that the error satisfied the second prong of the plain error doctrine (see discussion below) because the error denied defendant a fair trial).

More relevant to the codified evidence rule and plain-error review is Illinois Supreme Court Rule 615(a), which is an evidence-related rule that applies in criminal cases. It reads:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

Similarity of Illinois and Federal Plain Error Standards

As pointed out by the supreme court in *People v. Herron*, 215 Ill. 2d 167 (2005), Rule 615(a) is substantially identical to Federal Rule of Criminal Procedure 52, and has been applied in similar fashion. As further noted in *Herron*, the supreme court holdings on plain error reflect identical application of the same standards provided by the United States Supreme Court's decisions in *United States v. Cotton*, 535 U.S. 625 (2002) and *United States v. Olano*, 507 U.S. 725 (1993) (holding that forfeited error may be noticed if there was (1) an error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings). See also *People v. Hollahan*, 2020 IL 125091, ¶13 (reiterating the similarity in the holding in *Olano* and the principles in Illinois "when it comes to plain error review").

Triggering Plain Error Review

The supreme court has referred to the plain error doctrine as "a limited and narrow exception to the general rule of procedural default." *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *see also People v. Downs*, 2015 IL 117934, ¶ 15. In *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), the supreme court provided the standard for applying plain error review where an issue has been forfeited:

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2)

> a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence."

Later, in *People v. McDonald*, 2016 IL 118882, in addition to the two separate prongs of plain error provided in the quote above, the supreme court added these general principles:

> "The first step in a plain error analysis is to determine whether error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). Absent reversible error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000). The defendant has the burden of persuasion on both the threshold question of plain error and the question whether the defendant is entitled to relief as a result of the error. *In re M.W.*, 232 Ill. 2d 408, 431 (2009)." *McDonald*, at ¶ 48.

Test for Second Prong of Plain Error Review

The second prong of the plain-error test has been equated to "structural error," which is "systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009). But the Illinois Supreme Court has made it clear that second-prong plain error is not restricted to the six types of structural error that have been recognized by the U.S. Supreme Court: "a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction." See *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006); also see *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). In *People v. Averett*, 237 Ill.2d 1, 13 (2010), for example, the supreme court cited *Glasper* in holding, "We may determine an error is structural as a matter of state law regardless of whether it is deemed structural under federal law."

As a matter of fact, in *People v. Moon*, 2022 IL 125959, the supreme court held that the failure to administer a trial oath to a jury in a criminal case (even where a *voir dire* oath had been administered) constitutes structural error under the second prong of the plain error test, and results in the reversal of a criminal conviction—and, if the unsworn jury issued an acquittal, "would not bar the State from retrying the defendant on the same charges because jeopardy never attached." *Moon*, at ¶ 81. Though addressing a different factual situation, in *People v, Richardson*, 2022 IL App (2d) 210316, the appellate court, relied on the holding in *Moon* in reversing a jury trial verdict of guilt for armed robbery. The appellate court reasoned that the combination of the refusal of the trial court to declare a mistrial, after the jury was given a *Prim* instruction and after the jury then informed the court that it could not agree on a verdict, resulted in coercive pressure which constituted structural error. *Richardson*, at ¶¶ 44-49.

On the other hand, in *People v, Jackson*, 2022 IL 127256, where defendant had been convicted of first degree murder and attempted armed robbery and relied on plain error review because he had made no contemporaneous objection or post-trial motion, the supreme court reversed the appellate court's reversal of guilt, holding that the trial court's inadvertent failure to poll one of the 12 jurors was not second-prong structural error. The court noted that defendant had not invoked first-prong-closeness-of-the-evidence error, and it reasoned that polling the jury is not a fundamental right that is deemed to be structural error rather than trial error, and that such error is subject to harmless error review.

Also, in *People v. Patterson*, 217 Ill. 2d 407 (2005), noting that, pursuant to U.S. Supreme Court opinions, "most constitutional errors are not structural defects," the supreme court held that the improper admission of a nontestifying codefendant's grand jury testimony, which inculpated the defendant, was not structural error but a mere "trial error" occurring during the presentation of the case to the jury, even though the error involved a confrontation clause violation. Such errors, the court held, are subject to harmless-error analysis. In *People v. Fox*, 2022 IL App. (4th) 210262 ¶¶ 92-104, in a case similar to the issue in *Patterson*, the appellate court cited that decision in applying harmless error.

Interestingly, the United States Supreme Court decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), demonstrates that even "structural error" may not, in certain circumstances,

result in a finding of error. In that case, because the courtroom could not accommodate all the potential jurors for a murder trial, members of the public who were not potential jurors were excluded from the courtroom during jury selection. Among the excluded persons were the defendant's mother and her minister. The defendant's attorney made no objection to the exclusion, the defendant was convicted, and the issue of the denial of a public trial was not raised on direct appeal. The defendant later collaterally attacked the judgment based on ineffective assistance of counsel. Noting that its decision would likely have been different if the issue had been preserved and raised on direct appeal and, addressing the issue in the context of the allegation of ineffective assistance of counsel, the Supreme Court applied the second prong test of *Strickland* in holding that the petitioner had failed to establish prejudice and it thus affirmed the judgment of conviction. *Weaver* represents a clear indication that even structural error may not lead to a finding of plain error in federal courts. It thus presents another demonstration of the need for counsel to make a contemporaneous objection to an erroneous court ruling.

Other examples of Illinois Supreme Court decisions that did not involve structural error but nonetheless applied second-prong plain error include *People v. Clark*, 2016 IL 118845, ¶¶ 25, 46, where, in agreeing with the appellate court that the defendant should not have been convicted and sentenced for uncharged offenses he did not commit, holding "although our decisions in *Glasper* and *Thompson* equated second-prong plain error with structural error, we did not restrict plain error to the types of structural error that have been recognized by the Supreme Court;" *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009), where the failure to apply the one-act, one-crime rule constituted second-prong plain error; *People v. Walker*, 232 Ill. 2d 113, 131 (2009), where the failure of the judge to exercise discretion in denying a request for a continuance constituted second-prong plain error, given the egregious facts in that case; and *People v. Hicks*, 181 Ill. 2d 541, 545 (1998), where the imposition of an unauthorized sentence affected substantial rights and thus triggered second-prong plain error.

In *People v. Lewis*, 234 Ill.2d 32, 48-49 (2009), the supreme court held that the imposition of a fine that contravenes a statute triggers second-prong plain error (but note that pursuant to Ill. S. Ct. R. 472(e), added effective May 17, 2019, in appeals filed or pending since March 1, 2019, such an error raised for the first time on appeal is not to be addressed in the reviewing court, but rather remanded to the circuit court for the filing of an appropriate motion). And in *People v. Fort*, 2017 IL 118966, ¶19, the supreme court held that the imposition of a statutorily prohibited adult sentence on a juvenile triggers second-prong plain error.

Decisions on General Principles Related to Plain Error Review

For a sampling of cases that discuss principles related to whether plain error review should be granted, see *People v. Lewis*, 234 Ill. 2d 32 (2009) (holding a reviewing court must initially determine whether an error actually occurred; but see *People v. White*, 2011 IL 109689, ¶¶ 139, 148, where, in engaging in "a qualitative—as opposed to strictly quantitative—commonsense assessment of the evidence" in determining that the evidence was not closely balanced, holding that "[w]hen it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred"); *People v. Naylor*, 229 Ill. 2d 584 (2008) (holding burden of persuasion as to the two prongs is on party seeking plain-error review and, if burden cannot be carried, procedural default must be honored).

In P*eople v. Williams*, 2022 IL 126198, a jury convicted defendant of predatory criminal sexual assault of a child and aggravated criminal sexual assault. During closing arguments, defense counsel argued that the State had failed to present the corroborating evidence of two witnesses who were alleged to have knowledge of the alleged offenses. In rebuttal, the State contended that defendant had subpoena power and thus could have called the witnesses, and that the testimony of the witnesses would have been inadmissible hearsay. Defendant failed to object to the prosecutor's rebuttal argument on hearsay. Having failed to object to that State's argument, defendant sought relief under plain error. The supreme court first pointed out that a defendant "cannot obtain relief on an unpreserved error under the plain-error doctrine if he would not have been entitled to relief on the same error if preserved." *Id.* at ¶49. The

court's analysis thus hinged on whether a clear and obvious error had occurred.

The supreme court first held that "the prosecutor's comment on the defense's subpoena powers was not improper. The statement was an accurate and reasonable response to defense counsel's claim that the State should have called [the two witnesses]", and that "[w]hile the prosecution is generally not permitted to comment on a defendant's failure to produce evidence, such comments are not improper after a defendant with equal access to that evidence assails the prosecution's failure to produce it." *Id.* at ¶ 45. The court further noted that the prosecutor's hearsay comment was invited by defense counsel, albeit it was incomplete. The court also held that the comments were not prejudicial and that, in fact, the prosecutor reminded the jury that the State bore the burden of proof. The court thus held that defendant did not satisfy the "closely balanced" first-prong of the plain error doctrine, nor the second, presumptively prejudicial-error prong.

See also *People v. Hood*, 2016 IL 118581 (finding that there was no error, and thus no plain error, while rejecting defendant's contentions that his right to confront the victim-witness had been violated and that there had been plain error in admitting at trial the deposition of the incapacitated victim under Ill. S. Ct. R. 414; and further holding that, in the face of evidence that defendant waived his right to be present at the victim's deposition (where he was represented by counsel who cross-examined the victim), his due process rights were not violated and there was no plain error because of the failure to obtain the written waiver required by S. Ct. R. 414(e)).

Decisions on the Closely Balanced First Prong Test for Plain Error Review

In *People v. Adams*, 2012 IL 111168, the supreme court cited *White* in holding that, in determining whether the closely balanced prong has been met, the court makes a "common-sense assessment" of the evidence within the context of the circumstances of the individual case. In *Adams*, although comments that were not objected to during the State's final arguments were improper and constituted error, they did not merit reversal of the conviction because neither prong of the plain-error test was satisfied.

In *People v. Belknap*, 2014 IL 117094 the supreme court had another opportunity to consider the principles provided by *White* and *Adams*. In *Belknap*, the supreme court agreed with the appellate court's holding that the trial court committed error in failing to comply with Supreme Court Rule 431(b) by not asking prospective jurors whether they understood the four principles set forth in that rule (commonly referred to as the *Zehr* admonitions); but it also held, contrary to the appellate court's holding, that the evidence in the case was not closely balanced, and thus plain error review was unwarranted.

In its 4-to-3 decision in *People v. Sebby*, 2017 IL 119445, the supreme court held that a Rule 431(b) error (related to jury-selection admonitions based on the *Zehr* principles) does not trigger second-prong plain error. The court held, however, that application of the first prong of the plain error doctrine, in a case such as this where the evidence was deemed to be closely balanced, the trial court's failure to ask the proper *Zehr* questions of prospective jurors, as provided by Rule 431(b), required reversal of a conviction for resisting a peace officer and a remand for a new trial. In , the trial court had advised prospective jurors of the *Zehr* principles but asked whether they "had any problems with" or "believed in" the four *Zehr* principles, rather than whether they "understood and accepted" those principles. The court held that "prejudice rests not upon the seriousness of the error but upon the closeness of the evidence. What makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive." *Sebby*, at ¶ 68. The court also rejected the contention that the final instruction given to the jury under IPI Criminal 4th No. 2.03, which recites the *Zehr* admonitions, did not cure the error that occurred in not properly asking prospective jurors about the *Zehr* principles.

In *People v. Lucas*, 2019 IL App (1st) 160501, the appellate court held that second-prong plain error occurred when, during a bench trial, because it could not be done in the courtroom, the trial court and the State and defense counsel reviewed in chambers and outside the defendant's presence—without any commentary or argument—a videotape of the defendant's traffic stop (which was relevant to the charged offenses). With one judge dissenting, the appellate court held that, though the

defendant was advised that the video would be reviewed by the trial court and lawyers outside her presence and she did not object, she did not knowingly waive her right to be present for the viewing because she was not informed of that right. The court held that reversal and remand were necessary because the defendant was deprived of her right to be present during a critical stage of the proceedings.

In both *People v. Sargent*, 239 Ill. 2d 166 (2010), and *People v. Marcos*, 2013 IL App (1st) 111040, the courts addressed the plain error doctrine in situations where: (1) hearsay statements made by children who were victims of sexual offenses were admitted under the exception provided by section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10; see **Appendix U**); (2) the trial court had not given the jury an instruction required by section 115-10(c) of the Code (see IPI Criminal 4th No. 11.66, which implements the statutory requirement); and (3) the defendant did not submit the required instruction or object to the trial court's failure to give it to the jury. Both the supreme court in *Sargent* and the appellate court in *Marcos* held that, although the error in the trial court's not giving the jury instruction was definitely clear and obvious, an analysis of the record established that the evidence was not closely balanced and thus the error did not rise to the level of plain error.

Cumulative Error

In cases where neither prong of the plain error analysis applies, defendants frequently contend that the trial's cumulative errors requires reversal. In *People v. Speight*, 153 Ill. 2d 365, 376 (1992), though it rejected the defendant's contention that cumulative errors required reversal, the supreme court reasoned that, "while individual trial errors may not require a reversal, those same errors considered together may have the cumulative effect of denying defendant a fair trial."

Though the invocation of such error is usually unsuccessful, a primary example of cumulative error resulting in reversal is *People v. Blue*, 189 Ill. 2d 99 (2000) (applying due process considerations and employing the same test used when a reviewing court applies the second prong of the plain error test, and reasoning that the State's arguments "encouraged the jury to return a verdict grounded in emotion, and not a rational deliberation of the facts," holding that cumulatively, the errors created a pervasive pattern of unfair prejudice to defendant's case).

For a recent decision applying cumulative error for reversing defendant's convictions and remanding for a new trial, see *People v. Quezada*, 2022 IL App. (2d) 200195 (in this 40-page opinion, citing *People v. Redmon*, 2022 IL App (3d) 190167, ¶ 34, in pointing out "that individual trial errors that do not alone warrant reversal may cumulatively deprive a defendant of a fair trial" (*Quezada*, at ¶ 74), holding that "the erroneous admission of both [a prosecution witness's] interrogation videos and the gang evidence, while not individually reversible, particularly within the ineffective-assistance or plain-error contexts, cumulatively deprived [defendant] of a fair trial." (*Id.*)).

For a decision holding that cumulative evidence was justifiably admitted, see *People v. Jones*, 2020 IL App (4th) 190909. In that unlawful delivery of a controlled substance conviction, evidence was admitted about the defendant's involvement with controlled substances in numerous other instances. The appellate court held that using other-crimes evidence to corroborate the witness's testimony (that she purchased heroin from the defendant) on a material question was appropriate because the other-crimes evidence supplemented the witness's testimony on a fact that was of consequence to the determination of the action under IRE 401, for it made the witness's testimony more believable on the material issue of her purchase of heroin from the defendant.

***Ramirez*: Admonition Concerning Need for Care by Trial Counsel in Preserving Error**

In *People v. Ramirez*, 2015 IL App (1st) 130022, an appeal alleging trial court error that resulted in a longer sentence, where the appeal was based on the assertion of plain error because of the defendant's failure to raise the issue in the trial court, the appellate court denied the defendant's claim, responding in words that should serve as notice to trial counsel about the need to exercise care in preserving issues for review:

> "We do no favors to the criminal bar to routinely bypass forfeiture to consider forfeited issues on their merits. Habitually excusing the failure to preserve errors for review under the plain-error doc-

trine (i) minimizes the importance of trial counsel's vigilance to identify and preserve objections in order to facilitate appellate review, (ii) undermines the ability of trial counsel to address and, if necessary, correct claimed errors, and (iii) results in an ever-growing body of largely hypothetical legal analysis, *i.e.*, *if* counsel had timely preserved the error now raised on appeal, *then* this is how we wold resolve the issue. The more often we honor the rule of procedural default and the more frequently we confine plain-error to its intentionally 'narrow and limited' scope, the better and more cogent our analysis of concrete appellate issues will be." *Ramirez*, at ¶ 27 (emphasis in original).

Distinction Between Waiver and Forfeiture

In *People v. Phipps*, 238 Ill. 2d 54, 62 (2010), the supreme court spelled out the difference between waiver and forfeiture in this manner:

> "Waiver is distinct from forfeiture, however. While forfeiture applies to issues that could have been raised but were not, waiver is the voluntary relinquishment of a known right."

Later, in *People v. Hughes*, 2015 IL 117242, the supreme court explained the difference in these terms:

> "We should acknowledge that these two terms [waiver and forfeiture] have been used interchangeably at times, particularly in the criminal context, despite representing distinct doctrines. 'As this court has noted, there is a difference between waiver and forfeiture. While waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements. [Citations.] These characterizations apply equally to criminal and civil matters.'" Citing *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 320 n.2 (2008). *Hughes*, at ¶ 37.

In *People v. Sophanavong*, 2020 IL 124337, the court stated this:

> "Over the years, this court has noted that the terms forfeiture and waiver have, at times, been used interchangeably, and often incorrectly, in criminal cases. *People v. Hughes*, 2015 IL 117242, ¶ 37; *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Forfeiture is defined 'as the failure to make the timely assertion of [a] right.' *People v. Lesley*, 2018 IL 122100, ¶ 37; see also *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 320 n.2 (2008) (stating 'forfeiture is the failure to timely comply with procedural requirements'). Waiver, on the other hand, 'is an intentional relinquishment or abandonment of a known right or privilege.' *Lesley*, 2018 IL 122100, ¶ 36." *Sophanavong*, at ¶ 20.

The distinction between waiver and forfeiture (which, as the above quotes indicate, in many decisions frequently and incorrectly is labeled "waiver") is important because procedural forfeiture may nevertheless allow plain error review, whereas the voluntary surrender of a known right will not. See *e.g.*, *People v. Smith*, 2019 IL App (1st) 161246, ¶ 50 (citing supreme court and other appellate court decisions in holding "[w]hether we couch it in terms of 'waiver' or 'invited error,' plain-error review of that action is not available") Also, forfeiture "is a limitation on the parties and not on [the reviewing] court, which has a responsibility to achieve a just result and maintain a sound and uniform body of precedent." *Pederson v. Village of Hoffman Estates*, 2014 IL App (1st) 123402, ¶ 44 citing *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438 (2008).

Distinction Between Harmless Error and Plain Error

In a criminal case addressing whether reversible error had been committed because of an *Apprendi* violation, the supreme court noted that, in addition to the threshold determination concerning the applicability of plain error or harmless error analysis depending on whether the defendant did or did not make a timely trial objection based on the alleged error,

> "[a]n 'important difference' between the two analyses lies in the burden of proof: in harmless-error analysis, the State must prove that the jury verdict would have been the same absent the error to avoid reversal, whereas under plain-error analysis,

> a defendant's conviction and sentence will stand unless the defendant shows the error was prejudicial." *People v. Crespo*, 203 Ill. 2d 335, 347-48 (2003).

The simple test for harmless error analysis is not whether the prosecution produced sufficient evidence to support a conviction, but whether the error may have swayed the jury's judgment. The overall strength of the prosecution's evidence constitutes an important factor in making this determination.

In *People v. Lerma*, 2016 IL 118496, the supreme court provided the following standard for determining harmless error where evidence was excluded:

> "This court has recognized three approaches to determine whether an error such as this is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or cumulative." *Lerma*, at ¶ 33.

Plain Error Review in Civil Cases

Although the plain error doctrine generally is applied in criminal cases, it applies in civil cases as well. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363 (1990), where the supreme court noted that plain error review in a civil case was first applied by that court in *Belfield v. Coop*, 8 Ill. 2d 293 (1956), where the court held:

> "If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon."

In *Gillespie*, the supreme court held that "we will strictly apply the waiver doctrine unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." In reviewing prior cases, the *Gillespie* court concluded that "[i]n each of [those civil cases] where a new trial was awarded, the prejudicial error was so egregious, that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." The court noted: "The cases where we applied the *Belfield* standard and awarded a new trial involved blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice."

Standard of Review for Evidentiary Issues

Although IRE 103(e) is directly relevant to appellate proceedings, trial judges and attorneys must know the standard of review for evidentiary issues, for it illustrates the deference accorded trial courts in their rulings on the admission of evidence. The standard is succinctly stated by the supreme court in *People v. Becker*, 239 Ill. 2d 215 (2010):

> "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion. [Citations.] An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]. Decisions of whether to admit expert testimony are reviewed using this same abuse of discretion standard. [Citations.]"

In *United States v. Groce*, 891 F.3d 260, (7th Cir. 2018), the Seventh Circuit offered this explanation for the abuse of discretion standard for evidentiary rulings:

> "Abuse of discretion is, of course, a highly deferential standard. We give special deference to evidentiary rulings because of the trial judge's first-hand exposure to the witnesses and the evidence as a whole, and because of the judge's familiarity with the case and ability to gauge the impact of the evidence in the context of the entire proceeding. A trial court abuses its discretion when no reasonable person could take the view adopted by

the trial court." *Groce*, 891 F.3d at 268 (internal citations and quotation marks omitted).

Note that many Illinois Supreme Court decisions require a "clear showing" that the trial court abused its discretion in order to overturn a ruling on the admissibility of evidence. *See e.g.*, *People v. Cookson*. 215 Ill. 2d 194 (2005). Note also that, although *Becker* and many other supreme and appellate court decisions present the generally accepted standard quoted above for the admission of evidence, an additional basis for a reviewing court's finding error in the admission of evidence occurs where the trial court's ruling rests on an error of law. *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009) ("A circuit court abuses its discretion when it makes an error of law. See *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L.Ed.2d 392, 414 (1996) (where the Supreme Court explained that '[l]ittle turns *** on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction'").

Where admissibility turns on a question of law, the standard of review is *de novo*. *See, e.g., People v. Hall*, 195 Ill. 2d 1, 21 (2000); *People v. Williams*, 188 Ill. 2d 365, 369 (1999).

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 104. Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMMENTARY

Author's Commentary on Fed. R. Evid. 104(a)

***Cobige v. City of Chicago*: A Primer for Thinking About and Applying the Rules of Evidence**

Although it does not refer to Rule 104(a), the Seventh Circuit decision in *Cobige v. City of Chicago, et al.*, 651 F.3d 780 (7th Cir. 2011), is instructive regarding the admissibility of evidence under both federal and Illinois rules. In that case, a jury awarded $5 million in compensatory damages and $4,000 in punitive damages to the plaintiff, who sued as the son and special representative of the estate of his mother. The mother, who had been arrested on a drug charge and was held in a police lockup before court presentation, was allowed by police to suffer untreated pain, ultimately leading to her death.

The Seventh Circuit affirmed the jury's finding on liability, but vacated the damages award, ruling that the district court's evidentiary rulings had prejudiced the defendants' efforts to counter the plaintiff's testimony related to damages for loss of companionship and for loss of the enjoyment of life.

The plaintiff, who was 27 years old when his mother died, testified that "she had been a friend as well as a parent, a bulwark of support and a role model throughout his life." He also testified that "she provided wise advice and support" to him and that "she taught me mostly everything I know. Everything she knew she tried to instill in me." The defendants (the city of Chicago and four police officers) sought to counter that evidence by introducing proof that the mother had been a drug addict who had been in trouble with the law for much of her adult life and had spent multi-year stretches in prison. The district court admitted the evidence of one of the mother's convictions, but excluded evidence of other convictions and about her drug addiction and arrest record. As a result, the jury did not learn that the plaintiff's mother had been sentenced to four years' imprisonment for two drug offenses in 1998, and that shortly after her release she was arrested again and convicted in 2001 for another drug offense, for which she was sentenced to three years' imprisonment. Her death occurred in 2006, while she was in custody for a drug offense.

The Seventh Circuit rejected the district court's refusal to allow evidence of the mother's convictions, drug addiction, and arrests based on the district court's reliance on FRE 609(b), 404(b), and 403. The Seventh Circuit held that the proffered evidence was necessary to undermine the plaintiff's testimony, and that the three rules relied upon by the district court to deny admissibility were inapplicable.

As for the district court's invocation of FRE 609(b) (related to the inadmissibility, for impeachment purposes, of a conviction more than 10 years old) the Seventh Circuit pointed out that the defendants did not seek admission of the mother's conviction "for the purpose of attacking the character or truthfulness of a witness," for the simple reason that the mother was not a witness. The rule therefore could not be used as a basis for exclusion of the evidence.

As for FRE 404(b), the Seventh Circuit pointed out that the defendants "did not offer the evidence about imprisonment, arrests, and addiction to show that [the mother] acted 'in conformity therewith' on a different occasion." In other words, the defendants did not offer the evidence of the commission of a crime to establish the mother's propensity to commit another crime, but rather to show "how much [the mother's] estate and son suffered by her death." In short, because the mother's character and life prospects were placed in issue by her son's testimony, the defendants were entitled to introduce evidence to counter that evidence.

As for FRE 403, the Seventh Circuit stated: "When the law makes damages depend on matters such as the emotional tie between mother and son, the defendant is entitled to show that the decedent's character flaws undermined the quality of advice and support that she could have supplied." This, the court held, did not constitute "prejudice" at all. And it certainly was not "unfair prejudice."

The Seventh Circuit concluded that the exclusion of evidence "that could have significantly reduced the award of damages cannot be called harmless." It therefore vacated the damages awarded and remanded the case to the district court for a new trial solely on the issue of damages.

According to newspaper reports, in December 2011, the Chicago City Council approved a settlement in this case in the amount of $2.02 million.

Author's Commentary on Ill. R. Evid. 104(a)

IRE 104(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the clarifying substitution of "the court" for "it" in the last sentence, which was a change also made in the amended federal rule. The rule requires the court to decide preliminary questions relating to the qualifications of a witness, the existence of a privilege, and admissibility of evidence generally and, except for rulings on privilege, provides that the

court is not bound by the rules of evidence in doing so. Thus, where the preliminary question to be decided by the court is based on a factual determination, the rules of evidence (privilege excepted) do not apply during the hearing to determine admissibility. This principle is reinforced by IRE 1101(b)(1), which refers to "Rule 104" and is substantially identical to IRE 104(a). Indeed, "the trial court may consider hearsay evidence, including the unavailable witness's hearsay statements." *People v. Peterson*, 2017 IL 120331, ¶ 44, citing the rule, *People v. Stechly*, 225 Ill. 2d 246, 278 (2007), and *Davis v. Washington*, 547 U.S. 813, 833 (2006).

The proponent of evidence bears the burden of proving the necessary elements for admissibility. *People v. Torres*, 2012 IL 111302, ¶ 53; *People v. Cookson*, 215 Ill. 2d 194, 204 (2005).

People v. Taylor: Application of IRE 104(a) and Blueprint for Admissibility of Video Recording

Given modern advances in technology, the supreme court's decision in *People v. Taylor*, 2011 IL 110067, is worthy of note. In that case, the court reversed the appellate court's holding that a surveillance videotape recording had been improperly admitted at trial (under the "silent witness" theory, where a photo or video shown to be accurate is admissible as speaking for itself), on the basis that a proper foundation had not been laid. The appellate court had reached this determination based on its conclusion that, for many reasons, the State had failed to establish the reliability of the process that produced the tape. In its analysis, the supreme court first held that, as in other admission-of-evidence determinations, the proper standard of review is abuse of discretion, not *de novo*. It then approved of the six factors that the appellate court had applied in determining the reliability of the videotape, but emphasized that "this list of factors is nonexclusive," because one of them "may not be relevant or additional factors may be needed to be considered." *Taylor*, at ¶ 35. In short, the individual circumstances involved in each case need to be considered by the trial court to determine the accuracy and reliability of the process that produces a recording. *Id*.

The supreme court then found fault with much of the appellate court's analysis, noting among other things, the provisions of IRE 104(a) that a preliminary question such as the admissibility of evidence "is not constrained by the usual rules of evidence." *Taylor*, at ¶ 40. Thus, the court held, the appellate court erred in not considering a police report that, though not admitted in evidence at trial, was relevant on the questions related to the copying process of the videotape (from DVR to VHS tape) and to the sufficiency of its chain of custody. *Id.* at ¶¶ 40-41.

Regarding the appellate court's determination that the videotape was inadmissible because of chain-of-custody problems, the supreme court pointed out that, as "this court has repeatedly stated … gaps in the chain of custody go to the weight of the evidence, not its admissibility." *Id.* at ¶ 41.

Next, the supreme court disagreed with the appellate court's holding that the tape was inadmissible because the original recording had not been preserved. The court pointed out that, under IRE 1001(2), a videotape copy of another recording qualifies as an original. *Id.* at ¶¶ 42-43.

Finally, the supreme court held that the appellate court's conclusion that the tape should not have been admitted because "the State failed to establish that *no* alterations, deletions or changes had been made when the original DVR recording was copied to the videotape" was an "overly restrictive" requirement. *Id.* at ¶ 44 (emphasis in original). The court reasoned that "some editing may be necessary to make the evidence admissible in the first place" and that "most editing will not render evidence inadmissible but rather will go to the weight of that evidence." *Id*. The court concluded: "The more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording. In other words, the edits cannot show that the recording was tampered with or fabricated." *Id*.

Application of *Taylor*

In *People v. Stoppelwerth*, 2014 IL App (4th) 131119, a case involving a petition for adjudication of wardship, an off-duty sheriff's deputy viewed on his iPad a live-feed webcam that showed a man engaged in sexual conduct and sexually abusing the respondent's son in the defendant's presence. Though there was no tape-recording of what the deputy saw, 12 archived still images were retrieved and admitted into evidence. On appeal from the trial court's finding of abuse and neglect and its award of custody and guardianship of her son to DCFS, the respon-

dent argued that the silent witness theory should have resulted in the inadmissibility both of the deputy's testimony about what he viewed on the webcam and of the still images from the webcam archive. Citing and applying *Taylor*, the appellate court rejected the respondent's arguments. The court first held that there was no need to satisfy the nonexclusive list of factors supplied by *Taylor* for determining the reliability of the process by which a videotape or photo was produced, because the deputy's testimony and the respondent's admissions established the accuracy and reliability of the process used to create the images. As for the deputy's testimony, the appellate court held that the silent witness theory did not apply simply because the deputy's testimony about what he viewed on the live feed of the webcam was not a video recording.

For another appellate court decision addressing the admission of a video and relying on *Taylor*, see *In re D.Q. and J.C., Minors*, 2016 IL App (1st) 16680 (in an abuse and neglect case, holding that there was a proper foundation for the admission of a video of a mother repeatedly striking her three-year-old daughter with a spatula and stick).

For other cases that address the "silent witness" theory as related to the admissibility of lay opinion testimony, see the *Author's Commentary on Ill. R. Evid. 701*.

People v. Parker: Example of Applying IRE 104(a) for Establishing a Foundation for Admitting Evidence

In *People v. Parker*, 2019 IL App (3rd) 160455, in response to the State's intention to admit evidence that defendant's fingerprint was on a wine glass in the victim's apartment where the alleged armed robbery had occurred, defendant filed a motion *in limine* to prevent the State from introducing evidence that would reveal that defendant's fingerprint was obtained from a prior arrest and thus would lead to inferences concerning his prior arrest record. During trial, the State presented evidence by the fingerprint analysis expert that the fingerprint on the glass matched defendant's fingerprint, without providing information to the jury as to the source of defendant's known fingerprint. On appeal, defendant contended that the trial court had erred in admitting that evidence without a proper foundation for its admission. The appellate court noted that at a pretrial discussion the source of defendant's fingerprint was disclosed and the trial court had "ruled that the fingerprints would be admitted into evidence, with the caveat that the State should not discuss their source." *Parker*, at ¶ 48. In affirming the admission of the evidence of the fingerprint comparison based upon the trial court's pretrial determination, the appellate court relied on IRE 104(a)'s requirement that "preliminary questions concerning *** the admissibility of evidence shall be determined by the court." *Id.* at ¶ 44. The court also cited IRE 103(d)'s requirement to "prevent inadmissible evidence from being suggested to the jury by any means" and IRE 104(c)'s similar requirement. *Id.*

Parker establishes that under IRE 104(a) a pretrial court determination that there is a proper foundation for the admission of evidence renders unnecessary the presentation of the foundation for the jury, especially where the foundation evidence may be prejudicial to the defendant.

But *Parker* offered another notable ruling. When the State offered a second fingerprint analysis expert to corroborate the testimony of the other expert, the trial court cut off questioning on the witness's expert qualifications, stating that "such questioning should have been completed prior to trial" and, over defendant's objections, the court found the witness qualified as an expert. *Id.* at ¶ 52. The appellate court held that this was error, but that the error was cured when defense counsel elicited the witness's qualifications on cross-examination. The appellate court provided this principle regarding the trial court's erroneous ruling: "There is no rule or statute mandating that such a foundation be established prior to trial, or that a witness be ruled qualified in a pretrial order." *Id.* at ¶ 54.

Author's Commentary on Ill. R. Evid. 104(b)

IRE 104(b) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule, which is easier to understand through the federal rule's revised wording, allows admissibility of evidence based upon a party's representation that the subsequent production of evidence will establish the relevancy of the evidence earlier admitted. *See Marvel Eng'g Co. v. Commercial Union Ins. Co.*, 118 Ill. App. 3d 844 (1983) (applying FRE 104(b)).

This often overlooked (but very useful) rule provides the method for establishing the "conditional relevancy" for

introducing evidence in chronological order, which usually is more persuasive than jumping ahead in time to establish foundational requirements and then returning to an earlier chronological time to present evidence relevant to the issues, a process that can be confusing to jurors who are unaware of (and unconcerned with) a party's need to establish foundational requirements for admitting evidence.

Author's Commentary on Ill. R. Evid. 104(c)

IRE 104(c) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule codifies the commonsense requirement that hearings be held out of the presence of the jury when they concern the admissibility of confessions, matters involving the testimony of a criminal defendant who requests a hearing on a preliminary matter out of the jury's presence, and those matters that justice requires to be out of the jury's hearing. The rule is generally applied in criminal cases, but the portion of the second sentence, which requires that hearings on preliminary matters "shall be so conducted [*i.e.*, "out of the hearing of the jury"] when the interests of justice require," applies equally to civil cases.

Author's Commentary on Ill. R. Evid. 104(d)

IRE 104(d), which is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, provides subject-matter protection for a defendant who testifies about a preliminary matter concerning admissibility of evidence in a criminal case.

For a relevant case, where the appellate court held that IRE 104(d) had not been violated, see *People v. Maxey*, 2018 IL App (1st) 130698, ¶¶ 84-93 (in a suppression hearing where the questioning by the State had relevance to defendant's coming from the direction where a residential burglary had just occurred, though defendant had not testified about where he had been before his car was stopped by police, it was proper for the prosecutor to ask where defendant had been prior to entering the road on which he was stopped, where defendant had testified that he was legally driving northbound on the road but a police officer testified that he observed defendant driving southbound on the same road and making an illegal U-turn).

Author's Commentary on Ill. R. Evid. 104(e)

IRE 104(e) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. In allowing evidence related to the weight of admitted evidence, the rule is consistent with the principle that admissibility of evidence is separate from considerations concerning the weight or credibility of the evidence.

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper purpose or scope and instruct the jury accordingly.

COMMENTARY

Author's Commentary on Ill. R. Evid. 105

IRE 105 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the non-substantive addition of the words "purpose or" between the word "proper" and the word "scope" at the end of the rule for the purpose of clarity. The Notes of the Advisory Committee on Rules (1972) offer this insight concerning the purpose of the rule:

> "A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403."

In *United States v. Abel*, 469 U.S. 45, 56 (1984), the United States Supreme Court held, "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." And in *People v. Monroe*, 66 Ill. 2d 317, 322-23 (1977) the Illinois Supreme Court held:

> "It is the long-established rule that evidence admissible for one purpose cannot be excluded for the reason that it would not be admitted for another purpose, and that the party against whom it is admitted may tender instructions appropriately limiting the purpose for which it may be considered."

For relevant cases, see *People v. Lucas*, 132 Ill. 2d 399 (1989) (opposing party entitled to a limiting instruction); *People v. Gacho*, 122 Ill. 2d 221, 253 (1988) (generally, court has no duty to give a limiting instruction on its own); *People v. Gordon*, 2017 IL App (3d) 140770, ¶¶31-32 (discussing propriety of the trial court's giving a limiting instruction concerning defendant's earlier statement to his wife of his desire to have sex in the presence of his young son as a teaching tool, in prosecution for sexual exploitation of a child based on defendant's subsequently having sex with his girlfriend in presence of his son, and holding that trial court was in fact required by IRE 105 to provide the limiting instruction to ensure that jury understood that defendant's earlier statements were evidence only of his state of mind).

See also *United States v. Robinson*, 724 F.3d 878 (7th Cir. 2013), where, despite the parties' stipulation to a limiting instruction, the trial court failed to orally provide the jury with the instruction that the defendant's prior conviction for a felony offense should be considered merely for the limited purpose of assessing whether the defendant was a convicted felon, an element of the charged offense of possession of a firearm by a felon. In reversing the defendant's conviction, the Seventh Circuit placed special emphasis on the use of the word "must"

in FRE 105, as amended December 1, 2011 (where the word "must" replaced the word that had been "shall" in the pre-amended version), and expressed concern that the jury might have interpreted the standard instruction, concerning its ability to draw reasonable inferences from the evidence, to reasonably infer that the defendant, as a convicted felon in a case where possession was disputed, was more likely to have possessed the firearm than not.

FEDERAL RULES OF EVIDENCE

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

ILLINOIS RULES OF EVIDENCE

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

COMMENTARY

Author's Commentary on Ill. R. Evid. 106

IRE 106 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule is an expression of the rule of completeness. It is limited to writings and recorded statements. It does not apply to non-recorded oral statements—but note the trial court's ability under Rule 611(a) to "make the interrogation and presentation effective for the ascertainment of the truth." The Notes of the Advisory Committee on Rules (1972) provides this explanation for the rule:

> "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. [Citations.] The rule does not in any way circumscribe the right of the adversary to develop a matter on cross-examination or as part of his own case."

Common-Law Limitation and Broader Rule

See Supreme Court Rule 212(c), which provides for the use or reading of other parts of a deposition, and *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 556 (1976), regarding the principle in general (but without reference to "any other writing"), where the supreme court stated: "if one party introduces part of an utterance or writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury." *Lawson*, 64 Ill. 2d at 556. Note, however, that IRE 106, like its federal counterpart, does not limit the rule of completeness to the *same* writing or recorded statement, which was the case previously in Illinois, as demonstrated by the pre-codification decisions in such cases as *People v. Patterson*, 154 Ill. 2d 414, 453-54 (1993) and the language quoted above from *Lawson*. *See also People v. DePoy*, 40 Ill. 2d 433, 438-39 (1968). See, too, section (1) under the "Modernization" discussion in the Committee's general commentary on page 2 of this guide.

Decisions Applying the Rule

In *People v. Craigen*, 2013 IL App (2d) 111300, the appellate court provided an extensive analysis of IRE 106 in rejecting the defendant's contention that an audio recording of an excul-

patory statement the defendant gave to police nearly three months before he gave an inculpatory video statement, which was admitted into evidence, also should have been admitted into evidence as a related recorded statement. In holding that the trial court did not abuse its discretion in refusing to admit the prior recording, the appellate court reasoned:

> "[U]nder the common-law completeness doctrine, the remainder of a writing, recording, or oral statement is admissible only if required to prevent the jury from being misled, to place the admitted portion in context so that a true meaning is conveyed, or to shed light on the meaning of the admitted portion, and the same holds true for admissibility of a writing or recorded statement under Illinois Rule of Evidence 106. Simply because a writing or recorded statement is related to an admitted writing or recorded statement, or pertains to the same subject matter, does not mean that it satisfies the requirements for admissibility under Rule 106." *Craigen*, at ¶ 46.

The appellate court added: "The former interview did not shed light on the latter interview or place it in context—it merely contradicted it," and therefore it was not admissible under IRE 106. *Id.* The court emphasized that "[t]he rule is not a means to admit evidence that aids a defendant in proving his or her theory of the case," pointing out that "[w]here, as here, a defendant has not shown that the admitted writing or recorded statement, standing alone, is misleading, Rule 106 does not provide an avenue for admitting another writing or recorded statement." *Id.*, at ¶ 48.

For a recent decision applying the above principles, in the context of a postconviction proceeding, where the defendant alleged ineffective assistance of counsel for not invoking the completeness doctrine and where the circuit court dismissed the defendant's petitions as frivolous and patently without merit, see *People v. Viramontes*, 2021 IL App (1st) 190665, ¶¶ 49-60.

Examples of other appellate court cases involving the completeness doctrine are worthy of note—if only to demonstrate that determinations regarding application of the rule can be controversial.

In *People v. Ruback*, 2013 IL App (3d) 110256, one of the issues addressed by the appellate court was whether a videotaped exculpatory statement made by the defendant's wife to police, just before her inculpatory statement, should have been admitted with the inculpatory statement that was admitted as a prior inconsistent statement. The authoring appellate judge said the statement was properly barred under common-law principles that bar the admission of prior consistent statements; a specially concurring judge said the issue had been waived and therefore should not have been addressed; and the other specially concurring judge said that the exculpatory statement should have been admitted under the completeness doctrine, but that the error in not admitting it was harmless.

In *People v. Alvarado*, 2013 IL App (3d) 120467, the appellate court held that, where the defendant knew and agreed to the condition for admitting the favorable portion of a video recording, the trial court's ruling admitting the part of the video unfavorable to the defendant (which the trial court had previously suppressed) was correct under the completeness doctrine. But it held that it would have been preferable to have admitted the unfavorable portion of the video recording during the State's rebuttal case. And a specially concurring judge concluded that, if the admission of the unfavorable portion of the video was error, it was invited error because the defendant chose to admit the favorable part of the tape, knowing that the trial court's condition for admitting that portion of the tape was the admission of the unfavorable portion.

FEDERAL RULES OF EVIDENCE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

ILLINOIS RULES OF EVIDENCE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. 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.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Informing the Jury. In a civil action or proceeding, the court shall inform the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

COMMENTARY

Author's Commentary on Ill. R. Evid. 201(a)

IRE 201(a) is identical to the federal rule before the latter's amendment for stylistic purposes effective December 1, 2011. The rule addresses only adjudicative facts, *i.e.*, the facts of a particular case. It dispenses with the need to prove facts that are outside the area of reasonable controversy. It does not address legislative facts. For statutes that address judicial notice of legislative facts, including ordinances, statutes, the common law, and court orders, see generally 735 ILCS 5/8-1001-1009; for

statutory procedures for admitting statutes and court decisions, see 735 ILCS 5/8-1101-1106; and for statutory procedures for admitting court, municipal, corporate, and land office records, and patents for land, state patents, and state land sales, see 735 ILCS 5/8-1201-1211.

See, specifically, section 8-1003 of the Code of Civil Procedure (735 ILCS 5/8-1003), which addresses both legislative facts and common law: "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

Author's Commentary on Ill. R. Evid. 201(b)

IRE 201(b) is identical to the federal rule before the latter's amendment for stylistic purposes effective December 1, 2011. *See Murdy v. Edgar*, 103 Ill. 2d 384 (1984) (providing the same standards contained in the rule).

In *People v. Tassone*, 41 Ill. 2d 7 (1968), the State failed to prove the value of a stolen semi-trailer truck. In affirming the defendant's conviction for felony theft, the supreme court reasoned:

> "We see no valid reason why notice may not be taken in a case such as this that the property has a value of over $150. Courts do not operate in a vacuum; they are presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true. [Citation.] To say that it is not common knowledge that a large tractor and trailer are worth more than $150 is to close our eyes to reality. We do not take judicial notice of the exact value of the property but we do take notice that it is worth more than $150." *Tassone*, 41 Ill. 2d at 12.

In the pre-codification decision in *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993), relying upon and citing supreme court precedent, the appellate court provided this succinct summary of evidence subject to judicial notice:

> "Courts may take judicial notice of matters which are commonly known or of facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. (*People v. Davis* (1976), 65 Ill. 2d 157, 161.) A court will not take judicial notice of critical evidentiary material not presented in the court below, however, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties. *Vulcan Materials Co. v. Bee Construction* (1983), 96 Ill. 2d 159, 166, citing *Ashland Savings & Loan Association v. Aetna Insurance Co.* (1974), 18 Ill. App. 3d 70, 78."

In *Mehlberg*, the appellate court declined to take judicial notice of secondary sources that had not been submitted to the trial court but were submitted to the appellate court for the purpose of impeaching the State's expert witnesses concerning DNA evidence. The court accordingly struck the portions of the appendix to the defendant's brief that contained secondary materials from various publications, as well as the portions of the defendant's brief that referred to them.

People v. Heard, 2021 IL App (1st) 192062, was a bench trial in which the defendant was charged with possession of less than 15 grams of a substance containing methylenedioxymethamphetamine (ecstasy or MDMA). A police officer, who made a traffic stop of the defendant who was driving the car, asked the defendant what was in the knotted plastic bag that was protruding from the center console. The defendant responded, "dust." Pointing out that there was no evidence that "dust" meant ecstasy, the appellate court reversed the defendant's conviction, reasoning:

> "The State offered no evidence to support the judge's finding that 'dust *** is a street term for the drug commonly known as ecstasy.' The State contends that the trial judge could rely on his own knowledge of street names for drugs, but we find that the judge is not at liberty to take judicial notice of the meaning of slang expressions. Therefore, there must be some admitted evidence of the meaning of the slang expression." *Id.* at ¶18 (ellipsis is the court's).

In re N.G.: Supreme Court Disagreement on Application of Judicial Notice

In *In re N.G.*, 2018 IL 121939, judicial notice played a key role in the underlying decision of the four justices in the supreme court majority, but the use of judicial notice drew heavy criticism from the three dissenting justices. In that case, the supreme court reviewed the appellate court reversal of the judgment of the circuit court terminating a father's parental rights to his minor son, on the grounds that he was an unfit parent based on a statute in the Adoption Act (750 ILCS 50/1(D)), which presumed him to be "depraved" because he had been convicted of at least three felonies. One of the father's three convictions was for an unlawful use of a weapon charge under a statute, a part of which the supreme court had determined to be facially unconstitutional in its decision in *People v. Aguillar*, 2013 IL 112116. Because the record on appeal did not contain information regarding the specific provision of the statute under which the father had been convicted, the appellate court, *sua sponte*, examined and took judicial notice of court records from the father's prior prosecution in the circuit court. Citing a number of appellate court decisions, the supreme court majority found that "[d]oing so was well within the appellate court's authority," and it found that the records confirmed that the father's conviction was based on sections of the statute found to be unconstitutional in *Aguillar*. *N.G.,* at ¶ 32.

In addressing that portion of the majority's decision, the dissent was critical of the appellate court's taking judicial notice of facts from the earlier criminal proceeding "to establish evidentiary proof regarding the nature of the conviction," and using those facts "to not only fill evidentiary gaps in the record but as a basis to vacate the judgment of conviction in the [earlier] criminal proceeding." *Id.* at ¶ 115. The dissent then contended: "none of the majority's cited precedent, nor the Illinois Rules of Evidence (Ill. R. Evid. 201 (eff. Jan. 1, 2011)) regarding judicial notice, countenances the *use* of judicially noticed facts from outside the record on appeal to fill gaps in the evidentiary record and to *sua sponte* vacate a judgment of conviction in a separate criminal proceeding. The majority ignores any proper limitations on the use of judicially noticed facts." *Id.* (Emphasis in original).

The takeaway from *N.G.*: Although the supreme court approved the use of judicial notice in this case, trial lawyers should ensure that the record in the trial court—which, of course is the record on appeal—provides the facts and arguments relevant to the appeal (as well as to the trial), so that no initial recourse to judicial notice on appeal is necessary.

Recent Decisions Disallowing Judicial Notice

For a case that cites this codified rule and other decisions in holding that testimony from a separate proceeding not involving the defendant was not subject to judicial notice, see *People v. Rubalcava*, 2013 IL App (2d) 120396. See also *In re S.M.*, 2015 IL App (3d) 140687 (reversing delinquency finding in holding that the trial court should not have taken judicial notice of the information in the State's rebuttal closing argument to establish the age element (that the juvenile was under 18 years of age) for the offense of unlawful possession of a concealable firearm, where the State presented no evidence of juvenile's age during the evidentiary stage at trial, and holding that, to establish age of juvenile beyond a reasonable doubt, judicial notice could not be taken: of the fact that the proceeding was in juvenile court, of "the file," and of the fact that juvenile had previously made an unsworn statement that he was 16 years of age to the court during his arraignment).

See also *People v. Crawford*, 2013 IL App (1st) 100310, ¶125 ("expert's deposition [in another case] was not undisputed, so judicial notice of the substance of that testimony—but not the *fact* that the expert testified—would be inappropriate"); and *People v. Shamhart*, 2016 IL App (5th) 130589, ¶ 39 ("The court could have taken notice that the defendant had filed documents, but it could not have taken judicial notice of the content of the documents, as that content was disputed.").

In *Shrock v. Ungaretti & Harris Ltd.*, 2019 IL App (1st) 181698, the appellate court noted that "it would be improper to judicially notice the allegations in a pleading filed in another lawsuit and take those allegations to be *established facts* in this case" (*id.* at ¶ 66 (emphasis by the court)), but it held that its reliance on other filings by the plaintiff were indicative of the plaintiff's knowledge of alleged injury, which was related to whether the statute of limitations barred the current litigation.

In I*ttersagen v. Advocate Health and Hospitals Corp.*, 2021 IL 126507, the appellate court denied the plaintiff's motion to take judicial notice of a tax document to support his allegation of juror bias. In its review, the supreme court affirmed the appellate court's ruling, reasoning:

> "Plaintiff forfeited his argument concerning the tax document by failing to raise it in the trial court, and he compounded the forfeiture by waiting until the eleventh hour to present it to the appellate court. See *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004) (issues not raised in the trial court are forfeited and may not be raised on appeal). The forfeiture obviates the need to address whether the tax document is subject to judicial notice." I*ttersagen*, at ¶ 76.

Seventh Circuit Judge's Advice on Seeking Judicial Notice on Appeal

In *In the Matter of Steven Robert Lisse*, 905 F.3d 495 (7th Cir. 2018), Judge Frank Easterbrook, in his capacity as motions judge, explained why he was publishing an explanation for his denial of a document styled "Request for Judicial Notice," "in the hope of forestalling other, similar applications, which recently have increased in frequency."

After first providing the two requirements of FRE 201(b)—which is substantially identical to IRE 201(b)—Judge Easterbrook pointed out that the appellant in the case at bar made requests for judicial notice of four documents. Two of the requests were for orders entered by a state court in Wisconsin. He concluded that, as public records, they were appropriate subjects of judicial notice. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) and FRE 901(b)(7).

The third document was a power of attorney filed in state court. Citing various rules of evidence, he questioned whether the document could meet the requirements for proving authenticity and even for relevance. He noted that, even if the document had been filed in the proceedings at bar, it would not be subject to judicial notice; and it would not receive privileged status because it was filed in a state court.

The fourth document was a lawyer's motion filed in the same state court. Pointing out that the document was not subject to judicial notice because it was not evidence of an adjudicative fact, he noted that just as an appellate brief in the Seventh Circuit is not evidence, neither is a lawyer's motion in state court. He distinguished the current request from a situation where a document is offered for judicial notice merely to show that it had been filed.

Finally, Judge Easterbrook explained why he was denying the request for judicial notice in its entirety, including even the first two documents that were indeed subject to judicial notice. His reasons were pragmatic:

> When evidence is "not subject to reasonable dispute," there's no need to multiply the paperwork by filing motions or "Requests." Just refer to the evidence in the brief and explain there why it is relevant and subject to judicial notice. If the assertion is questionable, the opposing litigant can protest. "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." Rule 201(e) [which is substantively identical to IRE 201(e)]. That "timely request" and the "opportunity to be heard" both belong in the next brief. So if an appellant proposes judicial notice, the appellee's objection can be presented in its own brief. If it is an appellee who proposes judicial notice, the appellant's reply brief provides the opportunity to be heard in opposition. There's no need to engage in motion practice, require the attention of additional appellate judges, and defer briefing.

Judge Easterbrook's opinion certainly should be heeded when judicial notice is sought before the Seventh Circuit. And its relevance to appeals in Illinois courts of review should be considered.

Sampling of Illinois Appellate and Seventh Circuit Court Decisions on Judicial Notice Based on Internet Searches

In a decision that predates the Illinois Rules of Evidence, the appellate court cited the two requirements now incorporated in IRE 201(b)(1) and (2) in holding that it could take judicial notice of a Google Map submitted by the State for the first time on appeal, in order to show that the location where a drug

transaction occurred was within 1,000 feet of a public park. *See People v. Clark*, 406 Ill. App 3d 622 (2d Dist. 2010) ("case law supports the proposition that information acquired from mainstream Internet sites such as Map Quest and Google Maps is reliable enough to support a request for judicial notice").

Also, in *People v. Stiff*, 391 Ill. App. 3d 494 (5th Dist. 2009), the appellate court consulted Google Maps to determine the distance between the place where the victim was set on fire and the place to which he ran, as an aid to determine the admissibility of statements made by him under the excited utterance exception to the hearsay rule. And in *Hoskin v. Union Pacific R.R. Co.*, 365 Ill. App. 3d 1021 (5th Dist. 2006), the appellate court *sua sponte* consulted MapQuest to determine distances between towns for the purpose of determining the propriety of the trial court's ruling on a forum *non conveniens* motion.

In *Shaw v. Haas*, 2019 IL App (5th) 180588, citing its decision in *Hoskin*, the appellate court used Google Maps, in a case involving the propriety of a circuit court's ruling on a motion based on *forum non conveniens*, to take judicial notice for determining the distances for a defendant traveling either to the Monroe County courthouse or to the St. Clair County courthouse. *Id.* at ¶ 24. The appellate court also took judicial notice from Google Maps to determine the four-minute traveling time difference from the defendant's corporate headquarters to the two courthouses. *Id.* at ¶ 25. Parenthetically, consistent with the supreme court's decision in *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 166, the appellate court held that the annual report of the Administrative Office of the Illinois Courts is a proper reference in assessing court congestion. *Id.* at ¶ 29.

Citing *Clark* and *Stiff*, in *Wisnasky v. CSX Transportation, Inc.* 2020 IL App (5th) 170418, a case involving tragic deaths from the collision of a car and a train, the appellate court took judicial notice of an aerial photograph from Google Maps and included the photograph in its opinion, "[f]or the limited purpose of assisting the reader in understanding the layout of [the relevant street crossing the railroad tracks]." *Id.* at ¶ 6,

In *United States v. Julius*, 14 F.4th 752 (7th Cir. 2021) the Seventh Circuit noted several instances where courts have taken judicial notice of distance estimates from Google Maps, but reasoned that travel-time estimates are a different matter for bicycle travel time distance. That is so because "[a]ny number of factors could impact a cyclist's travel time, including the cyclist's level of intoxication (recall that [defendant] was drunk), the type and quality of the bicycle, and the cyclist's proficiency at riding a bike." *Julius*, at 756.

For those interested in pursuing the role of an appellate court's Internet research for facts that are not in the record, the Seventh Circuit Court of Appeals decision in *Rowe v. Gibson*, 798 F.3d 622, (7th Cir. 2015), is must reading. In the majority decision, Judge Richard Posner presented numerous facts derived from Internet searches in support of the reversal of summary judgment entered against a *pro se* plaintiff. Judge Posner's justification for such searches makes for interesting reading, as does the short concurring opinion which concludes that resort to the Internet was unnecessary, and the partially concurring and dissenting opinion, which asserts that the court's opinion in reversing the grant of summary judgment was premised on its finding of a genuine issue of material fact based on its Internet research.

Note that, in *People v. Gocmen*, 2018 IL 133388, the supreme court separately provided two Internet sites to bolster conclusions it drew from the record:

- To demonstrate as unfounded the appellate court's inference from testimony that, because the "NARK swipe" used by a police officer was "used to test for opiates when cocaine is not an opiate," and it therefore was "unclear whether [the police officer] even administered the correct type of test, and if so, whether he administered it correctly," the supreme court relied on a website that stated "that NARK tests are available for a variety of substances, including opiates and cocaine." *Gocmen*, at ¶¶ 44-45.
- To demonstrate that, if the trial and appellate courts based their conclusions on what they believed was common knowledge that track marks on the defendant's arm could have been caused by regular injections of insulin for diabetes as claimed by the defendant, they were mistaken—a fact acknowledged by defense counsel at oral

> argument and augmented by a website, provided in a footnote, that "[i]nsulin is injected subcutaneously into the fatty layer between skin and muscle, not intravenously." *Id.* at ¶¶ 49-51 and note 2.

Note too that in *Guerra v. Advanced Pain Centers S.C.*, 2018 IL App (1st) 171857, an appeal in a medical malpractice action, the dissenting justice referred to numerous Internet sites related to drug addiction and the effect of numerous opiate drugs on a patient who died from an acetaminophen overdose.

For additional interesting reading concerning Internet research for facts that are not in the record, see Formal Opinion 478 of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association, issued on December 8, 2017. In concluding that judges should not perform research designed to obtain adjudicative facts that are not subject to judicial notice, the Opinion notes that Rule 2.9(C) of the Model Code of Judicial Conduct states:

> "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."

The Opinion further notes that "Comment [6] to Rule 2.9 clarifies that the 'prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.'"

Author's Commentary on Ill. Rs. Evid. 201(c) and 201(d)

IRE 201(c) and 201(d) are identical to their counterpart federal rules before their amendment for stylistic purposes effective December 1, 2011. Note, however, that the December 1, 2011 amendment consolidated the two federal rules into a single rule designated as FRE 201(c)(1) and (2).

Regarding IRE 201(c), see *People v. Barham*, 337 Ill. App. 3d 1121 (2003) (court may take *sua sponte* judicial notice, but is not required to do so if not requested, and should satisfy certain requirements when doing so).

See also *In re M.D.*, 2022 IL App (4th) 210288, which makes it clear that judicial notice may not be used in determining parental fitness in a case involving termination of parental rights. In that case, which is a blueprint for determining whether the rules of evidence apply in a case involving different hearings leading to the termination of parental rights, the appellate court pointed out that, though judicial notice may be applied in some of the steps leading to the termination of parental rights (such as those involving dispositional hearings and permanency hearings), judicial notice may not be applied in the fitness-hearing portion. Thus, it would be error for the trial court not to apply the rules of evidence in that portion of the proceedings. Noting that, in this case, the trial court had indicated it was taking judicial notice of the court records, the appellate court concluded that the trial court did not actually invoke judicial notice in its determination concerning the fitness portion of the parental-termination proceeding. Because the trial court had properly relied on the evidence admitted pursuant to the rules of evidence in making that determination, there was no error.

Author's Commentary on Ill. R. Evid. 201(e)

IRE 201(e) is identical to the federal rule before the latter's amendment for stylistic purposes effective December 1, 2011. *See People v. Barham*, 337 Ill. App. 3d 1121 (2003) (discussing the principles generally and emphasizing that a court, like a jury, should not rely upon facts within its knowledge that have not been admitted). See also *In re S.M.*, 2015 IL App (3d) 140687 (citing *Barham*, in holding that, after the evidence was closed and during the State's rebuttal closing argument, it was improper for the trial court to take judicial notice of the juvenile's unsworn statement, made during his previous arraignment proceeding, that he was 16 years of age, to establish an element of the offense of unlawful possession of a concealable firearm by a person under the age of 18 years).

The second sentence of the rule entitles a party to be heard if the court takes judicial notice without notifying the parties.

Author's Commentary on Ill. R. Evid. 201(f)

IRE 201(f) is identical to FRE 201(f) before the latter's amendment for stylistic purposes effective December 1, 2011. Note, however, that the December 1, 2011 amendment altered the previous federal subdivision designation by moving what had been FRE 201(f) to its current location as FRE 201(d).

In *People v. Castillo*, 2022 IL 127894, the supreme court determined that an aggravated battery took place in the prison in Pontiac because it was "public property." The defendant contended, however, that no evidence was presented that the Pontiac prison was publicly owned and that the trial court had not taken judicial notice of that fact. The supreme court, however, pointed out that the appellate court had taken judicial notice of that fact and that, under IRE 201(f), which provides that "[j]udicial notice may be taken at any stage of the proceeding." judicial notice by the appellate court was proper.

Author's Commentary on Ill. R. Evid. 201(g)

Except for the substitution of "Informing" in the title of the Illinois rule for the word "Instructing" in the title of the federal rule, and the substitution in the Illinois rule of "inform" for the word "instruct" in both sentences of the federal rule, in order to permit more informal direction from the court to the jury, IRE 201(g) is identical to what was FRE 201(g) before its amendment for stylistic purposes effective December 1, 2011. Note, however, that the December 1, 2011 amendment re-designated the federal rule as FRE 201(f).

FEDERAL RULES OF EVIDENCE

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

ILLINOIS RULES OF EVIDENCE

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by rule, statute or court decision, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMENTARY

Author's Commentary on Ill. R. Evid. 301

IRE 301 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the minor adjustment due to the difference between federal and Illinois procedures.

Mandatory Presumptions Prohibited in Criminal Cases

Note that the rule applies only to civil cases. Mandatory presumptions in criminal cases are *per se* unconstitutional. That is so because mandatory presumptions deprive defendants of the constitutional guarantees of the presumption of innocence and the prosecution's burden of establishing guilt on every element by proof beyond a reasonable doubt. See, for example, *People v. Jordan*, 218 Ill. 2d 255 (2006) (holding that a mandatory presumption, even a rebuttable one, is unconstitutional). See also *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that mandatory conclusive presumptions are unconstitutional because they conflict with the presumption of innocence, and mandatory rebuttable presumptions are unconstitutional because they relieve the prosecution of its burden of proving every element of the offense beyond a reasonable doubt); *People v. Watts*, 181 Ill. 2d 133 (1998) (holding that mandatory rebuttable presumptions that shift the burden of production to a criminal defendant are unconstitutional because, in effect, they require a trial court "to direct a verdict against the defendant on the element which is proved by the use of the presumption").

Distinguishing Mandatory and Permissive Presumptions

The difference between mandatory and permissive presumptions in the context of criminal cases is illustrated by the supreme court decisions that follow.

- *People v. Woodrum*, 223 Ill. 2d 286 (2006) (noting that a "permissive presumption allows, but does not require, the trier of fact to infer the existence of the ultimate fact upon proof of the predicate fact, without placing a burden on the defendant," and holding that the child abduction statute that provided "the luring or attempted luring of a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child shall be *prima facie* evidence of other than a lawful purpose" constituted a mandatory presumption, because "*prima facie* evidence is evidence that will establish a fact or sustain a judgment *unless contradictory evidence is produced*" (emphasis in original; internal quotation marks omitted).

• *People v. Hester*, 131 Ill. 2d 91 (1989) (defining a permissive presumption as "one where the fact finder is free to accept or reject the suggested presumption. It places no burden on the defendant and affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. The validity of a permissive presumption is subject to a less stringent test: there must be a rational connection between the facts proved and the facts presumed, and the ultimate fact must be more likely than not to flow from the basic fact. Nevertheless, the inference must be supported by corroborating evidence of guilt; if there is no corroborating evidence, the leap from the proved fact to the presumed element must still be proved beyond a reasonable doubt." *Hester*, 131 Ill. 2d at 99-100 (citations and internal quotation marks omitted).

• *People v. Housby*, 84 Ill. 2d 415 (1981) (holding a "permissive inference may always be rejected by the fact finder if it chooses to ignore it, and where there is corroborating evidence, the permissive inference is not the sole and sufficient basis for a finding of guilt. It is unnecessary therefore to establish that the inference follows beyond a reasonable doubt from the proved fact, for while it is necessary to prove the elements of an offense beyond a reasonable doubt, that may be done by resort to all the evidence, including the permissive inference. But, where the permissive inference stands unsupported by corroborating circumstances, the lead from the proved fact to the presumed element must satisfy the higher standard proof beyond a reasonable doubt for there is nothing else on which to rest the fact finder's verdict of guilt.").

• *People v. Epstein*, 2022 IL 127824 (holding that the circuit court's pretrial exclusion of the defendant-driver's blood-alcohol concentration (BAC) test, based on the testimony of an expert witness concerning the tardiness of the test, was improper because the BAC test did not create a mandatory presumption and the State still had the burden, during trial, of proving the elements of the charged offenses, while the defendant had the right to present evidence concerning the reliability of the test while she drove the car, so that the jury could perform its essential function of weighing and assigning the appropriate weight to be given to all relevant evidence).

Sampling of Relevant Decisions

For cases relevant to the codified rule, see *Franciscan Sisters Health Care Corporation v. Dean*, 95 Ill. 2d 452 (1983) (in a will contest case, where there was a rebuttable presumption of undue influence on the testatrix by the lawyer who drew up the will and was a beneficiary under it, holding that the presumption of undue influence was overcome by evidence provided by defendant and describing Thayer's "bursting bubble" theory and citing cases applying it); *McElroy v. Force*, 38 Ill. 2d 528 (1967) (in personal injury case, rebuttable presumption that deceased owner of car was its driver was not rebutted by any evidence and thus properly sustained the judgment); *Collins v. Noltensmeier*, 2018 IL App (4th) 170443 (holding that, based on defendant's unauthorized exercise of a power of attorney which made no specific allowance for her changing the beneficiary on the IRA of the deceased granter of the power of attorney, the rebuttable presumption of fraudulent self-dealing was created, and holding further that, in the absence of clear and convincing evidence to rebut the presumption, the grant of summary judgment in favor of the plaintiffs was affirmed); *In re Estate of Mark A. Coffman*, 2022 IL App (2d) 210053, *pet. for leave to appeal allowed*, No. 128867 (filed Nov. 30, 2022) (discussing relevant considerations in holding that (1) evidence established there was no presumption of undue influence by the testator's wife, who was the beneficiary of the testator's will, because the wife had no fiduciary duty and did not procure the will; and (2) the alternative presumption that the testator was debilitated was not established).

Rule 302. Applying State Law to Presumptions in Civil Cases

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

[FRE 302 NOT ADOPTED.]

COMMENTARY

Author's Commentary on Non-Adoption of Fed. R. Evid. 302

The *Erie* doctrine (see *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938)), which provides that, in diversity actions, federal courts must apply not only the statutes of the state where the transaction occurred but also that state's common law, does not apply to actions pending in Illinois state courts. Thus, the principle contained in FRE 302 is not required in Illinois. If a choice of law issue arises on an evidentiary issue in Illinois, the issue is to be decided pursuant to principles contained in Restatement (Second) of Conflicts of Law. *See Esser v. McIntrye*, 169 Ill. 2d 292 (1996) (recognizing that Illinois follows the Restatement (Second)'s most significant relationship test).

For an Illinois Supreme Court example of a decision applying the Restatement, see *Barbara's Sales, Inc. v. Intel Corp.* 227 Ill. 2d 45 (2007) (in following the Restatement, applying "the broad principle that the rights and liabilities as to a particular issue are to be governed by the jurisdiction which retains the 'most significant relationship' to the occurrence and the parties"). For an example of an Illinois Appellate Court analysis of a choice-of-law issue, see *Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st) 132905 (holding that Indiana law should apply because Indiana had more significant contacts with the vehicular accident that occurred on an interstate highway in that state).

For an example of a Seventh Circuit Court of Appeals choice-of-law issue, see *Rainey v. Taylor*, 941 F.3d 243 (7th Cir. 2019) (noting that the court has not always been clear about whether state or federal law controls in determining the applicable standard for reviewing a jury's compensatory award in cases involving state-law claims, and holding that, because the U.S. Supreme Court has held that state-law standards for evaluating a jury's compensatory award are substantive and not procedural, "when a federal jury awards compensatory damages in a state-law claim, state law determines whether that award is excessive"). *Rainey*, 941 F.3d at 253.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
Rule 401. Test for Relevant Evidence Evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action.	**Rule 401. Definition of "Relevant Evidence"** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

COMMENTARY

Author's Commentary on Ill. R. Evid. 401

IRE 401 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule provides the test for determining whether evidence is relevant. Plainly stated, evidence is relevant if it has any tendency to make more or less probable a fact that is of consequence in determining the action. Thus, "[w]hether evidence is relevant is a low threshold." See *United States v. Hamzeh*, 986 F.3d 1048,1052 (7th Cir. 2021), citing *United States v. Driggers*, 913 F.3d 655, 658 (7th Cir. 2019).

Pre-Codified Supreme Court Decisions on Relevant Evidence

In adopting FRE 401, well before the codification of Illinois evidence rules, in *People v. Monroe*, 66 Ill. 2d 317 (1977), the supreme court discussed and applied the federal rule's definition of relevant evidence. In explaining "relevancy," the *Monroe* court provided this quote from the notes of the federal Advisory Committee:

> "Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. * * *
>
> "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand." *People v. Monroe*, 66 Ill. 2d at 322.

In *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000), the supreme court said this about relevant evidence:

> "Relevant evidence is evidence that has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed. R. Evid. 401; see *People v. Monroe*, 66 Ill. 2d 317, 322 (1977) (adopting Rule 401); see also *Marut v. Costello*, 34 Ill. 2d 125, 128, (1965) (holding that evidence is relevant if it 'tends to prove a fact in controversy or renders a matter in issue more or less probable'). Relevancy is 'tested in the light of logic, experience and accepted assumption as to human behavior.' *Marut*, 34 Ill. 2d at 128. However, `[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.' *Monroe*, 66 Ill. 2d at 322, quoting Fed. R. Evid. 401, Advisory Committee's Note."

The appellate court decision in *People v. Tatum*, 2019 IL App (1st) 162403, ¶¶ 108-124, discusses relevance in relation

to the admission of autopsy photos in a murder prosecution. Citing IRE 401 and *People v. Bounds*, 171 Ill. 2d 1, 46 (1995), and reasoning that the word "consequence" in the phrase "any fact that is of consequence" can be equated with the word "issue," the court held that there is no basis for contending that a disputed issue is necessary to satisfy the requirements of relevancy. Because the State is required to prove every element of a charged offense, it is permitted to "prove any fact it needs to prove, such as the cause or manner of death, even if that fact is not disputed." *Tatum*, at ¶ 113. Thus, as the supreme court established in *Bounds*, autopsy photos were properly sent to the jury room even though the cause of death was not disputed at trial. Noting, however, that evidence offered to prove undisputed facts is more likely to be excluded under Rule 403's balancing test, the appellate court applied that test in holding that the photos were properly provided to the jury because of arguments made by defense counsel in closing arguments, which put the victim's injuries at issue and resulted in the court's conclusion that "the probative value of the photos was no longer substantially outweighed by the risk of unfair prejudice." *Id.* at ¶ 121.

Peach v. McGovern: Rejecting Prior Appellate Court Decisions in Permitting Admissibility of Postaccident Vehicular Photographs

In *Peach v. McGovern*, 2019 IL 123156, a jury trial involving a rear-end vehicular accident, the trial court directed a verdict against defendant on the issue of negligence at the close of the evidence, but reserved the questions of causation and damages for the jury. Testifying as an adverse witness at trial, defendant said she saw plaintiff stopped at a stop sign and that she fully stopped behind his pickup truck. She testified that she "spaced out" and let her "foot off the brake just a little bit, [and] tapped into his truck," without pressing the gas pedal once she had stopped. *Peach*, at ¶ 5. Plaintiff testified that his back bumper was dented; defendant testified that her license plate was bent. The front bumper on defendant's car was cracked, but it was not determined that the accident caused the crack. *Id.* at ¶ 6. Photos of both vehicles were taken after the accident, and both parties testified that the photos were accurate. Over plaintiff's objections, all the photos were admitted into evidence.

Plaintiff testified that since the accident he has experienced chronic neck pain from his head hitting the back window of his truck. He sought treatment a few days after the accident from his family physician, and then from a physician who was a pain management specialist. This physician opined that "the accident caused whiplash and may have caused an annular tear and loss of integrity of disc space." *Id.* at ¶ 13. He testified that even a low-speed collision could cause the injuries. Over plaintiff's objections, in response to the question whether his findings might not have been caused by the accident, the physician responded, "Yes, that's true. It might not have been caused by the accident." *Id.* at ¶ 14. When asked if some other event could have caused the findings, the physician answered that "a lot of things could have happened" but he did not know of anything. *Id.*

The jury returned a verdict for defendant, awarding plaintiff zero damages. The trial court denied plaintiff's posttrial motion for a new trial on the issue of damages. On appeal, finding that the trial court improperly allowed the admission of the postaccident photographs without offering expert testimony and that "the jury's findings are unreasonable and not based on the evidence presented at trial," the appellate court reversed the judgment and remanded for a new trial on damages. *Id.* at ¶ 19. On further review, the supreme court reversed the appellate court's judgment and affirmed the judgment of the circuit court.

The supreme court first considered the propriety of the admission of the postaccident vehicular photographs. After quoting IRE 401, the court noted that "[i]n general, photographic evidence is admissible if it has a reasonable tendency to prove or disprove a material fact at issue in the case but may be excluded when irrelevant or immaterial or if its prejudicial nature outweighs its probative value." *Id.* at ¶ 27. Citing appellate court decisions where photographic evidence had been admitted, the court pointed out that in this case the appellate court had relied on *Baraniak v. Kurby*, 371 Ill. App. 3d 310 (2007) and *DiCosola v. Bowman*, 342 Ill. App. 3d 530 (2003), both of which had held that, "absent expert testimony connecting the vehicle damage depicted in postaccident photographs

to the plaintiff's injuries, such photographs are not relevant and, therefore, not admissible." *Peach*, 2019 IL 123156 at ¶28.

The court pointed out that both appellate court decisions had cited *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000) in support of their holdings. In rejecting the application of *Voykin* in circumstances related to the admission of photographs, the supreme court noted that *Voykin* simply had rejected the same-part-of-the-body rule, which had erroneously allowed evidence of a prior injury without a showing that it was causally connected to the present injury, provided both injuries affected the same part of the body. (For more on *Voykin*, see the heading *Expert Testimony Needed to Show Causal Connection Between Injury at Issue and Preexisting Injury or Conditions* under the *Author's Commentary on Ill. R. Evid. 702*.) The court reasoned that the holding in *Voykin*, which was predicated on the admissibility of the plaintiff's prior injury, "is factually distinguishable from *Baraniak* and *DiCosola*, which did not involve prior injuries." *Peach*, 2019 IL 123156 at ¶31. Because, the court held, those decisions extended *Voykin* beyond its reasonable limits, they were overruled. *Id.*

Citing IRE 401 and numerous prior reviewing court decisions, the supreme court summarized its holding regarding the admission of the postaccident photographs as follows:

> "Postaccident photographs, just like testimony of witnesses describing an accident, are relevant to the issues of proximate cause and injury. Further, neither the photos nor the witness testimony need necessarily prove or disprove a particular medical condition in order to be admissible. Complete certainty is not required for admissibility. An item of evidence being but a single link in a chain of proof, need not prove conclusively the proposition for which it is offered. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without the evidence. Additionally, arguments about inferences from a party's testimony concerning the nature of impact are equally and appropriately made from the photographs.
>
> "If a jury is allowed to consider relevant testimony about vehicle speed and impact forces, a jury should be permitted to consider photographs that depict the damage, or lack thereof, done to the vehicles. These subjects are traditionally things jurors can understand, and experts have not been needed to supplement witness descriptions of events. Illinois courts have long recognized the jury's proper role in evaluating vehicle accident cases and the credibility of witnesses based on facts testified to and demonstrated by photographs." *Id.* at ¶ 38-39 (all citations and internal quotations marks omitted).

Lorenz v. Pledge: Confronting Confusing and Misleading Video

For a decision addressing the test for the admissibility of experimental evidence, see *Lorenz v. Pledge*, 2014 IL App (3d) 130137. In that case, the appellate court cited IREs 401 and 402 as providing the general guidelines for the admission of experiments—in this case a video created by the defendants after an accident. The video was designed primarily to show the line-of-sight of the driver in the plaintiffs' car, which was involved in a collision with a police car pursuing another car, resulting in a death and injuries that were the subject of the action for damages. During trial, although the defendants repeatedly informed the jury that the video was not a re-creation, a majority of the appellate court panel held that the video did not satisfy the foundational requirement for establishing that the essential conditions regarding the line of sight were substantially similar. With one justice dissenting on rehearing, the majority held that the video had the potential for confusing and misleading the jury. The judgment of the circuit court was therefore reversed and the cause was remanded for a new trial.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.

COMMENTARY

Author's Commentary on Ill. R. Evid. 402

Except for not including FRE 402's enumeration of the bases for not allowing admissibility of relevant evidence, IRE 402 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, Rather than enumerating bases for not allowing admissibility, the Illinois rule simply adds the word "law" at the end of the phrase that now reads "except as otherwise provided by law" in its first sentence. See *People v. Ward*, 2011 IL 108690, ¶ 77 ("evidence, even if relevant, will be excluded if its admission would violate another rule of evidence, such as the hearsay rule"). An example of a law that excludes relevant evidence is the Dead-Man's Act (735 ILCS 5/8-201), which does so by rendering incompetent as a witness a party adverse to a party who sues or defends as the representative of a deceased party or a person under a legal disability.

Note that, as stated by the United States Supreme Court in *United States v. Abel*, 469 U.S. 45, 56 (1984), "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." This principle was reasserted in *People v. Monroe*, 66 Ill. 2d 317, 322-23 (1977):

> "It is the long-established rule that evidence admissible for one purpose cannot be excluded for the reason that it would not be admitted for another purpose, and that the party against whom it is admitted may tender instructions appropriately limiting the purpose for which it may be considered."

For the codified rule relevant to instructing the jury concerning the limited nature of admitted evidence, see IRE 105.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded 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, waste of time, or needless presentation of cumulative evidence.

COMMENTARY

Author's Commentary on Ill. R. Evid. 403

IRE 403 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See Gill v. Foster*, 157 Ill. 2d 304, 313 (1993), where in a case substantially predating adoption of codified evidence rules in Illinois and without citing FRE 403, the supreme court applied principles provided in the rule in reviewing the trial court's ruling on admission of evidence. Note that the rule allows the exclusion of *relevant* evidence if its probative value is *substantially* outweighed by one or more of the dangers it lists. The rule overlays all other evidentiary rules. The test for exclusion of relevant evidence provided by the rule is frequently referred to as the "Rule 403 balancing test."

Probably the most invoked and applied part of the rule is that which provides for exclusion of relevant evidence based on the danger of unfair prejudice—the risk that the case will be decided on an improper basis, frequently because the proffered evidence would appeal to emotions more than fact or reason.

In parsing a term within the very first part of Rule 403, in *Smith v. Hunt*, 707 F.3d 803 (7th Cir. 2013), the Seventh Circuit Court of Appeals equated "probative" with "relevant":

> "Whether evidence is 'probative' is a similar question to whether it is 'relevant.' *Compare Black's Law Dictionary* 1323 (9th ed. 2009) (defining 'probative' as '[t]ending to prove or disprove'), *with id.* at 1404 (defining 'relevant' as '[l]ogically connected and tending to prove or disprove a matter in issue.')" *Smith*, 707 F.3d at 810.

Citing *People v. Eyler*, 133 Ill. 2d 173, 218 (1989), in *People v. Edgeston*, 157 Ill. 2d 201, 237 (1993), the Illinois Supreme Court noted that it had "defined prejudice [as later defined in IRE 403] as an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror, and held that relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value." The *Edgeston* court went on to note that "evidence which is otherwise relevant need not be excluded merely because it may prejudice the accused or arouse feelings of horror or indignation in the jury." *Edgeston*, 157 Ill. 2d at 237-38.

In *People v. Epstein*. 2022 IL 127824, the supreme court held that the circuit court improperly excluded the result of the defendant-driver's blood-alcohol concentration (BAC) test, based on the testimony of the defendant's expert witness that the BAC test occurred too late and its probative value was therefore substantially outweighed by the risk of unfair prejudice under IRE 403. Noting that the expert's opinion was based on information provided by the defendant and on video recordings, the supreme court held that the circuit court erred in dismissing the case based on IRE 403, reasoning that the jury should have been allowed to perform its essential function of weighing and assigning the appropriate weight to be given to all relevant evidence from the State and defense witnesses.

Regarding Rule 403, a note of the federal Advisory Committee (1972) pointed out:

> "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.***The availability of other means of proof may also be an appropriate factor."

DEFINING RULE 403'S "UNFAIR PREJUDICE" AND APPLYING *OLD CHIEF V. U.S.* AND *PEOPLE V. WALKER*

Regarding "unfair prejudice," in *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010), the appellate court succinctly observed:

> "The question is not whether relevant evidence is more prejudicial than probative; instead, relevant evidence is inadmissible only if the prejudicial effect of admitting that evidence substantially outweighs any probative value. *People v. Hanson*, 238 Ill. 2d 74, 102 (2010) ('A court may exercise its discretion and exclude evidence, even if it is relevant, if the danger of unfair prejudice substantially outweighs any probative value'); *People v. Walker*, 211 Ill. 2d 317, 337, (2004); *People v. Bryant*, 391 Ill. App. 3d 228, 244 (2009). 'Prejudicial effect' in this context of admitting that evidence means that the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial. [*People v.*] *Lynn*, 388 Ill. App. 3d [272,] at 278 [(2009)]. In other words, the jury would be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror. *People v. Lewis*, 165 Ill. 2d 305, 329 (1995)."

People v. Moore, 2020 IL 124538, offers an example of unfair prejudice and the consequence of the jury's learning of the prejudicial information. In that case, involving the prosecution for unlawful possession of a weapon by a felon—which is what the statute required —defense counsel failed to stipulate to the mere fact that the defendant had been convicted of a felony, resulting in the jury being informed that the defendant's felony conviction was for murder. Citing *Old Chief v. United States*, 519 U.S. 172 (1997), and *People v. Walker*, 2011 Ill. 2d 317 (2004), both of which held that where a defendant offers to stipulate to having been convicted of a felony offense—where only the defendant's felony status needs to be proved—it is error to introduce evidence of the nature of the prior conviction. Reasoning that this was a closely balanced case, the supreme court in *Moore* held defense counsel had provided ineffective assistance in not stipulating only to the defendant's felony status, which resulted in the admission of the evidence of the defendant's murder conviction. The court reversed the conviction and remanded the case to the circuit court.

In *People v. Davis*, 405 Ill. App. 3d 585 (2010), a decision published after *Walker* but before *Moore*, the appellate court distinguished *Walker* by pointing out that in *Walker* the State needed to prove the predicate conviction only of a felony—to which the defendant's counsel had not agreed, thus resulting in a finding of ineffective assistance of counsel—whereas in this case, the State needed to provide proof of defendant's two or more specific qualifying felony offenses, to which defendant had not stipulated. It was thus proper for the State to provide proof of the required predicate offenses.

In distinguishing *Davis*, in *People v. Tolliver*, 2022 IL App (2d) 210080, the appellate court held that the State was erroneously allowed to admit evidence of two required predicate felony convictions, where the defendant had agreed to stipulate to his convictions for two prior *qualifying* offenses.

The takeaways from the above decisions are: (1) where a conviction requires predicate proof of a mere felony, the defendant's stipulation to having been convicted of a felony must be accepted, and the State may not prove the conviction for the specific felony offense; and (2) where a conviction requires predicate proof of a specific felony, the defendant's stipulation to having been convicted of a "qualifying or required" felony must be accepted, and the State may not prove the conviction for the specific felony offense. Defense attorneys must recognize what proper stipulation may be made in the defendant's best interest; and prosecutors must accept a proper stipulation in ensuring the revelation of what might be deemed prejudicial information.

A caveat to the preceding takeaways: In *People v. Wiley*, 2022 IL App (4th) 210283, ¶¶ 57-92, Justice Robert Steigmann, in his concurring opinion, offers a comprehensive discussion

on whether the decision to stipulate in *Old Chief /Walker/ Moore* situations belongs to defense counsel or the defendant. Justice Steigmann concludes that the decision belongs solely to defense counsel, but he maintains that, where the defendant disagrees with counsel's decision to stipulate, the supreme court should clarify whether defense counsel or the defendant should have that right.

It should be emphasized that the holdings in both *Old Chief* and *Walker* are limited to a defendant's agreeing to stipulate to a prior qualifying conviction for a felony offense, in order to prevent jury-disclosure of the specific offense. Those decisions do not apply where a defendant agrees to stipulate to evidence other than the nature of a prior felony conviction. For example, in the Seventh Circuit's opinion in *United States v. West*, ___F.4th ___, No. 21-2701 (7th Cir. Nov. 22, 2022), a conviction for possession of child pornography, the defendant alleged Rule 403 error based on the trial court's admission of child pornography images at trial when he had supposedly stipulated that the images contained child pornography. Rejecting that contention and relying on *Old Chief's* specific holding, the Seventh Circuit noted that *Old Chief* related to a defendant's felon status, and it quoted that case's statement that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *West*, advance sheet at 5, citing *Old Chief*, 519 U.S. 172, at 186□87.

Tension Between Confrontation Clause and Rule 403

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the United States Supreme Court held that, in this jury-trial prosecution for murder, the trial court had improperly applied Delaware's Rule 403—identical to FRE 403—in barring defense cross-examination of a prosecution witness about the witness's possible bias based on the State's dismissal of his public drunkenness charge. Although the Supreme Court held that the denial of cross-examination on that issue was improper as violative of the sixth amendment right to confrontation, it held that the error was harmless beyond a reasonable doubt. Two years later, in *Olden v. Kentucky*, 488 U.S. 227 (1988), in a *per curiam* decision, the Supreme Court held that, where the man with whom the alleged victim of a rape was cohabiting saw her exit another man's car, the defendant, whose defense was consensual sex, had the constitutional right under the Sixth Amendment confrontation clause to question the alleged victim about her cohabitation with that man to show her motive in making the claim of rape. The Court further held that the Kentucky appellate court holding "that petitioner's right to effective cross-examination was outweighed by the danger that revealing [the alleged victim's] interracial relationship [with the man with whom she was cohabiting] would prejudice the jury against her" was a limitation "without reason." *Olden*, 488 U.S. at 232.

Van Arsdall and *Olden* show the tension between Rule 403 balancing and the confrontation rights of an accused. For a discussion of those decisions and their application in a habeas corpus decision of the Seventh Circuit, see *Rhodes v. Dittmann*, 903 F.3d 646 (7th Cir. 2018) (trial court erred in limiting, under Wisconsin's version of Rule 403, cross-examination of defendant's sister, who testified as a prosecution witness, on the prosecution's central theory that defendant killed the deceased because the deceased had severely beaten the witness the day before the murder, thus depriving defendant of his efforts to rebut the prosecution motive theory (based on prior and the most recent abuse of the witness) by providing a more complete story of the deceased's violent abuse of the witness).

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Alleged Victim. In a criminal case, and subject to the limitations imposed by section 115–7 of the Code of Criminal Procedure (725 ILCS 5/115–7), evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or battery case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115–7.3, 115–7.4, and 115–20 of the Code of Criminal Procedure (725 ILCS 5/115–7.3, 725 ILCS 5/115–7.4, and 725 ILCS 5/115–20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) In a criminal case in which the prosecution intends to offer evidence under subdivision (b), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Comment to Rule 404

Evidence of character or a trait of character of a person for the purpose of proving that the person acted in conformity therewith on a particular occasion is not admissible, except in a criminal case to the extent provided for under Rule 404(a)(1) (regarding the character of the accused), and under Rule 404(a)(2) (regarding the character of the alleged victim). Rule 404(b) renders inadmissible evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, but allows proof of other crimes, wrongs, or acts where they are relevant under statutes related to certain criminal offenses, as well as for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

COMMENTARY

Author's Commentary on Ill. R. Evid. 404 Generally

At the outset, note that IRE 404 (like FRE 404) addresses character evidence in two subdivisions, (a) and (b) — each of which first provides the general rule barring evidence designed to prove propensity, but then provides exceptions to that general rule.

IRE 404(a): General Rule Excluding Character Evidence

IRE 404(a) provides the general principle that character evidence (which, under IRE 405(a), is established by reputation or opinion) is not admissible to prove "action in conformity therewith on a particular occasion" (*i.e.*, proof of propensity). A good illustration of what the rule prohibits in not allowing character evidence to prove conforming action—and demonstrating that proof of both negative and positive character evidence is prohibited—is found in the early Illinois Supreme Court decision of *Holtzman v. Hoy*, 118 Ill. 534 (1886). The appeal in that case was from a judgment of $2,500 for the "alleged negligence and unskillfulness" of a surgeon in treating the plaintiff's leg for a serious and complicated fracture. The sole issue was whether the trial judge properly refused to permit one of the surgeon-defendant's witnesses to answer the question: "I will ask you what his [the surgeon's] reputation is in the community, and among the profession, as being an ordinarily skillful and learned physician?" In the archaic prose of the 19th century (with some highly quotable references about the often short-lived and good reputation even of quacks), the supreme court effectively held that the surgeon's reputation for being skillful and learned was not relevant.

"Careful Habits": Not Defensible As Character Evidence

See the *Author's Commentary on Ill. R. Evid. 406* regarding the special concurrence in *Powell v. Dean Foods*, 2013 IL App (1st) 082513-B, as to why "**careful habits**" is a relic of the past, should not be admitted in Illinois courts as character evidence, and is not admissible as habit evidence (and why IPI (Civil) 10.08 is improperly being used to instruct juries), because "careful habits" does not describe a regular response to a specific situation and, where such evidence is sought to be introduced as character evidence, IRE 404(a) expressly precludes admissibility. In short, such evidence should not be admitted as either habit evidence or character evidence. See also Marc D. Ginsberg, *An Evidentiary Oddity:"Careful Habit" – Does the*

Law of Evidence Embrace This Archaic/Modern Concept? 43 Ohio N. U. L. Rev. 293 (2017), discussing the origins of Illinois' careful habits and calling for its abolition.

IRE 404(a)'s Exceptions to Non-Admissibility

After providing the general principle of non-admissibility of character evidence, IRE 404(a) then provides three exceptions to that general principle, the first two of which apply only in criminal cases and are first exercisable only by the defendant (IRE 404(a)(1) and (2)), while the third applies in both civil and criminal cases (IRE 404(a)(3)). Each of the exceptions is explained below in the separate *Author's Commentaries on Ill. R. Evid. 404(a) (1), (2), and (3)*.

IRE 404(b): General Rule of Exclusion and Exceptions to the General Rule

IRE 404(b) provides the general principle that evidence of other crimes, wrongs, or acts (*i.e.*, evidence of specific instances of conduct) is not admissible "to prove the character of a person in order to show action in conformity therewith" (*i.e.*, propensity), but then it provides Illinois statutory exceptions that permit evidence to show propensity, and (as in the federal rule) allows well established common-law exceptions that are admissible for purposes other than to show propensity—*i.e.*, for proof of the non-character purposes permitted by the rule (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

Thus, both subdivisions of IRE 404 generally prohibit evidence for propensity purposes, but IRE 404(a) allows character evidence for such purposes in some specified circumstances, while IRE 404(b) allows evidence of specific instances of "crimes, wrongs, or acts" offered for propensity purposes as allowed by specific statutes, as well as those offered not for propensity purposes but for the specific non-character purposes allowed by the rule.

Author's Commentary on Ill. R. Evid. 404(a)(1)

The first part of IRE 404(a)(1), which allows evidence of a pertinent trait of character offered by a defendant in a criminal case, or by the prosecution to rebut such evidence, is identical to FRE 404(a)(1) before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See People v. Lewis*, 25 Ill. 2d 442 (1962) (whether or not he testifies at trial, defendant may offer proof as to a pertinent trait of his character); *People v. Holt*, 398 Ill. 606 (1948) (where defendant offers evidence of his character trait, the State may offer evidence regarding the same character trait on rebuttal).

The second part of pre-amended FRE 404(a)(1) (now embodied in FRE 404(a)(2)(B)(ii) through amendment effective December 1, 2011), was not adopted because there is no Illinois authority that permits prosecution evidence to rebut a defendant-offered character trait of the victim by admitting evidence concerning the same trait of character of the defendant. Like FRE 404(a)(2)(B)(i), the Illinois rule allows the prosecution to rebut the defendant's evidence of a pertinent trait of character of the alleged victim but, in contrast to FRE 404(a)(2)(B)(ii), does not allow it to do so by offering the same character trait of the defendant.

Decisions Applying IRE 404(a)(1)

IRE 404(a)(1) and cases interpreting it demonstrate both the similarity of and the difference from the federal rule described above. See *People v. Devine*, 199 Ill. App. 3d 1032 (1990) (holding the State may introduce evidence of a defendant's violent nature "only if the defendant first opens the door by introducing evidence of good character to show that he is a quiet and peaceful person"); and *People v. Harris*, 224 Ill. App. 3d 649 (1992) (holding that defendant's prior convictions for crimes of violence may be introduced "only when the defendant clearly puts his character in issue by introducing evidence of his good character to show that he is a peaceful person").

See, in contrast, *People v. Cervantes*, 2014 IL App (3d) 120745, where the trial court allowed the State to admit into evidence certified copies of the defendant's three separate misdemeanor convictions for battery and two domestic battery offenses, to counterbalance the defendant's evidence that the victim in this murder prosecution had a history of making threats of violence, and therefore may have been the initial aggressor. Citing *Harris*, the majority of a panel of the appellate court held that the evidence of the defendant's convictions was improperly admitted because the defendant had not put

his character in issue. The dissent contended that *Devine* and *Harris* were wrongly decided and, citing what is now **FRE** 404(a)(2)(B)(ii) (which, as pointed out above, has not been codified in the Illinois rule), contended that "when a defendant raises self-defense and introduces evidence of the victim's violent or aggressive character, the prosecution should be able to introduce evidence of the defendant's violent or aggressive nature." Again, the view of the dissenting judge as to what *should* be allowed is not the rule in Illinois.

Specific Instances of Defendant's Conduct to Rebut Defendant-Presented Character Evidence Prohibited

IRE 404(a)(1) does not permit the State to rebut defendant-presented character evidence of the defendant's own character through proof of specific instances of the defendant's conduct. That prohibition is consistent with Illinois cases that specifically prohibit such rebuttal evidence, and differs from **FRE** 405(a)'s allowance of cross-examination of the character witness on "relevant specific instances of the person's conduct." In Illinois, the prosecution's rebuttal of defense-presented character evidence of the defendant's own character must be based on relevant character evidence which, as provided by IRE 405(a), "may be made by testimony as to reputation, or by testimony in the form of an opinion."

See, for example, *People v. Hermens*, 5 Ill. 2d 277, 287 (1955) (noteworthy for its humorous account of the drunken exploits of the defendant and two codefendants in stealing nine pigs, and quoting *People v. Page*, 365 Ill. 524 (1937), that "neither on cross-examination nor in rebuttal of proof of good character can particular acts of misconduct be shown," in reversing the defendant's conviction and holding that "eliciting from the character witnesses such statements [about the defendant] as 'I heard he done some dishonest acts' and 'He's been in trouble before but I don't know what for' were highly prejudicial and may have influenced the jury in reaching their verdict of guilty"). See also *People v. West*, 246 Ill. App. 3d 1070 (1993) (reversing defendant's conviction for murder, in holding that questions on cross-examination of defendant's girl friend about defendant's committing battery on her on one occasion and threatening her with a gun on another were improper).

Author's Commentary on Ill. R. Evid. 404(a)(2)

IRE 404(a)(2) is identical to FRE 404(a)(2) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for two minor differences, the first of which ((1) below) is not a substantive difference:

(1) The statute referred to in IRE 404(a)(2)—section 115-7 of the Code of Criminal Procedure of 1963 (which is provided at **Appendix E**)—is commonly referred to as the "rape shield law." It prohibits evidence of the prior sexual conduct or the reputation of the alleged victim or corroborating (*i.e.*, "propensity") witness, in specified sexual offenses and in other specified offenses involving sexual conduct. Though **FRE 412**, which provides the federal rape shield law, does not refer to a statute, that federal rule limits the defendant's evidence in similar fashion. (For more information on the Illinois statute, see the *Author's Commentary on Ill. R. Evid. 412 infra*.) Thus, in a criminal case, both the Illinois and the federal version of Rule 404(a)(2) allow the defendant to admit character evidence of an alleged victim—a victim of a homicide under the federal rule; a victim of a homicide or a battery under the Illinois rule—but they prohibit the defendant from presenting evidence that violates the rape shield law as provided by FRE 412 for federal cases and as provided by section 115-7 of the Code of Criminal Procedure for Illinois cases (as well as by IRE 412, through its reference to section 115-7).

(2) The second difference codifies Illinois law by adding "battery" to the Illinois rule. Thus, that offense, which is not included in the federal rule, provides a basis in addition to the offense of homicide for triggering character-trait evidence to establish that the alleged victim was the first aggressor. Note that Illinois does not require the defendant to be aware of an alleged victim's violent character at the time of the alleged offense.

See People v. Lynch, 104 Ill. 2d 194 (1984). Note, too, that IRE 405(b)(2) allows evidence of specific instances of the alleged victim's prior violent conduct in criminal homicide or battery cases under the same circumstances specified in IRE 404(a)(2). Thus, when the prerequisites of both IRE 404(a)(2) and IRE 405(b)(2) are met in cases involving homicide or battery offenses, both evidence of the alleged victim's character for peacefulness and evidence of the alleged victim's specific instances of conduct are admissible.

Decisions Applying IRE 404(a)(2)

For a discussion of the application of IRE 404(a)(2) and IRE 405(b)(2), see *People v. Yeoman*, 2016 IL App (3d) 140324, ¶¶ 28-29 (discussing effect of the two rules where defendant is aware of the prior conduct of the alleged victim (for its effect on defendant's state of mind) or where defendant is unaware of the alleged victim's prior conduct (to bolster defendant's claim that the alleged victim was the initial aggressor where the evidence related to self-defense is conflicting)). See also *People v. Gibbs*, 2016 IL App (1st) 140785, ¶¶ 33-34 (holding that trial court did not abuse its discretion in allowing stipulation to 14-year-old conviction of complaining witness for domestic violence, while not allowing cross-examination concerning details that led to conviction: "Nowhere does *Lynch* require that the court must allow live testimony on the issue of a victim's prior conviction. Rather, it is only where the evidence of a victim's violent character is based on arrests or altercations for which there was no conviction that live testimony is required."); *People v. Morgan*, 197 Ill. 2d 404 (2001) (holding no error in trial court's excluding proffered evidence concerning the abuse inflicted on defendant's mother by her parents during her childhood many years before where defendant sought admission, under *Lynch*, of evidence corroborative of his similar abuse by his grandparents for the purpose of justifying killing them in self-defense, where the evidence was too remote and defendant had no knowledge of his mother's prior abuse); *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 49 (relying on *Morgan*, in holding that "remoteness in time is a valid consideration in determining whether it is reasonable for the trial court to allow the admission of evidence pursuant to *Lynch*").

In *People v. Evans*, 2018 IL App (4th) 160686, where defendant was convicted by a jury of aggravated domestic battery and domestic battery and where defendant alleged self-defense, the appellate court held that the trial court had properly ruled inadmissible the post-offense conduct of defendant's female victim. The excluded post-offense evidence involved the victim's having been charged for damaging defendant's siding and vehicle and phone video showing the victim pouring liquid on defendant and setting fire to his beard with a cigarette. The appellate court reasoned that, though the victim's aggressive and violent character may support a self-defense claim by showing that defendant's knowledge of the victim's aggressive and violent character affected his perception of the victim's actions and his reactions to those actions, "information unknown to a defendant at the time of the incident could not have impacted the defendant's perceptions of the victim's actions." *Evans*, at ¶ 30. As for the holding in *Lynch* that a victim's "aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it" (*id.*, citing *Lynch*, 104 Ill. 2d at 200), the appellate court noted that defendant had relied upon IRE 404(a)(2) in seeking admission of the evidence (and not that the victim was biased or had some unknown motive for testifying against him), and it held that "*Lynch* does not stand for the proposition a victim's actions after the day of the charged offense should be admissible to show whether the victim was the aggressor at the time of the charged offense." *Id.*

Related to the prosecution's right to rebut character evidence of a victim, see *People v. Knox*, 94 Ill. App. 2d 36 (1968) (defendant's attack on the character of the victim of a murder offense, through the cross-examination of two State witnesses, allowed the State to provide evidence of the victim's good reputation during the State's case-in-chief).

People v. Hamilton, 2019 IL App (1st) 170019, is noteworthy on the issue of the defendant's state of mind, although it is not directly related to IRE 404(a)(2) and though the appellate court stated that "*Lynch* is irrelevant" (*id.* at ¶ 34). In that case,

the appellate court, with one judge dissenting, reversed the defendant's conviction for first degree murder based on defense counsel's providing ineffective assistance of counsel by failing to properly argue for the admission of evidence by the defendant's girlfriend that, although no gun was found on the victim, the victim carried a gun and that the defendant knew that the victim carried a gun—evidence that the majority reasoned would have supported his theory of self defense. Holding that "the testimony at issue was relevant for the limited and nuanced purpose of representing the defendant's *state of mind* at the time he shot [the victim]" (*id.* at ¶ 35 (emphasis in original)), the court criticized defense counsel for not having made offers of proof regarding the proffered testimony and for not arguing that the evidence was relevant to corroborate defendant's belief and state of mind in the need for self-defense.

Author's Commentary on Ill. R. Evid. 404(a)(3)

IRE 404(a)(3), which applies in both civil and criminal cases, is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. Its provisions are summarized in item number (3) under the next heading at the end of this commentary, which summarizes all three of IRE 404(a) subdivisions.

Summary of IRE 404(a)(1), (2), and (3)

In sum, the specified exceptions to the general rule of non-admissibility of character evidence, which is provided by the three subdivisions of IRE 404(a) mean that:

(1) *in a criminal case*, under **IRE 404(a)(1)**, a pertinent character trait of the defendant, *offered by the defendant*, is admissible as evidence that the defendant may have acted in conformity with that character trait, and evidence offered by the prosecution to rebut such evidence also is admissible;

(2) *in a criminal case*—subject to the limitations placed on such evidence by the rape shield law—under **IRE 404(a)(2)**, a pertinent character trait of the alleged victim, *offered by the defendant*, is admissible as evidence that the alleged victim may have acted in conformity with that character trait, and evidence by the prosecution to rebut such evidence also is admissible; and

(3) *in both civil and criminal cases*, under **IRE 404(a)(3)**, character evidence is admissible under IRE 607 (for impeachment purposes), IRE 608 (character evidence of untruthfulness of a witness, or of truthfulness to rebut such evidence), and IRE 609 (evidence of a prior conviction of a witness to attack the witness's credibility).

Author's Commentary on Fed. R. Evid. 404(b)

December 1, 2020 Amendments to FRE 404(b)

FRE 404(b) was amended effective December 1, 2020. In the words of the commentary accompanying the amended rule, "Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings."

The "clarifications" provided in the text and headings of the amended rule are not substantive. But the amendment of FRE 404(b)(2) and the deletion of what was that rule's subdivisions (A) and (B), and their replacement with what is now FRE 404(b)(3) and its subdivisions (A), (B), and (C) do represent substantive changes.

The amendments end the previous burden placed on a defendant in a criminal case to request notice of the prosecution's intent to offer evidence at trial of a crime, wrong, or other act—as permitted by FRE 404(b)(2)—to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Under newly added FRE 404(b)(3) and its added subdivisions (A), (B), and (C), the burden is now placed on the prosecution to provide notice of its intent to offer evidence of a crime, wrong, or other act previously permitted by common law.

In sum, the amended rules require the prosecution to inform the defendant of its intent to offer the evidence without a request by the defendant, to do so pretrial within a reasonable time "so that the defendant has a fair opportunity to meet it," and to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."

Note that, consistent with a relevant Illinois statute, IRE 404(c) provides for similar notice from the prosecution as is now provided by the federal rule.

Differences in Federal and Illinois Rule 404(b)

As the last two headings under this commentary and the next commentary on IRE 404(b) make clear, to fully appreciate the following discussion of FRE 404(b), the difference between the two 404(b) rules must be emphasized. The federal rule does not permit evidence of other crimes, wrongs, or acts to prove propensity, as does the Illinois rule through its cited statutory provisions. The federal rule permits evidence of other crimes, wrongs, or acts, not to establish character or for propensity purposes, but to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident—all well established common-law principles and all of which also are permitted by the Illinois rule. But note the admonition provided by the Seventh Circuit in *United States v. Lowe*, 2F.4th 652 (7th Cir. 2021):

> "Of course, 'Rule 404(b)(2)'s list is 'not exhaustive.'" *United States v. Torres-Chavez*, 744 F.3d 988, 991 (7th Cir. 2014) (quoting *United States v. Taylor*, 522 F.3d 731, 735 (7th Cir. 2008)). For example, we have held that evidence of a defendant's involvement in 'a home invasion and shooting earlier that night' can be admissible to prove that the defendant unlawfully possessed a firearm later that night. *United States v. Canady*, 578 F.3d 665, 677 (7th Cir. 2009)." *Lowe*, 2F.4 at 656.

***U.S. v. Gomez*: a New Framework for Admissibility of "Other-Act Evidence"**

In *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014), the Seventh Circuit Court of Appeals, sitting *en banc*, replaced the four-part test it had previously employed for admitting other-act evidence, in favor of "an approach that more closely tracks the Federal Rules of Evidence." *Gomez*, 763 F.3d at 850. The court offered the following summary of the new framework:

> "In sum, to overcome an opponent's objection to the introduction of other-act evidence, the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way. See FED. R. EVID. 401, 402, 404(b). Other-act evidence need not be excluded whenever a propensity inference can be drawn. But its relevance to 'another purpose' must be established through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case. If the proponent can make this initial showing, the district court must in every case assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair prejudice and may exclude the evidence under Rule 403 if the risk is too great. The court's Rule 403 balancing should take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case." *Id.* at 860.

Under *Gomez*'s framework, then, a two-step process is applied when the party-opponent objects to the admission of a crime, wrong, or other act: (1) the proponent of the evidence must first establish that the evidence should be admitted not to prove character but for a relevant purpose permitted by FRE 404(b)(2) (*i.e.*, relevant under Rules 401 and 402 to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident), and (2) the trial court must determine that Rule 403's requirement that the evidence's probative value is not substantially outweighed by unfair prejudice.

In *Gomez*, in applying the new framework, the entire *en banc* court found that, because there was no issue concerning

intent in this general intent crime and the defendant did not contest intent, the trial court erred in admitting evidence of a small quantity of cocaine found in the defendant's pants pocket in his bedroom in this trial for conspiracy to distribute cocaine, but a majority of the court found the error to be harmless. In a later case, *United States v. Stacy*, 769 F.3d 969 (7th Cir. 2014), the court applied the new framework in finding that evidence of the defendant's prior possession of methamphetamine was improper to prove his intent to use pseudoephedrine to make methamphetamine, but in this case too, the court found the error to be harmless.

For other examples of the application of *Gomez*, see:

- *United States v. Morgan*, 929 F.3d 411 (7th Cir. 2019) (where defendant conceded possession of methamphetamine but denied intent to distribute, it was proper to admit testimony of three Rule 404(b) witnesses to establish defendant's intent to distribute; and noteworthy for stressing the need for the trial court not to vaguely instruct the jury not to consider the 404(b) evidence for "other purposes," but rather to explicitly instruct the jury that defendant's past acts are not to create an inference that the defendant is a person whose past acts suggest a willingness or propensity to commit crimes).
- *United States v. Norweathers*, 895 F.3d 485 (7th Cir. 2018) (in prosecution for transporting and possessing child pornography, court approved admission of evidence of uncharged email exchange between defendant and another individual about drugging and having sex with young boys for purposes of proving identity, intent, and motive where defendant contended pretrial that another person had briefly logged into his email account).
- *United States v. Thomas*, 897 F.3d 807 (7th Cir. 2018) (recognizing as understandable witness's unsolicited and potentially prejudicial answers to questions posed by prosecutor—answers regarding three uncharged allegedly criminal acts by defendant—given prosecutor's pretrial disclosure concerning her inability to control witness, and finding no error and holding that the trial court was under no duty to provide an unsolicited curative instruction to the jury, under the holding in *Gomez*, which expressed "caution against judicial freelancing in this area because *sua sponte* limiting instructions ... may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction." *Thomas*, 897 F.3d at 813, citing *Gomez*, 763 F.3d at 869 (internal quotation marks omitted)).
- *United States v. Brewer*, 915 F. 3d 408 (7th Cir. 2019) (in a bank-robbery conviction that occurred in Indiana, affirming admission of evidence of unindicted robberies in Ohio and California, over defendant's contention about dissimilarities among the robberies, pointing out that *modus operandi* means "a 'distinctive'—not identical—'method of operation.'" *Brewer*, 915 F. 3d at 416).
- *United States v. Thomas*, 986 F.3d 723 (7th Cir. 2021) (in this jury trial for mail fraud based on defendant's using the mail to collect four checks in insurance money totaling $426,227.31 for a fire to a mobile home owned by him, applying *Gomez* and holding that evidence of insurance money paid to defendant for four other fires in homes owned by him, or in which he had an interest, as well as two other houses burned as a diversion, was properly admitted as direct evidence of defendant's scheme to defraud and not "other acts" under Rule 404(b), and holding further that evidence of an earlier fire that was too far removed in time to be part of the scheme was properly admitted as evidence of defendant's *modus operandi*).
- *United States v. Lowe*, 2 F.4th 652 (7th Cir. 2021) (noting prior Seventh Circuit concerns about using other-acts evidence merely to "complete the story" or to show "background" or "the course of investigation," compiling the evidence linking a handgun found in a dumpster to the defendant in holding that evidence of shots fired in the area where the

defendant was, just moments after the shots were fired, was properly admitted, reasoning, "In short, while 'complete-the-story evidence' is suspect, relevant other-act evidence generally may be admitted under Rule 404(b) 'when its admission is supported by some propensity-free chain of reasoning.' *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (citing, among other cases, *United States v. Lee*, 724 F.3d 968, 978 (7th Cir. 2013)). 'This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established *only* through the forbidden propensity inference.' *Id.*" *Lowe*, 2 F.4th at 656 (emphasis is the court's).

- *United States v. Jarigese*, 999 F.3d 464, (7th Cir. 2021) (in this prosecution for wire fraud and bribery involving defendant's bribery of the mayor of Markham, it was proper to admit evidence that the mayor accepted bribes from other persons who were not on trial, because the evidence of the other bribes were not "other bad acts" under FRE 404(b), but rather they were directly relevant to proving the charged scheme that the mayor, defendant, and the others were engaged in a scheme to defraud the City of Markham of money through the mayor's soliciting and the others paying bribes in exchange for contracts with Markham, where the same scheme to conceal payments to the mayor in providing money to companies he controlled and which did nothing to earn the payments were involved, just as applied in a conspiracy case).
- *United States v. Edwards*, 26 F.4th 449 (7th Cir. 2022) (applying *Gomez* and numerous other Seventh Circuit opinions, in holding, subject to a limiting instruction, that admitting evidence of the robbery of two other cellphone stores where a firearm was brandished—offenses to which the defendant pleaded guilty, but denied that he had brandished a firearm in one of them—was proper to show *modus operandi* in the jury-trial prosecution of a third-cellphone-store robbery, in order to prove both the defendant's identity and that he had brandished a firearm in one of the other offenses, where the defendant had denied both his involvement and the brandishing of a firearm in one of those offenses).

Examples of Decisions Before *Gomez*

For an example of a case applying the test for FRE 404(b) (again, not for propensity purposes, but for the common-law purposes allowed by the rule) before the *en banc Gomez* decision, see *United States v. Howard*, 692 F.3d 697 (7th Cir. 2012), where, in reviewing a criminal conviction, the Seventh Circuit affirmed the admissibility of the defendant's numerous prior bad acts. In doing so, the court held that admissibility of the prior acts was established by applying a four-part test:

> "(1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Howard*, 692 F.3d. at 703.

The court held that the first prong of the test was satisfied in this case because the prior bad acts provided evidence of motive, intent, plan, and preparation. Moreover, the court held, the acts were similar to and close enough in time to be relevant, the evidence of their commission was sufficient to establish that the defendant had committed them, and the Rule 403 balancing test was satisfied, especially in light of the trial court's numerous limiting instructions to the jury.

In *United States v. Chapman*, 692 F.3d 822 (7th Cir. 2012), another case that preceded the new framework provided by *Gomez*, the Seventh Circuit applied the same four-part test in upholding, under FRE 404(b), the admission of evidence of the defendant's 2004 forgery conviction in a prosecution for forgery offenses that occurred approximately two years after that

2004 conviction. Holding that the prior conviction "shed light on the questions of intent and lack of mistake" (*Chapman*, 692 F.3d at 827), the court rejected the defendant's contention that the conviction was improperly admitted to prove propensity by suggesting to the jury "once a forger, always a forger." *Id.* at 826-27. The court also held that the other prongs of the test had been satisfied.

In *United States v. Perkins*, 548 F.3d 510 (7th Cir. 2008), where the defendant was tried for possession with intent to distribute crack cocaine, the Seventh Circuit upheld the admission of the defendant's two prior convictions for unlawful possession of cocaine and one conviction for unlawful delivery of cocaine. Applying the four standards that applied before the *Gomez* decision, the court held that the evidence of the defendant's convictions were probative of his "knowledge of cocaine and crack cocaine, and were not intended to show a propensity to commit the crimes charged." *Id.* at 514. Noting that the defendant denied that the cocaine found in his residence was his, the court concluded that he impliedly denied his intent to distribute the drug and, because he was charged with a specific intent crime, his three convictions established his "knowledge of the respective value of even small quantities of cocaine, which is evidence of his intent to distribute." *Id.* Citing *United States v. Puckett*, 405 F.3d. 589 (7th Cir. 2005), where the court also concluded that a prior conviction for distribution of crack cocaine was admissible where the charged act involved distribution of cocaine, and *United States v. Hernandez*, 84 F.3d 931 (7th Cir. 1996), where the court held that "a prior conviction for possession of marijuana was 'similar enough' for Rule 404(b) purposes to charged crimes of distributing cocaine and heroin, even though different drugs were involved" (*id.* at 515), the court held that the defendant's three prior convictions were substantially similar to the charged offense.

Other Noteworthy Decisions

In *United States v. Taylor*, 701 F. 3d 1166 (7th Cir. 2012), two guns possessed and abandoned by uncharged men, who were arrested in connection with shootings committed by the defendant, were admitted into evidence. The Seventh Circuit rejected the defendant's argument based on the other-crimes prohibition of FRE 404(b), pointing out that "[t]he language of Rule 404(b) does not apply to crimes, wrongs, or acts of another person." *Taylor*, 701 F.3d at 1172.

United States v. Turner, 709 F.3d 1187 (7th Cir. 2013), presents an example of a reversal of drug-related convictions based upon the improper admission of prior-crime evidence under FRE 404(b). In that case, the defendant was convicted of possession of cocaine with intent to distribute and possession of a firearm in furtherance of that offense. The convictions were based on evidence recovered through the 2008 execution of a search warrant on a home. At trial, the defendant denied that the cocaine found in the home was his. He did not deny that the quantity and packaging of the cocaine established that it was intended for distribution. The defendant's conviction in 2000 for possession of cocaine with intent to distribute was admitted under FRE 404(b) for the purpose of proving intent. Concluding that the admitted other-crime evidence was not relevant to establish intent given the defendant's specific defense denying possession, the court reversed the convictions. Pointing out the limitations on the admission of other-crimes evidence under FRE 404(b), and the danger of a jury's interpreting such evidence as connected to propensity, the court admonished trial courts to apply fact-specific analysis to individual cases.

Distinguishing FRE 404(b) from IRE 404(b)

Unlike **IRE** 404(b), which permits propensity evidence under specified Illinois statutes, **FRE** 404(b) provides no exceptions that permit other-act evidence *for propensity purposes*. The decision in *United States v. Richards*, 719 F.3d 746 (7th Cir. 2013) illustrates the difference between the common-law exceptions permitted by the rule versus character evidence to prove propensity as allowed in some instances by the Illinois rule, which the federal rule does not permit. In *Richards*, the Seventh Circuit held that the defendant's prior bad acts were properly admitted for the permissible purpose of showing his knowledge that a bag in his possession contained narcotics, the defendant having denied knowledge of its contents. In closing arguments, however, the prosecutor improperly used the prior bad acts to argue the defendant's propensity to deal drugs—

resulting in the court's finding of prejudice and the reversal of the conviction and the remand of the case for a new trial.

Distinguishing FRE 404(b) from FRE 413 and FRE 608(b)

The "crimes, wrongs, or other acts" of FRE 404(b) should be distinguished from those admissible under FRE 413 and FRE 608(b). Proof of bad acts under FRE 404(b) is admissible in federal cases only to show non-character purposes such as "motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident." Proof of similar crimes in sexual assault cases, however, is allowed for propensity purposes under FRE 413. Also, proof of bad acts under FRE 608(b) (under the label of "specific instances of conduct") are admissible pursuant to cross-examination in federal cases for the limited purpose of attacking a witness's character for untruthfulness.

Author's Commentary on Ill. R. Evid. 404(b)

Short Overview of IRE 404(b)

Like IRE 404(a), which prohibits character evidence to prove propensity but then offers exceptions to the rule, the first part of IRE 404(b) prohibits evidence of other crimes, wrongs, or acts to prove the character of a person to show propensity. Then, however, like FRE 404(b), it allows admissibility of common-law exceptions, not to prove propensity for crimes, wrongs, or acts, but for other purposes recognized by those articulated common-law exceptions. Then, unlike FRE 404(b), it also allows admissibility of evidence to prove propensity for crimes, wrongs, or acts based on three codified Illinois statutes. This commentary explains IRE 404(b)'s general rule and its common-law and statutory exceptions.

Differences and Similarities in the Illinois and the Federal Versions of Rule 404(b)

IRE 404(b) is similar to FRE 404(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011. But the Illinois rule differs from its federal counterpart by virtue of the Illinois rule's allowance of certain offenses through specific criminal statutes in the Code of Criminal Procedure of 1963—statutes that allow proof of other offenses "to show action in conformity therewith" (*i.e.*, propensity evidence). IRE 404(b)'s provisions may be summarized as follows:

> (1) consistent with common-law principles, the rule generally prohibits other-crime evidence designed to show propensity (*see e.g.*, *People v. Heard*, 187 Ill. 2d 36 (1999); *People v. Kliner*, 185 Ill. 2d 81 (1998); *People v. Illgen*, 145 Ill. 2d 353 (1991); *People v. Lindgren*, 79 Ill. 2d 129 (1980));
>
> (2) despite that general common-law prohibition, however, the rule abrogates the common law by exempting from the general rule of exclusion propensity evidence that is allowed for the offenses and under the procedures provided in the rule's specified statutes; and
>
> (3) consistent with common-law principles, the rule allows a range of other-crime evidence for non-character purposes (*i.e.*, for non-propensity purposes) such as those enumerated in the rule's second sentence.

Note that items (1) and (3) above apply to both the Illinois and the federal version of Rule 404(b). The difference between the two rules lies in item (2) above: in contrast to the federal rule, the Illinois rule allows admission of statutorily specified other-crimes evidence for propensity purposes. But note that FRE 413 also admits, for propensity purposes, offenses that are similar to the offenses IRE 404(b) allows to be admitted through the statutes it cites. So, though the two versions of Rule 404(b) differ, the end result is the same: both sets of rules admit similar evidence for propensity purposes, albeit the federal rule does so by applying a different rule, FRE 413.

Propensity Statutes Cited in IRE 404(b)

The statutes and subject matter of the three IRE 404(b) propensity sections cited in Chapter 725's Code of Criminal Procedure of 1963 are:

- **Section 115-7.3** (725 ILCS 5/115-7.3), which allows propensity evidence for listed sex or sex-related offenses and other enumerated offenses that

involve sexual penetration or sexual conduct (see **Appendix A**);

- **Section 115-7.4** (725 ILCS 5/115-7.4), which allows propensity evidence of domestic violence offenses in prosecutions for domestic violence offenses (see **Appendix B**); and
- **Section 115-20** (725 ILCS 5/115-20), which allows propensity evidence of prior convictions in prosecutions for the type of offenses it lists, "when the victim is the same person who was the victim of the previous offenses that resulted in conviction of the defendant" (see **Appendix C**).

As indicated, the three statutes are provided in the appendix to this guide. Section 115-7.3 is at **Appendix A**; section 115-7.4 is at **Appendix B**; and section 115-20 is at **Appendix C**. (These statutes parallel some of the subject matter and virtually all the procedures provided by FRE 413 and FRE 414. For more on the three statutes, in addition to their availability in the appendix, see the *Author's Commentary on Ill. R. Evid. 413* and the *Author's Commentary on an Illinois Statute that is a Counterpart to Fed. R. Evid. 414*.) Each of the statutes allows evidence of other specific instances of conduct of the defendant "and may be considered for its bearing on any matter to which it is relevant." All three statutes also allow expert opinion testimony, as well as reputation testimony when the opposing party has offered reputation testimony.

- **Applying Section 115-7.3 (725 ILCS 5/ 115-7.3)**

Following are samplings of appellate court opinions applying **section 115-7.3** (see **Appendix A**), in approving the propensity admission of evidence of prior and subsequent sexual offenses.

- *People v. Bedoya*, 2021 IL App (2d) 191127, ¶¶ 90-105, a prosecution for eight counts of predatory criminal sexual assault of a child (in response to the defendant's contentions concerning numerous factual dissimilarities (primarily about where the incidents occurred) between the testimony of the youthful victim concerning the charged offenses and the testimony of two other boys concerning uncharged offenses, and with heavy reliance on section 115-7.3 and *People v. Donoho*, 204 Ill. 2d 159 (2003), holding that the trial court had not abused its discretion in admitting the testimony of the other boys because "the evidence was sufficiently similar to the charged conduct and not overly prejudicial." *Id.* at ¶ 97).
- *People v. Nevilles*, 2021 IL App (1st) 191388, ¶¶ 76-83 (holding that defendant was not prejudiced by the joinder of defendant's separate sex offenses against two girls under the age of 18, since the statements of each victim would have been admitted in a separate trial of either victim to show motive, intent, knowledge, absence of mistake and modus operandi, as well as propensity under section 115-7.3, and that the trial judge did not abuse its discretion in allowing the admission of a witness's testimony about defendant's statements after the dates the offenses were committed and statements made by another witness that conflicted with relevant dates provided by one of the victims).
- *People v. Petrakis*, 2019 IL App (3d) 160399 (affirming admission of evidence of defendant's prior offenses of aggravated criminal sexual abuse, which is made admissible under section 115-7.3, insofar as those offenses related to the instant prosecution for the charged offense of aggravated criminal sexual abuse; accepting State's concession that evidence of defendant's prior offenses for prostitution was improperly admitted because that offense is not listed in section 115-7.3, but noting that IRE 404(b) provides exceptions to the general rule of inadmissibility, thus holding that the common-law exceptions provided by IRE 404(b) allowed the admission of defendant's prior offenses for prostitution to prove motive and intent related to the charged offenses of juvenile prostitution and promoting prostitution, especially given the trial court's instruction to the jury limiting consideration of the evidence of defendant's

prior acts on the issue of his intent, motive, design or knowledge; and holding further that, based on the overwhelming evidence of defendant's guilt of aggravated criminal sexual assault (the only offense on which defendant was convicted), even if the evidence of defendant's prior prostitution offenses was wrongly admitted, the error was harmless).

- *People v. Johnson*, 2014 IL App (2d) 121004 (in addition to upholding the admission of other sexual offenses for propensity purposes under section 115-7.3 and also to prove intent, finding no reversible error where the jury was also improperly instructed on motive, identity, and absence of mistake—despite finding that it was improper for the trial court to admit the other-crimes evidence for those purposes, where the defense was consent—citing *People v. Jones*, 156 Ill. 2d 225, 240 (1993) ("Other crimes evidence that is admissible for one reason is not affected by inadmissibility for another reason")).
- *People v. Williams*, 2013 IL App (1st) 112583 (affirming a conviction for aggravated criminal sexual assault and approving the admission of evidence of a prior aggravated sexual assault offense for propensity purposes, after weighing the probative value of the evidence of the prior offense against undue prejudice to the defendant as required by section 115-7.3(c) (725 ILCS 5/115-7.3(c)).
- *People v. Braddy*, 2015 IL App (5th) 130354 (in prosecution for sexual offenses committed by defendant against his 13-year old daughter and the 14-year old daughter of his live-in girlfriend, proper to admit evidence of sexual offenses committed by defendant beginning when he was 11-years-old against his then 8-year-old sister approximately 20 years before).

For an example of a decision holding that the admission of evidence offered under IRE 404(b) was improper, see *People v. Gregory*, 2016 IL App (2d) 140294 (holding that portions of letters written by defendant were minimally relevant for the purpose of proving identity, but that substantial parts were not relevant to prove any material fact relevant to the case and "because the evidence of unrelated offenses was so voluminous and inflammatory, there was a great risk that the jury would find defendant guilty of the charges in light of his propensity, or that it would find defendant guilty not of the charges but instead of one of the uncharged acts." (*Gregory*, at ¶ 26)).

See also *People v. Lamonica*, 2021 IL App (3d) 200136 (in reversing conviction for aggravated criminal sexual assault, criticizing the fact that the State created a mini trial for the prior bad acts in comparison to the evidence for the charged offense, where the State had failed to prove force or threat of force and failed to disprove defendant's defense of consent by the alleged victim; and further holding that the prior bad acts evidence was factually dissimilar to the charged conduct.) *Lamonica*, at ¶¶ 48-54.

- *People v. Watts*, 2022 IL App (4th) 210590, ¶¶ 37-60, involving jury convictions for criminal sexual assault and criminal sexual abuse (rejecting defendant's contentions that the evidence of propensity witnesses was not sufficiently similar to the offenses against the victim and that their testimony involved a "mini-trial," thereby rejecting the Second District holding in *Lamonica* (discussed just above) and following its own Fourth District holding in *Kelley* (a section 115-7.4 discussion under the following commentary heading), upholding the trial court's admission of the propensity evidence and holding that factual differences are not dispositive and that factual differences "did not greatly reduce the probative value of the evidence to show defendant had a propensity to commit sexual assault" (*Watts*, at ¶ 49) and that the acts against the three propensity witnesses "were highly probative and part of a clear pattern of sexual assaults by defendant" (*id.* at ¶ 59)).
- The takeaway from *Lamonica*, *Watts*, and *Kelley*: Conflicts exist between appellate districts on

whether differences in sexual assaults, under section 115-7.3, and similar violent treatment of a domestic partner and a non-domestic partner, under section 115-7.4, should result in the exclusion of evidence of propensity to commit sexual assault or domestic violence—conflicts likely to receive supreme court attention.

Applying Section 115-7.4 (725 ILCS 5/ 115-7.4)

Following are samplings of appellate court opinions applying **section 115-7.4** (see **Appendix B**), in approving the propensity admission of other evidence related to domestic violence.

- *People v. Kitch*, 2019 IL App (3d) 170522, ¶ 33 (noting that section 115-7.3(c)(1), as pointed out by the supreme court in *People v. Donoho*, 204 Ill. 2d 159, 183-84 (2003), does not provide a "bright line rule about when prior convictions are *per se* too old to be admitted," and holding it was proper to admit, for propensity purposes, defendant's prior offense that occurred 13 years before the charged offenses where defendant had spent nearly seven years of the 13-year period incarcerated and had been released from prison approximately six years before committing the present offenses (for other decisions addressing the time difference between offenses, see the discussion under the heading, *Time Between Prior Act and Offense on Trial* under the *Author's Commentary on Ill. R. Evid. 413, infra*)).
- *People v. Kelley*, 2019 IL App (4th) 160598 (in jury conviction for murder of a domestic partner whom defendant thought had stolen money from him, holding that the trial court had not abused its discretion in admitting propensity evidence of defendant's violence on another woman with whom he had sexual relations and whom he battered after she took money from him; and, though that propensity witness was not a domestic partner of the defendant and though there were numerous factual differences between the case on trial and the woman's testimony about other batterings, reasoning that, except where a theory such as *modus operandi* to prove identity is pursued, propensity evidence need not directly relate to the charged or predicate offense, because "factual differences are incidental and meaningless" to prove propensity to commit the charged offense, and the propensity witness's admitted evidence properly established that "defendant was possessive and controlling toward his girlfriends and that he tended to become violent toward them when they did anything that challenged his assumed right of possession and control." *Kelley*, at ¶¶ 105-107).
- *People v. Ross*, 2018 IL App (2d) 161079 (noting that sections 115-7.3 and 115-7.4 "are nearly identical, with section 115-7.3 addressing prior incidents of sexual abuse, and section 115-7.4 addressing prior incidents of domestic violence" (*id.* at note 4); citing decisions that hold that "the other-crimes evidence must bear merely 'general similarity' to the charged offense" (*id.* at ¶ 173); citing the supreme court decision in *People v. Donoho*, 204 Ill. 2d 159, 184-85 (2003), where the prior offense was 12-15 years earlier and other appellate court decisions where the offenses ranged from 6 to 20 years earlier, and thus holding that the time lapse of nearly five years in the case at bar did not affect admissibility of the prior offenses (*id.*); also holding that the trial court had not erred in admitting defendant's conviction for battery of the victim who was later murdered, based on his plea of guilty to that offense from the original charge of domestic battery, and the admission of evidence of defendant's battery against the same victim, even though the charge for that offense had been *nolle prossed* by the State (*id.* at ¶ 174)).
- *People v. Heller*, 2017 IL App (4th) 140658 (in jury prosecution for domestic violence, proper to admit recording of the victim, defendant's fiancée, as substantively admissible after she testified she

did not recall having made the statements; also proper to admit, under section 115-7.4 for propensity purposes, testimony of defendant's former wife who testified about similar earlier domestic violence, with court rejecting defendant's claim of undue focus on that other-crimes evidence).

- *People v. Nixon*, 2016 IL App (2d) 130514 (applying IRE 404(b) and section 115-7.4 in affirming trial court's admission of defendant's prior offense six-years earlier, where he shot the victim in a finger and a shoulder, in a jury trial for an offense involving shooting at the same victim's car, for both propensity purposes and for the non-propensity common-law bases provided by IRE 404(b));
- *People v. Jackson*, 2014 IL App (1st) 123258 (only general similarity of offenses is necessary, and prior offenses were proximate in time, one occurring about a year and a half before and the other five weeks before the charged offenses).
- *People v. Currie*, 2022 IL App (4th) 210598, ¶¶ 53-102 (in this State interlocutory appeal of a prosecution for domestic battery under section 115-7.4, holding that the trial court had erred in not allowing the State's motion *in limine* to prove defendant's propensity to commit acts of domestic violence through the introduction of three certified copies of conviction for three prior domestic battery convictions, specifically holding that certified copies of conviction alone are admissible evidence of defendant's propensity to commit acts of domestic violence).

Applying Section 115-20 (725 ILCS 5/ 115-20; See Appendix C)

In *People v. Chambers*, 2011 IL App (3d) 090949, where, in construing subdivision (d) of section 115-20, which requires the State's disclosure of evidence, "including statements of witnesses or a summary of the substance of any testimony," together with subdivision (e), which refers to proof by "specific instances of conduct," the appellate court held admissible not only a *conviction* for the prior offenses it lists, but also the *evidence* underlying the conviction.

In *People v. Chapman*, 2012 IL 111896, the supreme court held that it was proper to introduce evidence of a prior domestic battery *conviction* in a prosecution for first-degree murder, where the victim in both offenses was the same person. Later, in *People v. Ross*, 2018 IL App (2d) 161079, the appellate court held that *Chapman* did not address the issue before it, where in the case at bar the nonenumerated conviction of battery (where defendant was originally charged with domestic battery but convicted of battery) was admitted for a similar kind of offense (murder), whereas *Chapman* involved an earlier conviction for an enumerated offense (domestic battery) and a later prosecution for murder (one of the "types of offenses" to which section 115-20 applies). Nonetheless, the court held, "we need not resolve the issue, because the other-crimes evidence was admissible under the common law and section 115-7.4." *Ross*, at ¶175.

In *People v. Fields*, 2013 IL App (3d) 080829-C, where, in a prosecution for sex offenses, the appellate court found no impropriety in the admission, for propensity purposes under section 115-7.3, not only testimonial *evidence* about a prior sex offense involving a different victim, but also evidence of a *conviction* for that sex offense—although the court held that the subsequent reversal of the propensity conviction that had been admitted into evidence required the reversal and remand of the case at bar.

***People v. Dabbs*: Blueprint for Understanding IRE 404(b)**

The Illinois Supreme Court's decision in *People v. Dabbs*, 239 Ill. 2d 277 (2010), predated the effective date of Illinois' codified evidence rules by almost six weeks, but referred to the then-pending rules generally and to IRE 404(b) in particular. It succinctly summarized supreme court cases that have allowed admissibility of other-crime evidence for non-propensity purposes and, based on its findings that the statute respects traditional rules relevant to the admissibility of evidence and that it meets constitutional muster, it upheld the validity and applicability of section 115-7.4, which allows other-crime evidence for propensity purposes in domestic violence cases.

In *Dabbs*, the supreme court provided a succinct summary—together with citations to its relevant decisions—concerning the common-law principles embodied in IRE 404(b) related to the admission of other-crimes evidence for reasons other than propensity:

> "As a common law rule of evidence in Illinois, it is well settled that evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135-36 (2005). Such purposes include but are not limited to: motive (*People v. Moss*, 205 Ill. 2d 139, 156 (2001) (evidence that defendant previously sexually assaulted child properly admitted to show his motive for murder of child and her mother)), intent (*Wilson*, 214 Ill. 2d at 141 (evidence that teacher previously touched other students in similar manner properly admitted to show intent in prosecution for aggravated criminal sexual abuse of students)), identity (*People v. Robinson*, 167 Ill. 2d 53, 65 (1995) (evidence that defendant previously attacked other similar victims in similar manner properly admitted under theory of *modus operandi* to show identity of perpetrator in prosecution for armed robbery and armed violence)), and accident or absence of mistake (*Wilson*, 214 Ill. 2d at 141 (evidence that teacher previously touched other students in similar fashion properly admitted to show lack of mistake in prosecution for aggravated criminal sexual abuse of students))." *Dabbs*, 239 Ill. 2d at 283.

Three supreme court cases could be added to the supreme court cases listed in the above quote, all of which approved the admission of evidence, under common-law principles, that the same or a similar gun was used by the defendant in another offense in order to prove the defendant's identity as the offender in the case on trial: *People v. Coleman*, 158 Ill. 2d 319 (1994); *People v. Richardson*, 123 Ill. 2d 322 (1988); *People v. Taylor*, 101 Ill. 2d 508 (1984).

The central issue in the *Dabbs* case involved the validity of the propensity exception in section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4; see **Appendix B**). During his trial for the offense of domestic violence on his girlfriend, evidence was admitted, pursuant to the statute, of the defendant's domestic violence on his former wife. On review, the supreme court first noted that it had previously upheld the constitutionality of section 115-7.3 (involving evidence of similar offenses in sexual assault cases; see **Appendix A**) in *People v. Donoho*, 204 Ill. 2d 159 (2003). It then considered whether section 115-7.4 meets threshold requirements related to admissibility of evidence. It concluded that, not only does the statute not abrogate the principle that the decision regarding the admission of evidence is within the sound discretion of the trial court, it does not alter the principle that, to be admissible, evidence must be relevant, and it does not abrogate the need for the trial court to balance probative value with the risk of undue prejudice.

The court then upheld section 115-7.4's constitutionality, rejecting the defendant's due process claim, based on its conclusions that there is no constitutional prohibition against propensity evidence, that the common-law prohibition of propensity evidence is an evidence rule that is subject to exceptions, and that the relevant statute bore a rational relationship to a legitimate legislative purpose. The supreme court therefore held that the statute "permits the trial court to allow the admission of evidence of other crimes of domestic violence to establish the propensity of a defendant to commit a crime of domestic violence if the requirements of the statute and of other applicable rules of evidence are met." *Dabbs*, 239 Ill.2d at 295.

Supreme Court Pre-Codification Decisions Relevant to IRE 404(b)

In addition to the decisions provided by *Dabbs* in the quote above, a number of pre-codification supreme court decisions provide guidance in the application of IRE 404(b):

- *People v. Heard*, 187 Ill. 2d 36 (1999) (holding that evidence of three prior crimes revealed defendant's continuing hostility and animosity toward the murder victims and intent to harm them, and thus the evidence was properly admitted to

prove defendant's motive and intent to commit the murders).

- *People v. Kliner*, 185 Ill. 2d 81 (1998) (in a prosecution for murder, holding evidence that defendant had allegedly pistol-whipped a witness, who was his former girlfriend, was not relevant to establish any material question, and that introducing such evidence to show that defendant was a bad person who had a propensity to commit crime or to enhance the credibility of a witness was not proper).
- *People v. Placek*, 184 Ill. 2d 370 (1998) (holding that in a prosecution for delivery of a controlled substance, the State improperly presented evidence concerning the recovery of stolen property from defendant's barn and made references in opening statements and through evidence to defendant's dealing in stolen auto parts).
- *People v. Illgen*, 145 Ill. 2d 353 (1991) (citing other cases that provided non-propensity bases for admission of prior acts of violence, and holding that evidence that defendant physically abused and verbally threatened his wife throughout their marriage was properly admitted as probative of defendant's criminal intent by tending to negate the likelihood that the shooting that caused his wife's death was an accident and thereby tended to prove his intent, and also that the evidence was relevant to show their antagonistic relationship and thus tended to establish defendant's motive to kill his wife).
- *People v. Lindgren*, 79 Ill. 2d 129 (1980) (holding evidence of arson of defendant's ex-wife's home committed by defendant after defendant committed a murder should not have been admitted as part of a continuing narrative because it was a distinct crime undertaken for different reasons at a different place and at a separate time).

***People v. Potts*: Primer on Distinguishing Other-Crimes Evidence for Propensity and Non-Propensity Purposes in Jury Instructions**

People v. Potts, 2021 IL App (1st) 161219 ¶¶ 171-225, merits special attention for its in-depth discussion concerning jury instructions in a first-degree murder conviction. At trial, the circuit court admitted evidence of defendant's acts of domestic violence against two other women as evidence of his propensity to kill the female victim, as well as other various kinds of uncharged conduct to prove his motive for killing the victim and/or the victim's state of mind. Because the alleged errors in the jury instructions were not properly preserved for appeal, the appellate court applied plain error review of those alleged errors and of the alleged ineffective assistance of counsel based on counsel's failure to object to the relevant instruction.

On his contention concerning the jury instruction, defendant argued that the instruction improperly allowed and even instructed the jury to consider all other-crimes evidence as propensity evidence. The instruction the trial court provided to the jury was based on Illinois Jury Pattern Instructions, Criminal, No. 3.14 (4th ed. 2000) (IPI Criminal 4th No. 3.14). The modified instruction given to the jury read:

> "Evidence has been received that the defendant has been involved in offenses other than that charged in the indictment. This evidence has been received on the issues of the defendant's propensity, motive, and state of mind and may be considered by you only for those limited purposes."

Noting that the instruction "incorrectly implied that other-crime evidence was admitted as proof of *his* state of mind but not [the victim's] as well," because defendant did not seek relief on this basis on appeal, the appellate court did not address it. *Potts*, at ¶ 182. But addressing defendant's focus on the instruction's not delineating which other-crimes evidence the jury could properly consider for each of the listed purposes, the appellate court pointed out the "real dangers to the defense in 'delineating' the permissible use[s] of each item of other-crimes evidence in a jury instruction." *Id.* at ¶ 184. Such an instruction, the court reasoned, "would risk drawing undue attention to damaging evidence." *Id.*

Notwithstanding those considerations, the appellate court held that the instruction given the jury was improper, rejecting the State's contentions that the jury could sort out proper application for the various offenses and, as a consequence, also rejecting the State's reliance on *People v. Lopez*, 371 Ill. App. 3d 920, 940 (2007), where only the non-propensity purposes of intent, motive, or absence of mistake were listed. That holding, the court reasoned, is distinguishable from the case at bar, which invites propensity purposes even for offenses subject to non-propensity purposes. *Potts*, at 186-89.

Having found the jury instruction in this case improper, the appellate court considered options for properly instructing future juries, pointing out serious and likely defense concerns in their implementation (*id.* at ¶¶ 191-93), without settling on any specific modifications. Ultimately, the appellate court considered each of the other crimes-evidence (which it pointed out should be referred to as "other-offense evidence" and some of which should be referred to as "other-conduct evidence" or "bad conduct evidence"), and held that the erroneous instruction did not warrant reversal. *Id.* at ¶¶ 195-225. It also held that, though defense counsel had been ineffective in permitting an instruction that allowed a propensity inference to be drawn by the jury, neither *Strickland* error or plain error occurred. *Id.* at ¶¶ 218-19.

Later, in *People v. McDaniel*, 2021 IL App (2d) 190496, a prosecution for sex offenses against two minors, the State was allowed to admit evidence that defendant had previously committed similar uncharged offenses against a third minor. Concluding that defendant had raised an alibi defense and that the jury should therefore be instructed on both identification and propensity, the trial court provided the jury an instruction that read:

> "Evidence has been received that the defendant has been involved in conduct other than those charged in the indictment. This evidence has been received on the issues of defendant's identification and propensity to commit sex offenses against children and may be considered by you only for that purpose. It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of identification and propensity to commit sex offenses against children."

Though defendant objected to the propensity references in the State-provided instruction, he offered no alternative jury instruction. The trial court gave the tendered instruction, reasoning that "omitting a reference to propensity would not give the jury a full, accurate description of the law because it had allowed the other-crimes evidence on the issues of both identification and propensity." *McDaniel*, at ¶ 43.

Agreeing with the trial court and applying *Potts*, the appellate court reasoned that "had the jury instruction at issue here omitted the reference to propensity, the State would have been entitled to an instruction that the evidence could be considered for propensity." *Id.* at ¶ 65. The court thus distinguished the decision in *Potts* by holding that "when, as here, the same conduct is admitted for a limited purpose and also to prove a defendant's propensity, a trial court does not err by instructing the jury it may consider the evidence for both propensity and the limited purpose." *Id.* at ¶ 66.

McDaniel's holding is that the instruction given in that case properly covered the same conduct of the defendant both for a limited purpose and for the purpose of propensity. That holding does not diminish the takeaway from *Potts* that judges, prosecutors, and defense attorneys must be mindful that IPI Criminal 4th No. 3.14, without appropriate modification on how to address different conduct that is applied in different ways, may seriously mislead jurors. Care must be taken to ensure that jurors be properly informed of the correct application of other-offense and other-conduct evidence.

For another decision involving appropriate instructions for other-offense conduct, see *People v. Johnson*, 2021 IL App (1st) 190567, where a majority of an appellate court panel reversed a conviction for murder and use of a firearm in the course of murder because the trial court failed to give the jury a limiting instruction. The opinion focused on a recorded jail telephone call involving the defendant, a conversation which could be interpreted as an effort to make a witness to the murder unavailable. The majority held that the recorded phone con-

versation was properly admitted as evidence of the defendant's consciousness of guilt.

But the majority's focus was not on the propriety of the admitted evidence, but on the jury instruction that was given and the one that should have been given. The trial court instructed the jurors that "they could consider the phone call 'a statement relating to the offenses charged' and that '[i]t is for [the jury] to determine whether the Defendant made the statement and, if so, what weight should be given to the statement.'" *Id.* at ¶21 (bracketed words in the court's opinion). On appeal, both the defendant and the State agreed that the instruction was improper and that IPI Criminal 4th No. 3.14 should have been given. As modified to apply to the facts of the case, that instruction would have provided:

> "Evidence has been received that the defendant has been involved in an offense other than those charged in the indictment. This evidence has been received on the issue of the defendant's consciousness of guilt and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense and, if so, what weight should be given to this evidence on the issue of consciousness of guilt."

Reasoning that the instruction given to the jury was misleading, the majority of the appellate court panel held that the trial court's failure to provide the appropriate limiting instruction related to "consciousness of guilt," permitted the jurors to consider the statement of the defendant as evidence of propensity to commit crimes. Because the defendant had not properly preserved the issue for appeal, the majority applied plain error review and concluded that the second prong of the plain error doctrine "denied the defendant a substantial right and undermined the integrity of the judicial process." *Id.* at ¶ 30. It therefore reversed the defendant's convictions and remanded the case to the circuit court.

The dissenting justice agreed that the instruction given the jury was erroneous and that a modified IPI 3.14 instruction should have been given. But it contended that the defendant "cannot meet either prong of the plain-error test, since the evidence against him was not closely balanced and the error did not undermine the fundamental fairness of his trial," and therefore the second prong of the plain-error exception to the forfeiture doctrine should not have been applied. *Id.* at ¶35.

The takeaway from *Johnson*: Setting aside whether the majority correctly applied the second prong of the plain-error doctrine, as *Potts* teaches and as stated above, care must be taken to ensure that jurors be properly informed of the correct application of other-offense and other-conduct evidence.

People v. Hayden: Hearsay Issue Related to Admission of Victim Statements Where Offenses Were Improperly Not Severed

In *People v. Hayden*, 2018 IL App (4th) 160013, a jury found the defendant guilty of two counts of predatory criminal sexual assault of a child based on counts that alleged separate offenses at different times against two different young girls. Both the majority panel and the dissenting judge agreed that the trial court erred in not granting the defendant's motion to sever the two cases based on the misjoinder of charges. The majority and the dissent disagreed, however, on whether the failure to sever the charges resulted in prejudice to the defendant.

The majority held that the failure to grant a severance constituted reversible error because each victim's allegations were allowed to be corroborated by hearsay statements made about each offense by each victim—statements admitted under section 115-10 of the Code of Criminal Procedure of 1963. The majority acknowledged that section 115-7.3 of the Code allows evidence of similar offenses as propensity evidence, but reasoned that section 115-10, which allows corroborating hearsay evidence to bolster the testimony of the victim of an offense, does not allow such hearsay evidence to bolster the testimony of a propensity witness. Because such hearsay evidence by both victims was allowed to be admitted in this case, the majority held the defendant was prejudiced and reversed the convictions and remanded the case for further proceedings. The lengthy dissent disagreed with the majority's "restrictive interpretation" of section 115-10, and would have found that, since the defendant suffered no prejudice, the denial of the defendant's motion for severance constituted harmless error.

The takeaway from *Hayden*, in the absence of a different interpretation of section 115-10 or an amendment of that statute by the legislature, is that joinder of separate offenses is

not proper on the basis that section 115-10 hearsay principles apply for both joined and severed charges.

Principles Related to the Admission of Other-Crime Evidence under IRE 404(b) and under Other Statutes

Note that, in criminal cases, because of the combination of common law and statutory provisions, a review solely of the language of IRE 404(b) does not fully disclose that there are circumstances that allow (and sometimes mandate) proof of other crimes. The following evidence is specifically admissible (a) under the rule (bolstered by common law), or (b) separately admissible pursuant to the provisions of various statutes:

(1) As the rule makes clear (and as confirmed by the quote from the *Dabbs* decision provided *supra*), other-crimes evidence that is not presented to prove propensity, such as evidence presented "for other [non-character] purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," is admissible.

(2) Statutes, such as sections 115-7.3 and 115-7.4 of the Code of Criminal Procedure of 1963, allow admissibility of specific instances of conduct to prove propensity.

(3) A statute, such as section 115-20 of the Code of Criminal Procedure of 1963, allows admissibility of evidence of specified prior convictions in prosecutions for specified offenses to prove propensity.

(4) Statutes that require proof of a prior conviction for specified offenses as an element for proving a higher class of offense require that the conviction be disclosed to the trier of fact. (*See, e.g.*, *People v. Zimmerman*, 239 Ill. 2d 491 (2010) (evidence of a prior juvenile adjudication for an act that would have been a felony if committed by an adult was necessary to prove the element in prosecution for the offense of aggravated use of a firearm); *People v. Davis*, 405 Ill. App. 3d 585 (2010) (evidence of a prior conviction for one of the offenses specified by statute necessary to prove element in prosecution for offense of armed habitual criminal);

(5) A statute that provides for evidence of the commission of a crime (*See People v. Murray*, 2019 IL 123389, holding that section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act (740 ILCS 147/10) requires the State to provide *prima facie* evidence to prove a street gang's identity, which includes evidence of "2 or more gang-related criminal offenses committed in whole or in part within this State" and proof that "at least one offense involved the solicitation to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 1961 or the Criminal Code of 2012").

Application of Ordinary Principles of Relevancy

In addition to what is stated in items (1) to (5) above, there is a line of cases that allow admissibility of other crimes evidence under ordinary relevancy principles, without invoking the provisions of a rule such as IRE 404(b). Some of these cases distinguish between whether the evidence of the prior offense is *extrinsic* or *intrinsic* to the charged offense. If the evidence of a prior offense is deemed to be extrinsic to the offense that is the subject of the trial, it may not be admitted to demonstrate the defendant's propensity to commit the charged offense, but it may be admitted if it is relevant to establish some other material question, such as the common-law exceptions allowed under IRE 404(b). If, however, the evidence of a prior offense involves intrinsic acts (*i.e.*, evidence concerning a necessary preliminary to the offense that is the subject of the trial or a part of the course of conduct leading up to the offense charged—frequently referred to as "part of a continuing narrative"—then the evidence is admissible under ordinary relevancy principles.

Decisions on Ordinary Principles of Relevancy

Examples of a supreme court case and several appellate court cases that address ordinary relevancy principles include:

- *People v. Adkins*, 239 Ill. 2d 1 (2010) (explaining derivation of the "continuing-narrative exception," quoting *People v. Marose*, 10 Ill. 2d 340, 343 (1957) that evidence of other-crime "acts are all a part of the continuing narrative which concern

the circumstances attending the entire transaction and they do not concern separate, distinct and disconnected crimes," and holding that evidence of the defendant's commission of a burglary in the same building in which he burglarized another apartment, where he killed a woman, constituted a continuing narrative of the charged murder);

- *People v. Manuel*, 294 Ill. App. 3d 113 (1997) (evidence of prior drug sales by the defendant to the same police informant involved in the sale of drugs in the case on trial did not constitute other-crimes evidence unrelated to the charged offense, because the previous drug sales were precursors to the offense that was the subject of the trial and provided context);
- *People v. Morris*, 2013 IL App (1st) 111251, ¶¶ 109-113 (citing *Manuel* in holding that defendant's earlier threats against two other men were relevant in his prosecution for murdering the victim because the threats constituted a "continuing course of conduct" that led to the victim's murder, and demonstrated the "defendant's increased agitation and escalating hostility, the focus of which was [the victim's] refusal of defendant's demand to leave the house");
- *People v. Rutledge*, 409 Ill. App. 3d 22 (2011) (evidence of the intoxicated defendant's striking a woman who refused his sexual advances while seated in a parked car, before he struck an off-duty police officer to whom the woman ran, was "inextricably intertwined" with the offense against the officer, for it showed that the defendant was drunk and angry and thus tended to explain the events leading to the altercation with the officer);
- *People v. Hale*, 2012 IL App (1st) 103537 (shooting of a woman shortly before a shooting that resulted in death constituted part of a continuing narrative that justified admission of the earlier offense in the prosecution of the later first-degree murder offense);
- *People v. Morales*, 2011 IL App (1st) 101911 (evidence of persons being beaten in a factory parking lot by codefendants of the defendant, 19 days before the murder and robbery offenses that were the subject of the case on trial and that occurred in the same parking lot, was probative of the defendant's involvement in the offenses on trial, gave rise to a reasonable inference that the two events were connected, allowed the trial court discretion to conclude that the earlier offenses were a precursor to the offenses on trial, and provided an explanation of an aspect of the crime not otherwise understandable—whether or not the defendant had been present for the earlier offenses);
- *People v. Feliciano*, 2020 IL App (1st) 171142 (where the 94-year-old victim was discovered violently beaten and identified defendant as the person who beat him, relying on the supreme court's holding in *People v. Illgen*, 145 Ill. 2d 353 (1991), in holding that the trial court properly admitted testimony of a witness who earlier saw bruises on the victim and was told by the victim that defendant "had been beating him and taking his money" (*id.* ¶ 113), as well as the testimony of the woman's husband who confronted defendant about what the victim had said, which defendant did not deny, that evidence having served to dispute evidence presented by defendant).

In *People v. Rogers*, 2014 IL App (4th) 121088, the defendant was convicted of aggravated battery based on his punching a 15-year-old boy and breaking his nose. During the jury trial, the State presented evidence that, after the offense, the defendant placed the victim's hand in a vice, threatening to cut off his arm, and threatened to kill the victim and a 14-year-old witness. In approving the admission of this other-crimes evidence, the appellate court reasoned that the evidence was "admitted to show why the boys were afraid of defendant and did not report the incident" and that

> "[d]efendant's threat to kill the boys was an attempt to intimidate witnesses and avoid police detection. Such conduct indicates consciousness of guilt. See *People v. Gamboney*, 402 Ill. 74, 80, 83 N.E.2d 321, 325 (1948) (an attempt to suppress evidence or obstruct an investigation is relevant as evincing consciousness of guilt)." *Rogers*, at ¶ 21.

See *People v. Serritella*, 2022 IL App (1st) 200072, ¶¶84-100, for examples of situations for the admission of evidence where motive and identity are relevant.

People v. Carter, 2016 IL App (3d) 140196, does not refer to IRE 404(b), but is noteworthy for the divergent views expressed by the three justices concerning evidence of the other-crime of attempted escape—evidence admitted in the defendant's prosecution for the offense of aggravated battery with a firearm. In affirming the conviction, the authoring justice premised his approval of the admission of the evidence of the defendant's plans to escape from jail while awaiting trial on the longstanding proposition of Illinois law that evidence of the crime of attempted escape is admissible for the purpose of showing a defendant's consciousness of guilt. *Carter*, at ¶ 32. The special concurring justice agreed with that result based on the strength of precedence, but expressed grave reservations about the logic and inconsistencies connected with such evidence. Finally, the dissenting justice contended that "the excessive other-crimes evidence constitutes reversible error arising out of a trial within a trial." *Id.* at ¶ 63.

For examples of decisions where "continuing narrative" was rejected as a basis for the admission of other-crime evidence, see *People v, Jacobs*, 2016 IL App (1st) 133881 (holding that, where defendant was charged with possession of a stolen car and not charged with stealing the car or burglarizing the home from which the car and jewelry were stolen, another person having been charged with those offenses, those offenses were distinct and undertaken for different reasons at a different place at a separate time, and evidence that tended to show that defendant had committed them therefore was improperly admitted as evidence of a continuing narrative); and *People v. McGee*, 2015 IL App (1st) 122000 (holding that altercation between defendant and victim's husband did not constitute a continuing narrative of defendant's alleged stalking offense toward the victim "as the altercation was a 'distinct' event 'undertaken for different reasons' at a different time" (*id.* at ¶ 30)).

***People v. Pikes*: Explication of Ordinary Principles of Relevancy**

In *People v. Pikes*, 2013 IL 115171, the trial court admitted evidence that one Donegan, a codefendant and fellow gang member of the defendant, had fired shots at a member of a rival gang who rode a scooter through his gang's territory. Donegan in turn was struck by a car driven by another rival gang member who had followed the driver of the scooter. The defendant was not involved in these incidents, but the evidence summarized above was presented to the jury, as well as evidence that the next day Donegan and the defendant, seeking revenge, drove through the rival gang's territory, and Donegan killed a member of the rival gang in a drive-by shooting. On appeal from the defendant's conviction for first degree murder, the appellate court reversed the conviction based on its conclusion that evidence of the "scooter shooting," in which the defendant was a non-participant, was improperly admitted as "other crime" evidence, because there was no proof that the defendant was involved in or participated in that offense.

On further review, the Illinois Supreme Court reasoned that, where an uncharged crime or bad act is not committed by the defendant, there is no danger that the jury will convict the defendant because it believes he or she has a propensity to commit crimes. The court held that, because the defendant was not involved in the scooter shooting incident, evidence concerning that incident was indeed not "other crime" evidence under IRE 404(b), that there thus was no need to show that the defendant was a participant in the earlier offense for that evidence to be admitted, as is the case when Rule 404(b) applies, but that the evidence of the scooter shooting was admissible as relevant to show the defendant's motive for the drive-by shooting that resulted in the death of the rival gang member. The court summarized its holding as follows:

> "It is evident, therefore, that the concerns underlying the admission of other-crimes evidence are not present when the uncharged crime or bad act was not committed by the defendant. In such a case, there is no danger that the jury will convict

> the defendant because it believes he or she has a propensity to commit crimes. Thus, the threshold requirement to show that the defendant, and not someone else, committed the crime does not apply. The evidence was clear that defendant was not involved in the scooter shooting. Thus, the appellate court erred in holding that the evidence of that shooting was inadmissible on the ground that the State did not show that defendant committed or participated in that shooting. We therefore conclude that the evidence of the scooter shooting was not other-crimes evidence and the appellate court erred in analyzing it as such." *People v. Pikes*, 2013 IL 115171, ¶16.

Regarding the admissibility of the "scooter shooting," the supreme court commented on the line of cases summarized above and, in reversing the judgment of the appellate court on the basis of its conclusion that the evidence was relevant and thus admissible, said this:

> "Rather than sow confusion by analyzing the scooter shooting evidence under terms such as 'extrinsic' or 'intrinsic' or as 'inextricably intertwined' or as a 'continuing narrative,' we conclude that the admissibility of evidence of the scooter shooting incident in this case should be judged under ordinary principles of relevance." *Id.* at ¶20.

Appellate Court Decisions Applying *Pikes*

The appellate court's decision in *People v. Talbert*, 2018 IL App (1st) 160157, applied *Pikes* and considerations of relevancy in upholding the admission of prior bad acts directed at the victims by a person who was not the defendant, but who was linked by evidence as directing the defendant to commit the acts that led to first degree murder, attempted murder, and the aggravated discharge of a firearm. Applying considerations of relevancy, the court held that it was unnecessary to establish the defendant's knowledge of the bad acts of his cousin (drug sales, an arson threat, and a subsequent attempt arson), and that, though motive is not an element of the offense of murder, the admitted evidence was relevant to establish the motive alleged by the State. Moreover, the court held, "[t]he evidence had great probative value given that it explained an otherwise inexplicable shooting." *Talbert*, at ¶45.

In *People v. Daniels*, 2016 IL App (4th) 140131, the appellate court first rejected the arguments of the parties that were based on the evidence of acts performed without the involvement of the defendant constituting "other-crimes" evidence under IRE 404(b)—*i.e.*, crimes that the defendant committed or participated in, and which therefore raise questions about propensity. Heavily relying on *Pikes* and citing other appellate court decisions, the court reasoned instead that the evidence of an earlier dispute between two rap groups about a microphone and evidence of an earlier altercation, neither directly involving the defendant, were admissible as a continuing narrative that helped explain the events involved in the charged offenses.

People v. Clark, 2018 IL App (2d) 150608, illustrates *Pikes*' application of ordinary principles of relevance. In *Clark*, the sole issue on appeal was whether a real gun was used in the offense that resulted in the charge of armed robbery with a firearm. The defendant's co-offender, who had held the gun during the robbery and had pleaded guilty, testified as a State's witness that the gun he held was real. The State then introduced evidence of the co-offender's conviction for armed robbery committed with a real gun before the date of the offense on trial. In response to the defendant's challenge to the admission of that conviction, the appellate court first reasoned that the prior conviction of the co-offender was not to be analyzed as "other crimes" evidence under IRE 404(b), because he was not the defendant at trial. Citing *Pikes*, the court held that "its admissibility is to be judged under ordinary principles of relevance." *Clark*, at ¶25. The court then noted that neither the trial court nor the State had introduced the armed-robbery conviction to bolster the co-offender's credibility; rather, "the conviction was limited to the issue of whether the gun was real." *Id*. at ¶29. Concluding that "the prejudicial impact of the conviction did not substantially outweigh its probative value," the appellate court held that "the trial court did not abuse its discretion in admitting the armed-robbery conviction to show that the gun used in this case was real." *Id*. at ¶31.

Seventh Circuit's Acceptance of Mere Principles of Relevancy

It should be noted that the Seventh Circuit Court of Appeals is in accord with the supreme court's approach to the type of evidence the court found admissible in *Pikes*, and with its quotes provided above from that case. In *United States v. Gorman*, 613 F.3d 711 (7th Cir. 2010), the Seventh Circuit questioned application of the "inextricably intertwined" doctrine, noting that the circuit "has recently cast doubt on the continuing viability of the inextricable intertwinement doctrine, finding that '[b]ecause almost all evidence admitted under this doctrine is also admissible under Rule 404(b), there is often 'no need to spread the fog of 'inextricably intertwined' over [it].' *Conner*, 583 F.3d at 1019 (*quoting United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2008), *cert. denied*, [555] U.S. [878], 129 S. Ct. 190, 172 L. Ed. 2d 135 (2008))." *Gorman*, 613 F.3d at 718-19.

Indeed, in its subsequent decision in *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) the Seventh Circuit, sitting *en banc*, abandoned its prior approach to analyzing other-act evidence in favor of applying mere relevancy principles. For a discussion of the *Gomez* decision, see the *Author's Commentary on Fed. R. Evid. 404(b)*, *supra*.

***Pikes*'s Application to Offenses Participated in by Defendant**

It should further be noted that, though *Pikes* addressed a situation where the defendant was not a participant in the earlier offense, its message that admission of evidence of an earlier offense "should be judged under ordinary principles of relevance," applies equally to an earlier offense in which the defendant was an active participant. An illustration of that is the post-*Pikes* case of *People v. Hensley*, 2014 IL App (1st) 120802, where the appellate court approved the admission of evidence that, shortly before the first-degree murder and other offenses for which he was tried, the defendant fired shots and pointed a revolver at and threatened others—on the basis that the defendant's prior activity constituted a "continuing narrative" concerning the "course of conduct" that led to the murder and other offenses that followed. The *Hensley* court summarized the authority that led to its holding as follows:

> "Our supreme court 'has recognized that evidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime.' *People v. Pikes*, 2013 IL 115171, ¶ 20 (quoting *People v. Adkins*, 239 Ill. 2d 1, 33 (2010)). In such cases, ordinary relevancy principles apply and the rule related to other crimes is not implicated. [*People v.*] *Rutledge*, 409 Ill. App. 3d [22] at 25 [(2011)]. This court has described evidence properly admitted as a continuing narrative as where intrinsic acts are 'a necessary preliminary to the current offense,' and where 'the prior crime is part of the 'course of conduct' leading up to the crime charged.' *People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 24-25 (quoting *People v. Manuel*, 294 Ill. App. 3d 113, 124 (1997)). Uncharged crimes admitted as a continuing narrative 'do not constitute separate, distinct, and disconnected crimes.' *Pikes*, 2013 IL 115171, ¶ 20. Conversely, distinct crimes made for different reasons at different times and places will not be admitted as a continuing narrative. *Adkins*, 239 Ill. 2d at 33." *Hensley*, at ¶ 51.

Note that the decision in *People v. Lopez*, 2014 IL App (1st) 102938-B (*appeal denied*, No. 118017 (9/24/14)), contrasts with the cases discussed above, particularly the appellate court decision in *People v. Morales*, 2012 IL App (1st) 101911, and the supreme court decision in *Pikes*. During trial in the *Lopez* case, as in the *Morales* case which arose out of the same events, the State had been permitted to present evidence of beatings that occurred in a factory parking lot less than three weeks before the beating in the same parking lot that led to the killing of the victim and the murder charge. At both the earlier offenses and the offense that led to the murder charge, codefendants of Morales and Lopez were involved, but, although there was evidence that Lopez was near the parking lot before and after the prior offenses, there was no evidence that he participated in those offenses. There was evidence, however, that he was present for and participated with Morales and other codefendants in the events that resulted in the murder.

In its original review of the case, the *Lopez* court reversed the defendant's conviction for first degree murder based on its rejection of *Morales* and its reliance on the *Pikes* appellate court

decision. Thereafter, the supreme court directed the appellate court to vacate its judgment and reconsider its decision in light of the supreme court's *Pikes* decision. On remand from the supreme court, the *Lopez* court again reversed the murder conviction based upon its holding that evidence of the earlier offenses—the "other crime" evidence—had been admitted improperly. The court distinguished *Morales*, where there was some evidence that Morales was present for the earlier offenses (evidence provided by a witness who later in his testimony stated that he was unsure whether Morales was present), even though the *Morales* court had held that the evidence of the prior offenses was admissible whether or not Morales was present or participated in those offenses. And it distinguished the supreme court's *Pikes* decision based on the fact that, in that case, there was evidence that the defendant and the codefendant were seeking retaliation for the earlier event, whereas in the case at bar, the court held, there was no relevance established between the earlier offenses and the offense for which Lopez was tried.

Examples of the Application of the Rule's Common-Law Exceptions

In *People v. Brown-Engel*, 2018 IL App (3d) 160368, an appeal from a bench-trial conviction for the offense of attempted aggravated criminal sexual abuse, the appellate court concluded that, because the charged offense was not an enumerated offense in section 115-7.3 of the Code of Criminal Procedure and because that offense is distinct from the offense formerly referred to as indecent liberties with a child, it was improper to admit evidence of prior bad acts involving the defendant with the 13-year-old female victim for propensity purposes. But noting that "evidence admissible for one purpose is not affected by inadmissibility for another" (*id.* at ¶ 20), the court held that "the evidence was admissible to establish defendant's intent and absence of an innocent state of mind pursuant to Illinois Rule of Evidence 404." *Id.* In addition to providing the rationale for the admission of such evidence, the court held that the other bad acts testimony of the victim "fits squarely within the recognized exceptions [of Rule 404(b)], which allow such evidence to show defendant's intent or to show that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge." *Id.* at ¶ 22.

In *People v. Larke*, 2018 IL App (3d) 160253, the appellate court held that it was proper, in this jury trial involving possession of cocaine with intent to deliver, for the trial court to admit evidence of the defendant' prior conviction for possession of cannabis with intent to deliver. In reliance on the appellate court's prior decision in *People v. Watkins*, 2015 IL App (3d) 120882, the court held that, though the substances possessed by the defendant differed, the prior offense was relevant, not for propensity purposes, but to prove the defendant's intent to deliver in this case. See *Watkins*, at ¶¶ 45-47, for its citation to a number of decisions justifying its approval of the admission of the prior offense for the purpose of proving intent.

In *People v. Mujkovic*, 2022 IL App (1st) 200717, where defendant was convicted of first degree murder, evidence was admitted that previously, on the same day defendant fatally shot the victim, he fired a gun on two separate occasions. In one instance, he fired a gun that resulted in hitting a person, and later he fired a gun in the air. On appeal, defendant contended that the prior shootings were improperly admitted in evidence as violative of the general rule prohibiting propensity evidence. Relying on the fact that defendant claimed self-defense, the appellate court held that the gun-shooting evidence was properly admitted because it provided evidence on the issue of intent, which negated the claim of self-defense.

For an example of a proper application of proof of other-crime evidence to prove guilt for the offense that was the subject of trial, see *People v. Simmons,* 2016 IL App (1st) 131300 (holding that evidence that defendant shot a woman (other than the deceased victim in the case at bar) in the hand more than a month before the murder of the victim was properly admitted into evidence, because the bullet in the woman's hand matched the bullet in the brain of the deceased victim, thus serving to identify the defendant as the offender in the murder case; proof beyond a reasonable doubt was not required to prove the earlier offense, and deficiencies in the woman's testimony went to the weight of her testimony, not its admissibility).

For a case affirming a conviction for first degree murder and approving the admission of prior acts of domestic violence based solely on the basis of common-law principles (*i.e.*, not to

show propensity, but for the purpose of proving motive, intent, identity, lack of mistake, or *modus operandi*), see *People v. Null*, 2013 IL App (2d) 110189. *See also People v. Jaynes*, 2014 IL App (5th) 120048, ¶¶ 54-57 (in prosecution for possession of child pornography, evidence of stories of underage children having sex, placed on the defendant's computer hard drive after his wife and stepchildren had access to the computer, was admissible to lessen the probability that they had placed the pornographic images on his computer or on CDs placed in his house, and because it was relevant to show lack of mistake, lack of accident, and intent); *People v. Sims*, 2019 IL App (3d) 170417 (with one justice dissenting, approving evidence of the defendant's earlier possession of a .45-caliber handgun in the prosecution for the possession of a .38-caliber handgun by a felon, where the latter handgun was found in the defendant's car and not on his person and the prior possession was admitted for the limited purpose of the defendant's intent, knowledge, lack of mistake, and lack of accident).

In *People v. Mitchem*, 2019 IL App (1st) 162257, in a prosecution for aggravated kidnapping and aggravated vehicular hijacking, the appellate court held that evidence of the prior successful kidnapping for ransom, three months earlier, by the defendant and his codefendant against the same victim (previously undisclosed because the victim was a drug dealer) had been properly admitted for the purpose of establishing their motive for kidnapping the victim once again.

In *People v. Cerda*, 2021 IL App (1st) 171433, ¶¶ 95-123, a prosecution for a the first-degree murder of three men involved in the purchase and sale of drugs, where extensive evidence of other crimes concerning the defendant's involvement in drug offenses was admitted, the appellate court provided a comprehensive analysis in holding that the evidence was properly admitted because "the other-crimes evidence did not transgress the general prohibition against the admission of other-crimes evidence where it fell within the exceptions for conspiracy, common design or plan, motive, identity, intent, and course of the police investigation." *Id.* at ¶ 122.

For an example of a case where admission of evidence failed to satisfy either relevancy or IRE 404(b) common-law requirements, see *People v. Stowe*, 2022 IL App (2d) 210296. In that case, defendant was charged with criminal sexual abuse and aggravated criminal sexual abuse of a 14-year-old autistic boy in a residential facility. When the boy spoiled himself, defendant, who worked as a service provider, took him to the bathroom to clean him and, according to defendant, the boy began masturbating. A supervisor entered the bathroom and concluded that defendant was engaged in sexual activity. During the jury trial, the State was allowed to introduce into evidence two photos recovered from defendant's cell phone depicting nude adult men. Defendant was convicted. On appeal, discussing and distinguishing other cases, the appellate court held that the photos were improperly and prejudicially admitted in evidence, because they had no relevance to the alleged offense, resulting in the trial court's abuse of discretion in allowing them to be admitted and the appellate court's determination that their admission did not constitute harmless error. The judgment on the merger of the two sexual offenses was reversed and the case was remanded for retrial.

Split in the Appellate Court about the Admissibility of Other-Crimes Evidence Admitted to Prove Intent Where Intent Is Not Expressly Put at Issue

In *People v. Davis*, 2019 IL App (1st) 160408, a prosecution for the offense of possession of more than 900 grams of cocaine, police recovered a 989-gram brick of cocaine and three handguns in the secret compartment of a car in which the defendant was a passenger. The trial court denied the defendant's motion to suppress the evidence and additionally granted the State's motion to admit the evidence concerning the three handguns. On appeal, the defendant argued that the evidence of the handguns should not have been admitted because "his intent had never been at issue, rendering the admission of the gun evidence as cumulative and prejudicial." *Id.* at ¶ 57. Reasoning in part that "the other-crimes evidence—possession of firearms—relates to the issue of Davis's intent to distribute the cocaine" (*id.* at ¶ 64), and holding that "the State can introduce admissible other-crime evidence to prove intent even where the defendant does not put intent directly in issue" (*id.* at ¶ 63), the appellate court disagreed.

In affirming the admission of the gun evidence, the appellate court noted it "confront[ed] a split in authority about the

admissibility of other-crimes evidence to help prove intent where intent is not expressly at issue." *Id.* at ¶ 59.

The court noted two decisions where the admission of other-crimes evidence to prove intent had been held to be improper: the pre-codification decision in *People v. Knight*, 309 Ill. App. 3d 224 (2d Dist. 1999) (in this conviction for domestic battery, reasoning that the "defendant's state of mind was not in controversy" (*id.* at 227), because he had testified that he had not beaten the victim, and therefore holding that the evidence of the defendant's threat six weeks after the beating was improperly admitted), and *People v. Clark*, 2015 IL App (1st) 131678 (although finding harmless error because of the overwhelming evidence of guilt, holding it was not probative of either intent or identity for the trial court to admit evidence that the defendant, who was charged with theft of a bicycle, had stolen a bicycle in the same area four years before).

In support of the propriety for admitting evidence to prove intent, *Davis* cited *People v. Cavazos*, 2015 IL App (2d) 120444 (rejecting defendant's contention that motive and intent were not in issue, in holding that proof of motive and intent justified admission of defendant's same-day attempt to kill a rival gang member after his involvement in a separate successful killing of a rival gang member). (As an aside, note that *Cavazos* was remanded to the appellate court, based on the supreme court's entry of a supervisory order, to consider the propriety of the juvenile defendant's sentencing. See *People v. Cavazos*, 2022 IL App (2d) 120444-B, where the appellate court upheld its prior decisions on the issues relevant to this commentary.)

In rejecting the holdings in *Knight* and *Clark* and agreeing with the holding in *Cazavos*, the *Davis* court relied heavily on the supreme court's decision in *People v. Heard*, 187 Ill. 2d 36 (1999). In that case, defendant was convicted by a jury of the murder by gunfire of three persons, including defendant's former girlfriend and her current boyfriend. During trial, the court admitted the State's evidence that defendant had stolen his former girlfriend's clothes and that he beat her after offering to return the clothes. The court also admitted evidence that on another occasion, while his former girlfriend and her current boyfriend were in a rental car, defendant twice rammed the rear of the car with his truck before they drove to a police station to file a report. Evidence also was admitted that on another occasion defendant rammed the car occupied by his ex-girlfriend and her current boyfriend and, when the current boyfriend exited the car to examine the damage, defendant fired shots at him.

On direct appeal to the supreme court in *Heard*, a death penalty case, defendant contended that the other-crimes evidence should not have been admitted because motive and intent were not at issue in this case for the killer "intended to kill the victims, so intent was not genuinely in issue." *Heard*, at 60. He also contended that "because he denied involvement in the murders, the identity of the perpetrator, not the motive and intent of the perpetrator, was the issue in this case." *Id.* The supreme court was not persuaded. It held that "the prosecution had to prove that defendant was the shooter. The prosecution introduced the other-crimes evidence to prove *defendant's* motive and intent to kill the victims, thus providing further proof of defendant's identity as the shooter." *Id.* at 59 (emphasis in original). The supreme court thus held that "the other-crimes evidence was admissible to prove defendant's motive and intent to commit the murders. The other-crimes evidence revealed defendant's continuing hostility and animosity toward [his former girlfriend and her current boyfriend]." *Id.*

In *Davis*, the appellate court concluded that it "deem[ed] the *Cavazos* court as the better reading of *Heard*: evidence of other crimes can be used to prove intent, even if intent is not put expressly at issue, because the burden remains on the prosecution to prove intent beyond a reasonable doubt regardless of whether the defendant disputes it." *Davis*, at ¶ 62. The court reasoned that if it were to embrace the reasoning of the other cases, "a defendant could deprive the State of its right to introduce relevant, competent evidence simply by staying silent about certain elements of the offense for which he or she has been charged." *Id.* at ¶ 63.

The takeaway from the above discussion: The split of authority described in this commentary exists only in the First and Second Districts of the appellate court—*Davis* and *Clark* in the First District, and *Cavazos* and *Knight* in the Second District. Under normal circumstances, that means that trial judges in those districts may choose the holding in the decision they

deem to be appropriate. A holding of the supreme court, such as that in *Heard*, however, always trumps a contrary appellate court holding and should be followed, absent another clarifying opinion from the supreme court.

Decisions on Admission of Evidence of Numerous Other-Crime Offenses

In a number of cases, defendants have contended on appeal that the sheer number of other-crime offenses admitted under section 115-7.3 in sexual offense prosecutions was excessive and that the aggregate prejudicial effect outweighed the probative value of such evidence. An early example of a case, where that effort succeeded, is *People v. Cardamone*, 381 Ill. App. 3d 462 (2008), where, in reversing the defendant's convictions for nine counts of aggravated criminal sexual abuse against seven girls, in a prosecution where there had been 14 complainants and an additional witness who also testified to sexual abuse, the appellate court estimated that there had been testimony related to 158 to 257 uncharged incidents.

In *People v. Perez*, 2012 IL App (2d) 100865, however, in referring to *Cardamone* as an "extreme case" and to the deference given to the trial court's rulings on admission of evidence, the appellate court affirmed the defendant's conviction for aggravated criminal sexual abuse, in a case where numerous uncharged offenses testified to by the complainant and another young girl had been admitted into evidence. The court noted that "any undue prejudice of 'more thorough other-crimes evidence' admitted under section 115-7.3 will be 'less' unduly prejudicial than in a common-law other-crimes case." *Perez*, at ¶ 49. Where the other-crime-offenses are offered by the victim of charged offenses as was the case in *Perez*, the court also stressed the need to introduce other-crimes evidence for the purpose of furnishing necessary context for the charged offenses. *Id.* at ¶¶ 50-51.

In *People v. Salem*, 2016 IL App (3d) 120390, the appellate court held that "the trial court abused its discretion by allowing the State to introduce unlimited other crimes evidence." *Salem*, at ¶ 59. In that case, involving a prosecution for four separate counts of unlawful possession of open vehicle titles, "the jury received 17 exhibits to examine and consider concerning the *uncharged* crimes related to defendant's alleged knowing possession of multiple stolen vehicles parked in his driveway." *Id.* at ¶ 59 (emphasis in original).

Propriety of Admission of Evidence Alleged to Contain Too Many or Unnecessary Details Related to Other-Crime Offenses

In *People v. Bates*, 2018 IL App (4th) 160255, ¶¶ 78-90, citing IRE 404(b) and section 115-7.3 of the Code of Criminal Procedure, as well as principles provided by the Second District pre-codification decision in *People v. Walston*, 386 Ill. App. 3d 598 (2008), the appellate court observed that the State had introduced "comprehensive evidence" of the defendant's alleged attack on a victim of an offense similar to the aggravated criminal sexual offense in the case at bar. Reasoning that such evidence is highly probative because the jury is able to use the evidence for propensity purposes as allowed by section 115-7.3, the court determined that, though such evidence is harmful to a defendant's case, it is not unduly prejudicial. The court rejected the defendant's argument that the State presented the other-crime case with "unnecessary detail" and held that the trial court's balancing determination under IRE 403 was not an abuse of discretion. Finally, the court rejected the defendant's argument that an improper "mini-trial" had occurred, reasoning that it was necessary to establish the defendant's involvement in the attack of the other-crime victim.

Opening the Door to Otherwise Inadmissible Other-Crime Evidence

People v. Hinthorn, 2019 IL App (4th) 160818, ¶¶ 68-86, demonstrates that, even where other-crime evidence is not deemed admissible, such evidence may be made admissible based on other legal theories. In that case, involving offenses of predatory criminal sexual assault and criminal sexual assault on the defendant's daughter, evidence of the defendant's prior rapes of his wife had been ruled inadmissible. Nevertheless, the appellate court affirmed the admission of that evidence based on curative admissibility, which provides that "if the defendant on cross-examination opens the door to a particular subject, the State on redirect examination may question the witness to clarify or explain the subject brought out during, or remove or correct any unfavorable inferences left by, the defendant's cross-examination, even if this elicits evidence that would not be proper or admissible." *Hinthorn*, at ¶ 71. In *Hinthorn*, the

appellate court also addressed the doctrine of completeness, which it held was inapplicable in this case.

Davis and *Rosado*: Need to Disclose to Jury Defendant's Acquittal for Crimes Admissible under IRE 404(b)

In *People v. Ward*, 2011 IL 108690, the supreme court held that the trial court's ruling barring the evidence of the jury acquittal of the defendant for a prior sex offense, admitted as propensity evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3), was improper. And in *People v. Rosado*, 2017 IL App (1st) 143741, the appellate court held that the trial court abused its discretion in allowing the admission of a *subsequent* offense of delivery of a controlled substance, because such evidence could not bolster identification of the defendant as the person who delivered a controlled substance in the earlier charged offense. As relevant here, however, the court invoked *Ward* in holding that the trial court erred in not allowing evidence of the earlier acquittal of the offense that had been admitted into evidence for the purpose of establishing identity.

Application in Civil Cases

It is important to note that the general prohibition against admitting character evidence for the purpose of proving propensity under both IRE 404(a) and IRE 404(b), although generally applied in criminal cases, applies also in civil cases. See, for example, *Powell v. Dean Foods, Co.*, 2013 IL App (1st) 082513-B, which, citing other cases, reversed and remanded judgments for the plaintiffs, where evidence of the defendant-truck driver's prior acts of speeding, a prior violation of federal logging regulations, and a prior fine were held to have been improperly admitted and to have served "no purpose other than to allow the inference that defendants acted badly at the time of the accident because they had done so prior to the accident." *Powell*, at ¶ 102.

Author's Commentary on Ill. R. Evid. 404(c)

IRE 404(c) places on the prosecution the responsibility for pretrial disclosure of evidence of other crimes, wrongs, or acts it intends to admit at trial. It is based on the requirements of subdivisions in each of the statutes in the Criminal Code of Procedure specified in IRE 404(b)—specifically, section 115-7.3(d), section 115-7.4(c), and section 115-20(d).

There is no FRE 404(c). But effective December 1, 2020, an amendment to the federal rules ended the previous requirement that a defendant in a criminal case had the burden of requesting the prosecution to provide reasonable notice of the prosecution's intent to admit evidence of the type of crimes, wrongs, or other acts permitted under FRE 404(b)(2). The amendment, which created FRE 404(b)(3)(A), (B), and (C), places the burden of notice about its intent to admit those other acts solely on the prosecution. By virtue of that amendment, FRE 404(b) now provides a notice requirement on the prosecution that is similar to that provided in IRE 404(c).

Application of IRE 404(c)

In *People v. Torres*, 2015 IL App (1st) 120807, the defendant, who was on trial for multiple offenses that included aggravated criminal sexual assault, contended that in its motion *in limine* the State had provided him an inadequate summary of the evidence of two prior offenses against the victim that it intended to present under IRE 404(b). He contended that the trial court was thus prevented from properly analyzing the evidence and that he was thus prevented from adequately opposing its admission. Specifically, the defendant asserted unfair surprise by the amount of detail concerning at least one of the other crimes testified to by the victim, and that he had not objected because of the State's inadequate factual summary. After quoting both IRE 404(c) and section 115-7.4(c) (which, as indicated above, is one of the statutes upon which IRE 404(c) is based), and noting that there was no case in Illinois interpreting the term "summary" in the phrase "a summary of the substance of any testimony" (a phrase found in both the rule and the statute), the appellate court reasoned that "a 'summary' need not contain all that is required by an offer of proof; a lesser amount of detail and particularity suffices." *Torres*, at ¶ 53. Noting that the State's motion *in limine* to admit the evidence "provided details as to time, place, the victim, and acts that were committed" by the defendant related to the other crime, the appellate court concluded that the trial court had properly admitted the evidence.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 405. Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

(b) Specific Instances of Conduct.

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct; and

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior violent conduct.

Committee Comment to Rule 405

Specific instances of a person's conduct as proof of a person's character or trait of character are not generally admissible as proof that the person acted in conformity therewith. Specific instances of a person's conduct are admissible, however, under Rule 405(b)(1), as proof of a person's character or a trait of character only in those limited cases (such as negligent entrustment, negligent hiring, and certain defamation actions), when a person's character or a trait of character is an essential element of a charge, claim, or defense. Specific instances of conduct are also admissible under Rule 405(b)(2) in criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor.

Author's Commentary on Ill. R. Evid. 405(a)

At the outset, note that IRE 405 addresses only the methods for proving character, not the admissibility or inadmissibility of character evidence, which are subjects addressed in IRE 404.

IRE 405(a) is identical to FRE 405(a) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for Illinois' non-acceptance of the federal rule's second sentence regarding cross-examination on specific acts of conduct. Under both the federal and the Illinois versions of Rule 405(a), character evidence is admissible only by reputation or opinion—not by proof of specific acts of conduct. The federal rule, however, allows *cross-examination* on specific acts of conduct. See *Michelson v. United States*, 335 U.S. 469, 479 (1948) (approving cross-examination on specific acts of defendant's conduct to counter defendant's admitted character evidence). In contrast to the federal rule, IRE 405(a) does not allow cross-examination on specific acts of conduct—except as permitted through direct and cross-examination by IRE 405(b)(1) when character or a trait of character is an essential element of a claim or defense, or by IRE 405(b)(2) through direct or cross-examination about an alleged victim's prior violent conduct, when self-defense is raised in homicide or battery cases.

Though it is consistent with FRE 405(a), the ability to prove character by *opinion* evidence represents a substantive change in Illinois law because, before the codified rule, Illinois—consistent with common law—permitted character evidence only by *reputation* testimony. (See the "Recommendations" section of the Committee's general commentary at the bottom of page 4 of this guide.)

Allowing opinion testimony to prove character raises an interesting question: Does the ability to prove character by opinion evidence allow for the admission of *expert* opinion testimony? The decision in *People v. Garner*, discussed just below, gives rise to that question.

***People v. Garner*: Does Proof of Character Through "Opinion" Testimony Under IRE 405(a) Allow for Expert Opinion Evidence?**

In *People v. Garner*, 2016 IL App (1st) 141583, a jury convicted defendant of the first degree murder of her six-year-old daughter by the administration of an overdose of a powerful antidepressant. During trial, the State presented evidence concerning defendant's motive for killing her daughter and for unsuccessfully attempting to commit suicide through a similar overdose. The motive evidence was that her husband, whom she suspected of having an affair, had just informed her by telephone that he intended to seek a divorce.

To counter the motive evidence, defendant sought to introduce testimony from a clinical psychologist that, based on his interview of defendant, he was of the opinion that (1) defendant "was not attempting to exaggerate or feign memory impairment or amnesia regarding events immediately leading up to her hospitalization and subsequent arrest" (to bolster defendant's testimony that she suffered amnesia and to counter the State's evidence from a nurse and two police officers who testified that, while defendant was hospitalized, they had talked to her about matters related to the charged offense); and that (2) defendant "was not a needy or dependent individual whose self-esteem or contentment with life was connected to the strength of her relationship with her husband," and that it "would be unlikely that she would have been so depressed with her husband's infidelities that she would try to kill herself and her child." *Garner*, at ¶ 6.

Holding that defendant was seeking to present inadmissible character evidence, the trial court had granted the State's motion *in limine* seeking the exclusion of the psychologist's testimony. Focusing initially on the psychologist's evaluation of defendant's likelihood to commit murder based on her phone conversation with her husband, the appellate court concluded that the trial court correctly treated the psychologist's testimony as character evidence, because the defendant conceded on appeal that the psychologist's opinion was that the defendant "lacked *the personality traits* to attempt suicide or murder in the wake of her husband's infidelities." *Id.* at ¶ 28 (emphasis added by appellate court). The appellate court further held that the trial court's grant of the State's motion *in limine* was correct because, when the ruling was made, the law allowed for character evidence to be admitted only through reputation evidence. Before the case went to trial, however, Illinois' codified evidence rules had been adopted, and the appellate court noted that "Rule 405(a) abrogated the prior rule prohibiting

defendants from introducing character evidence through opinion testimony and instead expressly permitted the practice." *Id.* at ¶ 30. Because, however, defendant failed to ask the trial court to reconsider its ruling after IRE 405(a) became effective (*id.*), the appellate court considered the issue under plain error review standards, rejecting defendant's argument—even if it "assumed the incorrectness of the trial court's decision." *Id.* at ¶ 32. The appellate court thus determined that, even if error had occurred, it was harmless error. *Id.* at ¶¶ 32-34. Thus, after presenting the possibility that the allowance of character evidence by testimony in the form of an opinion under IRE 405(a) may allow for an expert's opinion, the appellate court did not determine whether an *expert's opinion* about a defendant's character trait is properly admissible.

Although *Garner* provided no answer for the question it raised, it presents the *possibility* that expert opinion evidence is contemplated by IRE 405(a), but it cites no authority supporting or rejecting that principle. In this writer's opinion, offering such evidence as "character" evidence is unacceptable for several reasons.

First, *Garner's* conclusion that the psychologist's proffered testimony about defendant's *personality traits* constituted admissible character evidence was erroneous, and thus was an improper basis for its raising the possibility that such evidence may have been subject to expert opinion testimony under IRE 405(a). In *Michelson v. United States*, 335 U.S. 469, 477 (1948), a ruling that preceded the codification of the Federal Rules of Evidence but fully applies to both the federal and Illinois codifications, the United States Supreme Court stated that a character witness "may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits." As explained below, the relevant rules on character evidence establish that *conduct* is the basis for character evidence, and that an expert's opinion about a person's psychological traits is not contemplated.

A person's "conduct" forms the basis for proof of character in Rule 405. The second sentence of **FRE** 405(a) allows a character witness to be cross-examined even on "relevant specific instances of the person's conduct." Although **IRE** 405(a) has not adopted that federal provision, both the federal and the Illinois versions of Rule 405(b) allow proof of character or a character trait to be proved by specific instances of a person's conduct when the person's character or character trait is an essential element of a charge, claim, or defense. Also, the common-law exceptions for the admission of evidence of other crimes, wrongs, or acts in Rule 404(b) are based on conduct, not on personality traits or psychological evaluations. Likewise, the exceptions for the prohibition of proof of propensity in IRE 404(b) are based on evidence of other crimes, wrongs, or acts—based, in short, on "conduct." Although the relevant federal and Illinois rules prohibit proof of *specific acts* of conduct to prove character, proof of character under both versions—whether based on reputation or on opinion—is based on conduct.

In sum, each of the exceptions to the general rule prohibiting character evidence in IRE 404—whether based on common-law or a statute—is related to conduct. Even the exception provided by IRE 404(a)(1) is based on reputation or opinion evidence premised on a defendant's prior conduct. The rules make no allowance for expert opinion testimony on character based on psychological evaluation, for that would result in propensity evidence which is permitted only in explicitly limited circumstances, none of which includes the allowance of expert opinion evidence based on a psychological examination.

Second, *Garner* focuses only on IRE 405(a), the rule that provides the "methods of proving character," and does not take into account IRE 404(a), which generally prohibits evidence of character traits "for the purpose of proving action in conformity therewith on a particular occasion," *i.e.*, propensity. *Garner's* failure to refer to IRE 404(a) is significant for that rule provides the underlying basis for IRE 405(a)'s allowance of character evidence by reputation or opinion. IRE 404(a) provides that such evidence is allowed only "[i]n cases in which evidence of character or a trait of character of a person is admissible." So, if—as IRE 404(a) provides—character evidence is generally inadmissible and if there is no applicable exception to that general rule, neither *reputation* nor *opinion* about character is admissible.

IRE 404(a)(1), the rule that allows an accused in a criminal case to offer "a pertinent trait of character," is based on conduct and is invoked generally to admit evidence that a defendant

is peaceful and/or honest and/or law-abiding. Consistent with the inextricable relationship of "conduct" to character, together with common law that preceded evidence codification, that rule was intended to allow a defendant in a criminal case to present "proof of such previous good character as is inconsistent with the commission of the crime with which he is charged." *People v. Lewis*, 25 Ill. 2d 442, 445 (1962). See also *Michelson*, 335 U.S. at 479 ("the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged"). But the evidence offered by defendant in *Garner* had nothing to do with her "previous good character" or "conduct," nor with her commission of the charged crime.

Nevertheless, because the State placed in issue motive evidence, defendant was entitled to offer responsive evidence. Defendant was the best witness to provide the relevant evidence that the phone conversation with her husband had nothing to do with her actions, a subject well within her capacity to explain and one not requiring the helpful testimony of an expert witness. Indeed, defendant provided such responsive evidence. As *Garner* noted, defendant "testified in her own defense, during which time she testified about her character traits; and, notably, the trial court's order did not cut off all other avenues by which defendant could have presented evidence regarding her character." *Garner*, at ¶ 34.

If expert opinion testimony is deemed proper to counter motive evidence in a case such as this, it should be admitted on some other relevant basis, and not as inadmissible "character" evidence under IRE 404 or IRE 405(a). For example, in *People v. Bergund*, 2016 IL App (5th) 130119, without any reference to character evidence, the appellate court held it was error to prohibit the admission of a clinical psychologist's testimony that the defendant's personality profile showed that he was subject to manipulation, so his confession to the sexual abuse of his two young daughters may have been false because of psychological pressure, manipulation, and suggestions by his wife and mother-in-law. For a discussion of *Bergund*, see the *Author's Commentary on Ill. R. Evid. 702*, under the heading *Expert Opinion on False Confession Based on Personality Subject to Manipulation*.

Third, allowing expert opinion on character—even where genuine character evidence is involved—is inconsistent with IRE 405(a)'s intent, which simply is to reflect that most witnesses who offer testimony about character traits based on "reputation" frequently offer their own "opinion" about those traits. This is confirmed by the many pre-codification instances where trial courts struck the reputation testimony of a witness who, when asked on cross-examination whether the witness had talked to anyone about a person's character, answered with a firm "no," thus disavowing the very basis for the admission of "reputation" testimony. IRE 405(a)'s allowance of "opinion" testimony about character does not represent a substantive change, except to simply acknowledge that people do not generally talk with others about a person's character traits. A belief such as "John Doe is a peace-loving man" is rarely shared. But interactions with a person—about the conduct of that person—result in "opinions" about the character traits of that person. For that reason, Rule 405(a) now allows not only reputation evidence, which is based on what others say about the character of a person, but also opinion evidence, which is based on a witness's knowledge of the conduct of a person. The rule provides no indication that it contemplates expert opinion testimony about character.

Author's Commentary on Ill. R. Evid. 405(b)(1)

There is no federal rule designated 405(b)(1), but IRE 405(b)(1) is identical to FRE 405(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011. The codified Illinois rule is consistent with Illinois common law, which permits evidence of specific instances of conduct in causes of action where evidence of character or a trait of character is an essential element of a charge, claim, or defense, including, as the Committee Comment points out, in those involving negligent hiring, negligent entrustment, and defamation in certain cases.

In *People v. Collins*, 2013 IL App (2d) 110915, the defendant invoked IRE 405(b) in contending that the trial court had erred in barring him from impeaching a police officer with information contained in the officer's personnel file about a specific instance of untruthfulness. In affirming the defendant's conviction for delivery of a controlled substance to the police officer, the appellate court reasoned that the evidence was not related to the officer's ability to conduct the undercover drug transaction, nor did it raise an inference that he had anything to gain or lose during his testimony. *Collins*, at ¶ 19. Citing the rule and its Committee Comment, the appellate court also held that the officer's character "is not an element of a charge, claim or defense," and therefore such character evidence was not admissible under the rule. *Id.* at ¶ 20.

Author's Commentary on Ill. R. Evid. 405(b)(2)

There is no federal rule designated 405(b)(2), nor is there a federal rule that is a counterpart to the Illinois rule. IRE 405(b)(2), however, codifies Illinois common law in homicide and battery cases, which allows admission of an alleged victim's prior conduct where self defense is alleged and there is conflicting evidence as to who was the aggressor. *See People v. Lynch*, 104 Ill. 2d 194, 200-01 (1984), which allows admission of an alleged victim's prior acts of violence in self-defense cases, where there is conflicting evidence as to who was the aggressor, where (1) the defendant knows of such conduct because it affects his perceptions of and reactions to the victim's behavior or where (2) the defendant does not know of such conduct because the victim's propensity for violence tends to support the defendant's version of the facts.

In *People v. Barnes*, 2017 IL App (1st) 143902, based on remoteness-in-time considerations, the appellate court held that the trial court properly refused to admit the victim's convictions for resisting arrest and battery that had occurred 21 years before, and in *People v. Martinez*, 2019 IL App (2d) 170793, based on the same considerations, in a prosecution for battery the appellate court approved the trial court's refusal to admit the more-than 70-year-old victim's 55-year-old conviction for felony aggravated battery.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or 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 person or organization on a particular occasion was in conformity with the habit or routine practice.

COMMENTARY

Author's Commentary on Ill. R. Evid. 406

IRE 406 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. For a pre-codification case allowing evidence of the routine practice of an organization even in the absence of corroboration, see *Grewe v. West Washington County Unit District No. 10*, 303 Ill. App. 3d 299, 307 (1999).

Illinois cases had been inconsistent on whether the availability of eyewitness testimony prohibited habit testimony, with a trend in recent cases towards the admissibility of such evidence regardless of the presence of eyewitness testimony. IRE 406 removes any doubt concerning the issue. See also section (2) under the "Modernization" discussion in the Committee's general commentary on page 2 of this guide.

Although IRE 406 does not define "habit," the common-law foundational requirement for habit evidence is well capsulized in *Alvarado v. Goepp*, 278 Ill. App. 3d 494, 497 (1996):

> "The party seeking to admit habit testimony must 'show conduct that becomes semiautomatic, invariably regular and not merely a tendency to act in a given manner.' [Citations.] 'It is the notion of virtually invariable regularity that gives habit its probative force.' M. Graham, Cleary & Graham's Handbook of Illinois Evidence, § 406.1 (6th ed. 1994)."

"Careful Habits:" Improper as Character Evidence and as Habit Evidence

In *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶¶118-128, a case where the plaintiffs' concession that a plaintiff's deceased driver was at least 25% contributorily negligent for the vehicular accident that was the subject of the litigation, the appellate court held that the trial court erred in instructing the jury concerning the "careful habits" of that driver.

The special concurrence of Justice Stuart Palmer in *Powell* (¶¶ 144-155), went further, however, and is especially noteworthy. There, Justice Palmer addressed solely "careful habits" evidence and its related jury instruction. At the outset, he questioned "the continued viability of the concept of 'careful habits' evidence and thus the use of IPI Civil (2006) No. 10.08 in any case." *Powell*, at ¶ 146. As foundation for his doubts, he quoted extensively from the discussion in Michael H. Graham's *Handbook of Illinois Evidence*, §§ 406.1 and 406.2 (10th ed. 2010), which reasoned that the "careful habits" instruction is a relic of Illinois' former requirement for a plaintiff in a negligence action to plead and prove freedom from *contributory negligence*—a difficult task in wrongful death actions, a task that thus was addressed by allowing evidence of the careful habits of the decedent. He noted Graham's reasoning that, given the supreme court's abolishment of the bar to recovery based on contributory negligence and the introduction of comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1 (1981), the necessity for such pleading and proof no longer exists. He further noted Graham's distinctions between character and habit, particularly noting Graham's characterization that "[h]abit describes one's regular response to a repeated *specific* situation so that doing the habitual act becomes semiautomatic and extremely regular." *Powell*, at ¶ 151, quoting Graham, at

§ 406.1, at 287 (with emphasis added by Justice Palmer). He then emphasized Graham's statement that "[e]vidence that one is a 'careful man' is lacking the specificity of the act becoming semiautomatic and extremely regular; it goes to character rather than habit." *Powell*, at ¶ 153, quoting Graham, at § 406.1, at 287. He then expressed his belief "that being a careful driver is not a response to a repeated *specific* situation but rather a more generalized description of a person's character trait." *Powell*, at ¶ 154. Finally, having concluded that proof of "careful habits" is nothing more than proof of character evidence, Justice Palmer concluded with these remarks:

> "As character evidence I believe it should be inadmissible under our Rule 404(a). Therefore, as the special circumstances that spawned the concept of 'careful habits' evidence no longer exist, and as I feel that this is simply character evidence, I believe the concept to no longer be viable and further that IPI Civil (2006) No. 10.08 should be discarded." *Powell*, at ¶ 154.

Despite the 2013 *Dean* decision, "careful habits" remains alive and well in Illinois. See, for example, *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶¶ 112-117; see also *Karahodzic v. JBS Carriers, Inc.*, 881 F.3d 1009 (7th Cir. 2018) (citing *Jacobs* for the proposition that "careful habits evidence is admissible to show due care when the plaintiff is unavailable to testify and no eyewitnesses other than the defendant are available.") *Karahodzic*, 881 F.3d at 1017.

For additional discussion of why "careful habits" evidence should be excluded under the rule related to character, see the *Author's Commentary on Ill. R. Evid, 404(a) Generally*; see also Marc D. Ginsberg, *An Evidentiary Oddity: "Careful Habit" – Does the Law of Evidence Embrace This Archaic/Modern Concept?* 43 Ohio N. U. L. Rev. 293 (2017), discussing the origins of Illinois' careful habits and calling for its abolition. Justice Palmer's analysis and conclusions about "careful habits" as habit testimony under IRE 406 and as character evidence under IRE 404(a) are significant. They should be heeded.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Rule 407. Reserved. [Subsequent Remedial Measures]

COMMENTARY

Author's Commentary on Reserved Ill. R. Evid. 407

Appellate Court Conflict Regarding Products Liability Cases

IRE 407 is reserved because of a conflict in the decisions of the appellate court concerning whether the bar to evidence of subsequent remedial measures applies to products liability cases in Illinois. An example of a case that holds that the bar does not apply in such cases is *Stallings v. Black and Decker (U.S.), Inc.*, 342 Ill. App. 3d 676 (5th Dist. 2003); an example of a case that holds that the bar does apply in products liability cases is *Davis v. International Harvester Co.*, 167 Ill. App. 3d 814 (2d Dist. 1988).

Jablonski's Conflict Regarding Negligence Cases

On the other hand, before its decision in *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222 (5th Dist. 2010), both the supreme court and the appellate court had uniformly barred evidence of subsequent remedial measures in negligence cases, while also uniformly holding that remedial measures taken post-manufacture but pre-accident were barred in such cases. *See, e.g., Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 14 (1989) ("As a general rule, evidence of subsequent remedial measures is not admissible as proof of negligence."). Quoting *Lundy v. Whiting Corp.*, 93 Ill. App. 3d 244, 251-52 (1981), in *Schaffner* the supreme court reasoned:

> "The rationale for this long-standing rule is two-fold: correction of unsafe conditions should not be deterred by the possibility that such an act will constitute an admission of negligence, and more fundamentally, a post-occurrence change is insufficiently probative of prior negligence, because later carefulness does not necessarily imply prior neglect."). *Schaffner*, 129 Ill. 2d at 14.

In its later decision in *Herzog v. Lexington Township*, 167 Ill. 2d 288 (1995), the supreme court reasoned as follows:

> "Evidence of post-accident remedial measures is not admissible to prove prior negligence. Several considerations support this general rule. First, a strong public policy favors encouraging improvements to enhance public safety. Second, subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care. Third is a general concern that a jury may view such conduct as an admission of negligence." *Herzog*, 167 Ill. 2d at 300 (internal citations omitted).

In *Jablonski*, however, the appellate court deviated from prior decisions in holding that the subsequent-remedial-measure bar did not apply.

Committee's Original Draft of Rule 407 and Reason for Its Withdrawal

Before the appellate court holding in the *Jablonski* case, the Committee had drafted a proposed rule that essentially adopted FRE 407, but that added a provision, subdivision (2), that incorporated the principle that the subsequent-remedial-measure bar applied to a product that had been manufactured before it caused an injury. After learning of the conflict caused by the *Jablonski* holding and after the supreme court granted review in that case, however, the Committee withdrew its draft proposal, expecting the supreme court to address and resolve the conflicts described above.

In its opinion in *Jablonski v. Ford Motor Co.*, 2011 IL 110096, however, though it reversed the judgments of the circuit and appellate courts, the supreme court based its decision on the insufficiency of the plaintiffs' evidence related to negligent design, the plaintiffs' reliance on a non-cognizable postsale duty to warn, and the plaintiffs' faulty theory concerning the defendant's alleged voluntary undertaking. The court therefore explicitly found it unnecessary to address various evidentiary rulings, "including whether the trial court erred in admitting evidence related to postsale remedial measures." Thus, the issue involving subdivision (2) in the rule originally proposed by the Committee was not specifically addressed, nor was there a resolution of the conflict in the appellate court holdings concerning products liability cases.

The Committee's withdrawn draft rule is presented below. It includes subdivision (2), which excludes evidence of remedial measures taken "after the manufacture of a product but prior to an injury or harm allegedly caused by that product." Because of the conflict that continues to exist in Illinois concerning whether the rule applies in product liability cases, the rule on subsequent remedial measures remains reserved. Unless the supreme court decides to codify a rule on its own, the conflict that now exists on this issue will await resolution until a case in controversy is submitted to it.

Draft Rule 407. Subsequent Remedial Measures (as originally drafted, before withdrawn by the Committee)

> When, (1) after an injury or harm allegedly caused by an event, or (2) after manufacture of a product but prior to an injury or harm allegedly caused by that product, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures or design, if controverted, or for purposes of impeachment.

Garcia Decision

Garcia v. Goetz, 2018 IL App (1st) 172204, represents a rare published post-codification decision involving the principle of subsequent remedial measures, through not applying a codified evidence rule but by applying Illinois common law. In that case, while on a service call to repair a boiler, the plaintiff was injured when he fell down a flight of stairs leading to the basement of the defendants. The case was treated as involving premises liability rather than negligence. Although photographs of the stairway were produced and relied upon by the expert witnesses on both sides, the stairs were removed as part of a remodeling project before a physical inspection could occur.

The plaintiff argued that "the trial court should have allowed evidence regarding [the removal of the stairs] to let the jury decide if defendants had destroyed evidence and also to explain why his expert was forced to testify from photographs instead of from an in-person inspection of the stairway." *Garcia*, at ¶ 42. The trial court, however, granted the defendants' motion *in limine*, based on the principle of subsequent remedial measures, barring evidence that the defendant's expert was unable to inspect the basement stairway before its removal.

On appeal after a verdict for the defendants, the plaintiff first argued that, because the defendants denied "that the stairs

were dangerous or that the changes were made to remedy a dangerous condition, the remodel cannot be considered a subsequent remedial measure." *Id.* at ¶ 43. Relying on the definition of "subsequent remedial measure" in Black's Law Dictionary (*i.e.*, "an action taken after an event, which, if taken before the event, would have reduced the likelihood of the event's occurrence"), the appellate court reasoned that the "definition does not suggest that a subsequent remedial measure exists only when it is taken solely to remedy some unsafe condition," and thus it concluded that "the law does not require [defendants] to acknowledge that they removed the stairs specifically to address safety issues in order to benefit from the general ban of evidence of post-remedial measures as proof of negligence." *Id.* at ¶ 44.

Citing *Herzog* in noting that, although inadmissible to prove negligence, evidence of subsequent remedial measures may be admissible for another purpose, such as "to prove ownership or control of property if disputed by the defendant, to prove feasibility of precautionary measures if disputed by the defendant, or as impeachment" (*id.* at ¶ 46), the appellate court concluded that the plaintiff's focus was "not on the *fact* that defendants removed and replaced the stairs, but on the *timing* of that remodeling project, which occurred before [plaintiff's] expert was able to examine the stairway." *Id.* at ¶ 47 (emphasis in original).

Finally, in addressing the plaintiff's contention that the jury should have been allowed to decide the reasonableness of defendants' stated reason for removing the stairs before his expert had an opportunity to view them, the appellate court noted the tension between "spoliation" and the doctrine of subsequent remedial measure. To address that tension, the appellate court considered "the probative value of the spoliation inference and whether or not evidence was destroyed as a result of intentional wrongdoing or mere negligence." It held that the trial court had not abused its discretion in accepting the defendants' explanation that the stairs needed to be removed as part of the requirement to remove all the drywall in the basement in order to determine the source of water leakage in that location. *Id.* at ¶¶ 47-49.

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408. Compromise and Offers to Compromise

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim.

(b) Permitted Uses. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay; establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution.

COMMENTARY

Author's Commentary on Ill. R. Evid. 408(a)

IRE 408(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the deletion of the last portion of pre-amended FRE 408(a)(2), which is also the last portion of the current version of that federal rule. The deletion of everything after the word "claim" in FRE 408(a)(2) means that the federal rule's specific exception to prohibited uses is not provided in an Illinois criminal case. This rule alters the holdings of prior appellate court decisions that held that admissions of fact were not excluded merely because they were made in the course of settlement or compromise negotiations. *See Niehuss v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 143 Ill. App. 3d 444 (1986); *Khatib v. McDonald*, 87 Ill. App. 3d 1087 (1980). *See also* section (3) under the "Modernization" discussion in the Committee's general commentary on page 2 of this guide.

For a case applying the rule in the context of an administrative law proceeding, see *County of Cook v. Illinois Labor Relations Board*, 2012 IL App (1st) 111514 (in reversing a ruling of the ILRB, noting Illinois' adoption of the federal rule and holding that testimony at a settlement conference was inadmissible under FRE 408, which was substantially adopted by the ILRB; *see* 80 Ill. Adm. Code 1200.120 (2010)). For another case applying the rule in the context of a legal malpractice case, see *King Koil Licensing Company v. Harris*, 2017 IL App (1st)

161019, where in emails, in a letter, and in handwritten notes, the defendant made offers to prosecute an action on behalf of his former client against that client's licensee without any expense to it, the appellate court held that the trial court did not err in barring the evidence of this compromise under IRE 408.

Because of the similar wording of the federal and Illinois rules, a Seventh Circuit decision is relevant. In *Wine & Canvas Development, LLC v. Muylle*, 868 F.3d 534 (7th Cir. 2017), the plaintiff's primary claim was for trademark infringement. During the course of settlement discussions, the plaintiff said that his goal was to "close [the defendant's] door or [the plaintiff's] *** attorney would close [it] for [him]." Months later, the defendant filed a counterclaim alleging abuse of process. During a jury trial, the district court allowed admission of the statement made by the plaintiff during settlement discussions. The jury returned verdicts against the plaintiff and in favor of the defendant on its counterclaim. On appeal, the plaintiff challenged the admission of the plaintiff's statement on the basis that it was inadmissible under FRE 408. The Seventh Circuit disagreed. It reasoned that the statement had been made during settlement discussions on the original claims of the plaintiff but the statement was not relevant to those claims. Rather, it was relevant to the later-filed counterclaim for abuse of process, a claim that was brought after the settlement discussions. Pointing out that FRE 408(a) refers to "a disputed claim," not "disputed claims" or "any claims," and that subdivisions (1) and (2) of paragraph (a) also use the singular term "claim," and further pointing out that the defendant was allowed to admit the statement not to disprove liability on the plaintiff's claims "but rather to show the [plaintiff's] improper intent and ulterior motive in bringing [its] lawsuit for the purpose of proving [the defendant's] abuse of process counterclaim," the Seventh Circuit approved the admission of the statement under the unusual circumstances that existed in this case, because "settlement discussions usually encompass multiple claims all at once."

Author's Commentary on Ill. R. Evid. 408(b)

IRE 408(b) is identical to FRE 408(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for Illinois' addition of the first sentence, to make it clear that admissible evidence discoverable outside the course of settlement negotiations is not excluded merely because it was used in such discussions, and except for the addition of "establishing bad faith" as another example of a permissible purpose, and the substitution of "an assertion" for "a contention" in the phrase "negating an assertion of undue delay."

Hana v. Illinois State Medical Inter-Insurance Exchange Mutual Insurance Co., 2018 IL App (1st) 162166, was an action to recover the assigned rights of two defendant doctors based on a bad-faith claim for ISMIE's failure to settle the underlying medical malpractice litigation (in 2009) within the policy limits. In this 2018 decision on the bad-faith claim, the appellate court voided verdicts returned over ISMIE's objection to a six-person jury, but the court went on to address the on-remand propriety of admitting into evidence a 2013 letter from plaintiff's counsel to ISMIE, which offered to settle the lawsuit for the $1.35 million excess verdict entered against the two doctors in the underlying case. In the trial of the bad-faith claim, evidence of the 2013 letter and additional testimony about the letter had been admitted into evidence. This had been done under IRE 408(b)'s permitted purpose of "establishing bad faith." In finding that the 2013 letter was not admissible on remand, the appellate court provided this reasoning:

> As an initial matter, we agree with ISMIE that any evidence of the 2013 settlement offer was barred by Rule 408. While Rule 408 does allow the introduction of evidence of settlement offers and negotiations to establish bad faith, we do not believe that this exception includes the introduction of evidence with respect to the settlement of the *present litigation* so as to establish ISMIE's bad faith with respect to its handling of the *underlying case*. While no Illinois case has addressed this specific issue, we note that Rule 408 "mirrors the Federal Rule 408, which our state courts have been applying to cases for years." *County of Cook v. Illinois Labor Relations Board, Local Panel*, 2012 IL App (1st) 111514, ¶ 35. At least one federal

court has recognized that evidence of an insurer's refusal to settle a bad faith case is inadmissible for the purpose of establishing the insurer's bad faith in handling an underlying matter. *Niver v. Travelers Indemnity Co. of Illinois*, 433 F. Supp. 2d 968, 994 (N.D. Iowa 2006). This is consistent with the underlying policy of Rule 408; *i.e.*, promoting settlement.

Even if this evidence was not specifically barred by Rule 408, we agree with ISMIE that it is irrelevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan.1, 2011). "Evidence which is not relevant is not admissible." Ill. R. Evid. 402 (eff. Jan. 1, 2011).

In this case, the pleadings, evidence, arguments, and jury instructions all reflect that the ultimate issue was whether ISMIE's bad faith and willful and wanton conduct caused the excess judgment to be entered against the [two doctors] in the underlying case. The underlying judgment was entered in May 2009, and our prior decision affirming that judgment was entered in August 2011. The [two doctors] assigned their bad-faith claim to plaintiffs in March 2010, in exchange for a covenant not to enforce any excess judgment against the [two doctors]. In light of these facts, we fail to see how any refusal of ISMIE to settle this lawsuit in 2013 has any relevance with respect to whether ISMIE engaged in bad faith and willful and wanton conduct leading to the 2009 excess judgment. Even if we accepted plaintiffs' insistence that this evidence shows continuing willful and wanton conduct occurring after the 2009 excess judgment, we reject any contention that such evidence is in any way relevant to establishing that plaintiffs were therefore damaged by the 2009 judgment. Therefore, no evidence regarding the 2013 settlement letter should be admitted at trial upon remand.

Hana, 2018 IL App (1st) 162166, ¶¶ 30-32 (emphases in original).

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 409. Payment of Medical and Similar Expenses

In addition to the provisions of section 8–1901 of the Code of Civil Procedure (735 ILCS 5/8–1901), evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

COMMENTARY

Author's Commentary on Ill. R. Evid. 409

IRE 409 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the incorporation of the Illinois statute in the first clause. The cited statute excludes evidence of an offer to pay or payment for medical expenses. It was re-enacted by Public Act 97-1145, effective January 18, 2013, after amendments made by Public Act 94-677 (which added provisions related to expressions of grief, apology, sorrow, or explanations from health care providers) was found unconstitutional, because of an inseverability provision, in *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217 (2010)). The statute (735 ILCS 5/8-1901) is provided in the appendix at **Appendix D**.

For a case applying both the statute and the rule, see *Lambert v. Coonrod*, 2012 IL App (4th) 110518 (applying the statute and IRE 409 (applicable even though plaintiff's injuries occurred before the effective date of the codified evidence rules, because the rules affect matters of procedure), and upholding the trial court's ruling excluding evidence that defendant made in plaintiff's hospital room about plaintiff and his wife having nothing to worry about and that they "wouldn't have to pay a dime of any expenses" (*Lambert*, at ¶ 23), and holding that IRE 409 "is broad enough to include expenses beyond hospital and medical costs" because it "excludes evidence to pay 'similar expenses occasioned by an injury'" (*Id.* at ¶ 25)).

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Evidence of a plea discussion or any resulting agreement, plea, or judgment is not admissible in any criminal proceeding against the defendant who made the plea or was a participant in the plea discussions under the following circumstances:

(1) a plea of guilty which is not accepted or is withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Illinois Supreme Court Rule 402 regarding either of the foregoing pleas; or

(4) any statement made in the course of a plea discussion which does not result in a plea of guilty, or which results in a plea of guilty which is not accepted or is withdrawn, or which results in a judgment on a plea of guilty which is reversed on direct or collateral review.

COMMENTARY

Author's Commentary on Ill. R. Evid. 410

IRE 410 is based on Illinois Supreme Court Rule 402(f), and is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except that the Illinois rule: (1) is modified to distinguish Illinois from federal proceedings and (2) applies only to criminal and not to civil proceedings. Note also that, effective October 15, 2015, the supreme court amended the original version of IRE 410 in order to make it consistent with Supreme Court Rule 402(f). In addition to clarifying language, the amendment deleted the former final paragraph, which was substantially identical to what is now FRE 410(b), but is not addressed by Rule 402(f). The result is that IRE 410 does not have the exceptions provided by FRE 410(b).

Supreme Court Rule 402(f)

Supreme Court Rule 402(f), which is the rule cited in all of the decisions provided below, states in its entirety:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement,

plea, or judgment shall be admissible against the defendant in any criminal proceeding."

Determining Whether Statements Occurred During "Plea Discussion"

When a defendant seeks concessions from a police officer or a prosecutor, usually before or after an arrest and not as part of court proceedings, the issue that arises is whether statements made by the defendant were part of a "plea discussion" within the meaning of Rule 402(f), as well as IRE 410(4). The considerations that apply to resolve the issue are best summarized in *People v. Rivera*, 2013 IL 112467:

> "Not all statements made by a defendant in the hope of obtaining concessions are plea discussions. There is a difference between a statement made in the course of a plea discussion and an otherwise independent admission, which is not excluded by Rule 402(f). The determination is not a bright-line rule and turns on the factual circumstances of each case. In making this determination, we may consider the nature of the statements, to whom defendant made the statements, and what the parties to the conversation said. Before a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by defendant to enter a plea of guilty in return for concessions by the State. Where a defendant's subjective expectations to engage in plea negotiations are not explicit, the objective circumstances surrounding the statement take precedence in evaluating whether the statement was plea related." *Rivera*, at ¶ 19 (citations and internal quotation marks omitted).

The supreme court has provided a two prong test for determining the non-admissibility of a plea-related statement, containing both a subjective and an objective component. The test is whether: (1) the defendant exhibited a subjective expectation to negotiate a plea, and (2) the expectation was reasonable under the totality of the objective circumstances. *People v. Friedman*, 79 Ill. 2d 341, 351-52 (1980); *Rivera*, at ¶18.

Decisions Determining That Rule 402(f) Did Not Apply

In *People v. Rivera*, 2013 IL 112467, the supreme court applied the test provided under the preceding heading. There, in reversing the holding of the appellate court, the court found that the defendant's two statements, one to a police officer and the other to the same officer and an assistant state's attorney, about obtaining guarantees he might receive if he spoke to them or gave a confession about the alleged sexual offenses he was alleged to have committed, were admissible as independent admissions and not plea-related. The supreme court held that the defendant's statements "are not accurately characterized as an attempt to engage in plea negotiations," and "it must be clear that a defendant actually intends to plead guilty in exchange for a concession by the State, and that such intention is objectively reasonable under the circumstances." *Rivera*, at ¶ 30. The court therefore upheld the admission of evidence of the defendant's effort to obtain guarantees.

Other supreme court decisions holding that statements of defendants were not plea-related and therefore admissible at trial include *People v. Jones*, 219 Ill. 2d 1 (2006) (reasoning that "while Rule 402(f) was enacted to encourage the negotiation process, it was not enacted to discourage legitimate interrogation techniques. Those arrested often seek leniency, and not all attendant statements made in the hope of gaining concessions are plea-related statements under Rule 402(f);" and holding that, although not discernible from the record, taking as true defendant's allegations that he offered to bargain when talking to police, the objective circumstances in the case revealed that any expectation that he was engaged in plea negotiations was not reasonable); and *People v. Hart*, 214 Ill. 2d 490 (2005) (defendant's suggestion that he might be willing to cooperate with a detective, but that he first wanted to know what the detective could do for him, did not constitute a plea-related discussion; Rule 402(f) was not meant to exclude from admission evidence of mere offers of cooperation that do not include a willingness to plead guilty).

People v. Neese, 2015 IL App (2d) 140368, a prosecution for a felony theft offense, cites and relies on numerous principles from *Rivera* in holding that the statement of a police officer that he told defendant over the phone that, if defendant would

come in and give a full, written confession, he would consider charging defendant only with a misdemeanor offense, did not constitute a plea-related discussion, because neither the police officer nor defendant stated anything about a possible guilty plea. For that reason, the defendant's statement that, if he came in (he didn't) he (the defendant) would write that he had taken about $50 worth of coins from washing machines on each of 12 occasions, was admissible. Citing *Rivera* (see *Rivera* at ¶ 29), the appellate court emphasized "that this is the type of situation in which a court should resist characterizing a commonplace conversation between a police officer and a suspect as a plea negotiation." *People v. Neese*, 2015 IL App (2d) 140368, ¶ 19.

In *People v. Eubanks*, 2021 IL 126271, a year after having been charged with first degree murder and aggravated battery with a firearm, defendant gave detectives an inculpatory videotaped statement. Soon thereafter, he pleaded guilty to first degree murder. Still later, the trial court held a hearing on defendant's motions to withdraw his plea of guilty, and granted those motions. A stipulated bench trial followed, during which defendant's videotaped statement was admitted into evidence. Defendant, who had previously been offered 35 years' imprisonment in a recanted negotiated plea in exchange for his guilty plea and agreement to testify against two others involved in the murder, was found guilty of first degree murder and he was sentenced to 50 years' imprisonment. After the affirmance of his conviction and sentence, defendant filed a postconviction petition in which he alleged that his trial counsel was ineffective for failing to seek suppression of his videotaped statement at trial, pursuant to Illinois Supreme Court Rule 402(f). (The attorney had moved to suppress the statement on 5th and 14th amendment grounds, but not on the basis of Rule 402(f).) In a split decision, the appellate court held that defendant's videotaped statement was properly admitted. See 2020 IL App (3d) 189117. The majority held that defendant's videotaped statement was not made during plea discussions and was thus admissible at his trial. The dissenting justice contended that nothing in the language of Rule 402(f) nor in its accepted purpose distinguishes between a statement made during plea negotiations and a statement offered pursuant to said negotiations.

In its review of the appellate court decision, the supreme court applied Ill. S. Ct. R. 402 (f), and cited federal court decisions on FRE 410, prior Illinois Appellate Court decisions, and the evidence presented at the third stage of the postconviction evidentiary proceedings. The court concluded that defendant's statement was not made during plea discussions and was therefore admissible at defendant's trial. The court relied in part on the testimony of defendant and his attorney at the third stage of the postconviction proceedings that defendant had agreed to plead guilty before defendant made his videotaped statement. Concluding that it could "easily conclude based on this record that a plea deal was firmly in place *before* the videorecorded statement was made and that the statement was made pursuant to the deal" (*Eubanks*, 2021 IL 126271, at ¶ 47), the supreme court reasoned as follows:

> The construction rendered by these [federal and Illinois Appellate] courts is not only consistent with the plain language of Rule 402(f) but also with its purpose, which "is to encourage the negotiated disposition of criminal cases through elimination of the risk that the accused enter plea discussions at his peril." [Citation]. The rule's purpose is accomplished by excluding statements made *during* the negotiation process. Once negotiations are complete and the parties have reached an agreement, however, there is nothing more for the rule to "encourage." At this point, the case is most likely to be resolved according to the parties' agreed disposition. *Eubanks*, at ¶ 40.

Finally, addressing defendant's policy argument, the supreme court reasoned as follows:

> Defendant argues before this court that, even if the statement in this case was given after a plea deal had been reached and in performance of that deal, it should still be inadmissible as a matter of policy. But defendant offers no valid basis for reading the term "plea discussions" in the rule to encompass something more than negotiations. More importantly, he fails to identify a single case that supports his position. Indeed, all the cases

considering the issue uniformly hold that statements given after a plea agreement is finalized are admissible. *Eubanks*, at ¶ 42.

Decisions Determining that Rule 402(f) Applied

Two supreme court decisions that held that statements of defendants were plea-related and therefore not admissible at trial are *People v. Friedman*, 79 Ill. 2d 341, 351-52 (1980) (holding that defendant's statement to an Attorney General investigator, a month after his indictment, about "making a deal" and that his "unsolicited statement was an offer to enter negotiation," which was "a clear indication of defendant's intent to pursue plea negotiations," thus rendering inadmissible his statement at trial); and *People v. Hill*, 78 Ill. 2d 465 (1980) (defendant's statement to an assistant state's attorney that he "wanted to talk a deal" and then spelling out the terms he would agree to, constituted plea-related discussion, thus rendering his statements at trial inadmissible).

In determining whether statements are plea-related, note that, in distinguishing the statements of the defendants in *Friedman* and *Hill*, in *Rivera* the supreme court reasoned as follows:

> "Unlike the defendants in *Friedman* and *Hill*, defendant did not exhibit a subjective expectation to negotiate a plea. Defendant did not ask for any specific concessions from the State, only for unspecified 'guarantees.' Nor did defendant actually offer to plead guilty. Because defendant had not yet been charged when he made the statements, it is not apparent what concessions defendant hoped to receive in exchange for his confession. Not all statements made in the hopes of some concession are plea related." *Rivera*, at ¶ 26 (also citing appellate court decisions holding that statements were not plea-related).

Cooperation Agreements

In *People v. Stapinski*, 2015 IL 118278, the Illinois Supreme Court distinguished a "cooperation agreement" from the type of plea agreements that are covered by IRE 410 and Supreme Court Rule 402(f), or from the grant of immunity. In *Stapinski*, the supreme court applied contract principles in holding that, where a defendant fulfills his part of a cooperation agreement—an agreement with police to cooperate in developing a case against another in exchange for not being charged—due process principles require that the agreement be honored and that a charge brought in violation of the agreement be dismissed. The court further held that due process requires enforcement even where the State has not approved of the agreement, holding that "[a]n unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences." *Stapinski*, at ¶ 55.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENTARY

Author's Commentary on Ill. R. Evid. 411

IRE 411 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See Imparato v. Rooney*, 95 Ill. App. 3d 11 (1981) (evidence that a party has insurance is generally inadmissible because being insured has no bearing on the question of negligence and may result in a higher award); *Lenz v. Julian*, 276 Ill. App. 3d 66 (1995) (improper to inform the jury, either directly or indirectly, that a defendant is or is not insured against a judgment that might be entered against him in a negligence action).

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

Rule 412. Prior Sexual Activity or Reputation as Evidence

Evidence of the sexual activity or reputation of a person alleged to be a victim of a sexual offense is inadmissible:

(a) in criminal cases, as provided for and subject to the exceptions in section 115-7 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7);

(b) in civil cases, as provided for and subject to the exceptions in section 8-2801 of the Code of Civil Procedure (735 ILCS 5/8-2801).

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

COMMENTARY

Author's Commentary on Ill. R. Evid. 412

IRE 412 was adopted by the Illinois Supreme Court effective October 15, 2015. The rule's adoption acknowledges the applicability of rape shield statues in both criminal and civil trials. Because IRE 412 merely refers to the relevant statutes, familiarity with each statute's contents is necessary. The statutes are provided at **Appendix E** and **Appendix F**. The following commentary offers a comparison of the Illinois statutes with the federal rule's subdivisions.

Statutory Counterparts to Fed. R. Evid. 412(a)'s Bar to Admission

Section 115-7 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7), which limits the admissibility of the prior sexual activity or reputation of a victim of a sexual offense and is commonly referred to as the "rape shield statute" or the "rape shield law" or the "rape shield bar," is the counterpart to FRE 412. The statute is provided in the appendix to this guide at **Appendix E**. Like FRE 412(a), in prosecutions for specified sexual offenses and specified offenses involving sexual penetration or sexual conduct, the statute prohibits evidence of the prior sexual activity or of the reputation (akin to the federal rule's "predisposition") of an alleged victim or corroborating witness under section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3; available at **Appendix A**), with limited exceptions. Section 115-7's reference to section 115-7.3 "corroborating witness" refers to a propensity witness who provides evidence of another sexual offense of the defendant, as allowed by that statute. The supreme court has ruled that section 115-7 applies both to the State and to the defense and that it is unambiguous in prohibiting admissibility of a victim's prior sexual history, but for the exceptions (given under the following heading) that it explicitly provides. *See People v. Patterson*, 2014 IL 115102, ¶¶ 113-123; *People v. Santos*, 211 Ill. 2d 395 (2004); *People v. Sandoval*, 135 Ill. 2d 159 (1990).

In *United States v. Groce*, 891 F. 3d 260 (7th Cir. 2018), the defendant appealed his conviction for sex-trafficking for which he was sentenced to imprisonment for 25 years. The defendant contended, *inter alia*, that the district court had erred in excluding evidence during his jury trial of the prostitution histories of women who were alleged victims of his sex-trafficking, on the basis that the evidence was relevant to his *mens rea* in this case—one which required proof of the knowing use of (or reckless disregard concerning the use of) force, threats of force, fraud, or coercion. Invoking the "constitutional rights" exception in FRE 412(b)(1)(C), he argued that the district court had erred in excluding evidence of the prior prostitution histories by the erroneous application of FRE 412(a). Citing FRE 412(a), which bars "evidence offered to prove that a victim engaged in other sexual behavior," and prior related 7th Circuit decisions, the court held that the district court had ruled correctly, for a victim's prior sexual conduct is irrelevant to the required *mens rea* for sex-trafficking.

Note that in **civil cases**, Public Act 96-0307, effective January 1, 2010, created **section 8-2801** of the Code of Civil Procedure (735 ILCS 5/8-2801). That statute provides provisions similar to those in section 115-7 of the Code of Criminal Procedure of 1963 regarding inadmissibility of evidence of prior sexual activity and reputation. The statute is provided in the appendix at **Appendix F**.

Statutory Counterparts to Fed. R. Evid. 412(b)'s Exceptions

Similar to the exceptions provided by FRE 412(b), section 115-7(a) of the Code of Criminal Procedure of 1963 (*see* **Appendix E**) provides exceptions to the general rule of exclusion where the evidence concerns past sexual conduct with the accused relevant to the issue of consent or when the evidence is constitutionally required to be admitted. *See People v. Maxwell*, 2011 IL App (4th) 100434 (discussing other cases applying section 115-7(a) and holding that a theoretical cross-examination question posed by defense counsel to a doctor ("Is it possible that the alteration of the hymen of this girl could have happened from sexual intercourse by someone other than defendant?") was properly prohibited by the trial court in the absence of evidence that someone else may have been responsible, which would have made it constitutionally required).

In **civil cases**, section 8-2801 of the Code of Civil Procedure (735 ILCS 5/8-2801; *see* **Appendix F**), provides exceptions to the general rule of inadmissibility of prior sexual activity or reputation where the evidence is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence" or to prove prior sexual activity with the defendant in order to prove consent.

Relevant Illinois Decisions

In *People v. Patterson*, 2014 IL 115102, the supreme court emphasized:

> "the absolute nature of the rape shield bar, subject only to two narrow statutory exceptions for 'evidence concerning the past sexual conduct of the alleged victim [or corroborating witness] *** with the accused' and evidence that is 'constitutionally required to be admitted.' (Internal quotation marks omitted.) [*People v.*] *Santos*, 211 Ill. 2d [395] at 401." *Patterson* at ¶ 114.

In *Patterson*, the court also noted the *dicta* in *People v. Sandoval*, 135 Ill. 2d 159, 185 (1990), "stating that one 'extraordinary circumstance' potentially satisfying the constitutional requirement exception to the rape shield statute is an offer of evidence providing an alternative explanation for the victim's observed injuries." The court noted, however, that in the case at bar the examining physician had not testified that the alleged injury to the victim (cervical redness) was the result of a rape. Thus, there was no basis for applying an exception to the rape shield bar.

In addition to the *dicta* in *Sandoval*, for examples of cases providing insight into "constitutionally required" reasons that may necessitate exceptions to the general rule of exclusion provided by the rape shield bar, see *Olden v. Kentucky*, 488 U.S. 227 (1988) (holding that where the man with whom the alleged victim was cohabiting saw her exit the co-defendant's car, defendant had the constitutional right under the Sixth Amendment confrontation clause to question the alleged victim about her cohabitation with that man to show her motive in making the claim of rape); *People v. Gorney*, 107 Ill. 2d 53 (1985) (although affirming the conviction because the evidence was deemed to be overwhelming, holding that "[e]vidence of false allegations of rape may be admissible").

See also *People v. Bates*, 2018 IL App (4th) 160255, an aggravated criminal sexual assault prosecution, where the appellate court noted that defendant conceded that the DNA found on the victim's clothing, which matched the victim's two consensual partners, should be excluded based on the rape shield law. But the court held that, based on the same law, the trial court properly rejected defendant's contention that the DNA of a third but unidentified male found on the victim's vaginal swab should have been admitted as constitutionally required. The bases of defendant's contentions were that, though defendant could not be excluded as the potential source of DNA found on the victim's anal swab, there was no definite match with his DNA and, because the victim had testified that she had been both vaginally and anally penetrated, the unknown male may have been the source of the DNA on the anal swab as well,

and thus the actual offender. Noting that "[d]efendant's own expert witness conceded that the DNA profile found on [the victim's] anal swab would only occur in one out of every 840 trillion individuals in the African-American population" (*Bates*, at ¶ 62; interior quotation marks omitted), and reasoning that "the statistical improbabilities that an unidentified person other than defendant contributing both the semen on [the victim's] vaginal swab and anal swab, this evidence would not make a meaningful contribution to the fact-finding enterprise" (*id.* at 63), the court concluded "at best, the unidentified semen would be marginally relevant." *Id*. at 64. In addition to concerns that "this evidence would pose an undue risk of harassment, prejudice, and confusion of the issues," the court concluded that assuming the unidentified semen was from a consensual partner, such evidence would have no bearing on whether [the victim] consented to sexual relations with the defendant." *Id*. (interior quotation marks omitted). Having previously noted that the jury heard that defendant's DNA was found on a victim of another sexual assault under similar circumstances a few weeks after the assault in the case at bar, and pointing out that defendant had confronted the State's expert witness on cross-examination by demonstrating that his DNA was not found on the victim's vaginal swab and that he was not a direct match of the victim's anal swab, and further that this was not a case where defendant contended that he had consensual sexual relations with the victim, the appellate court held that the trial court did not abuse its discretion in denying the introduction of the unidentified DNA.

In *People v. Kruel*, 2022 IL App (1st) 200721, the appellate court affirmed the trial court's exclusion of DNA evidence of the victim's two other anal swabs of unidentified male DNA profiles, which the defendant contended was relevant to the absence of the defendant's DNA and to the State's opening the door to the admission of the unidentified DNA evidence. The appellate court noted that admission of the evidence of DNA evidence is required only (1) where consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim or (2) when the evidence is constitutionally required to be admitted. The court pointed out that consent was not an issue in the case because defendant maintained that the assault never occurred. Citing prior decisions, the court held that the constitutional exception requires that a defendant be permitted to offer certain evidence directly relevant to matters at issue in the case (Kruel, at ¶ 40), which were not present in this case.

In *People v. Carter*, 2022 IL App (1st) 210261, ¶¶ 101-118, a conviction for two counts of criminal sexual assault on a 16-year-old girl, the appellate court applied the rape shield statute in affirming the trial court's denial of the defendant's motion to admit evidence that the victim had a sexually transmitted disease (STD) a year before the alleged offenses. The appellate court held that proof of the victim's STD did not satisfy the two exceptions to the rape shield bar, because the evidence was not relevant to establish the victim's consent nor was it constitutionally required to be admitted.

In *People v. Pope*, 2020 IL App (4th) 180773, ¶¶ 23-33, defendant was charged with numerous sexual offenses of three children, 11, 12, and 14 years of age. Defendant asked the trial court to allow evidence that all the alleged victims in the case were previous victims of sexual assault by a parental figure. In response, the State informed the trial court that it did not intend to argue that the victims had unique sexual knowledge they could have learned only from what allegedly happened with defendant. Relying on *People v. Hill*, 289 Ill. App. 3d 859, 864 (1997), which held that evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge, the trial court noted that *Hill* required that the "prior sexual conduct must account for how the child could provide the testimony's sexual detail without having suffered defendant's alleged conduct." *Pope*, at ¶ 31. The court concluded that "[t]he purported testimony of these girls, given their ages and the allegations in this case, do not create such a 'unique knowledge' that would allow for the admission of such evidence." *Id*.

On appeal, defendant argued that the excluded evidence could be relevant as evidence of bias, prejudice, or motive. But the appellate court noted that "nothing about the prior sexual assaults (which had nothing to do with defendant) made the victims biased against defendant." *Id*. at ¶ 32. Reasoning that "(1) this evidence would not have been used to rebut an

argument of 'unique knowledge' and (2) there is no relevant alternative use identified by defendant," the court held "the trial court did not abuse its discretion regarding the application of section 115-7 to this case." *Id.* at 33.

ILLINOIS' STATUTORY COUNTERPARTS TO FED. R. EVID. 412(C)'S PROCEDURES

Section 115-7(b) of the Code of Criminal Procedure of 1963 (*see* **Appendix E**) requires the defendant to make an offer of proof, at a hearing held *in camera*, concerning the past sexual conduct or reputation of the alleged victim or corroborating witness, in order to obtain a ruling concerning admissibility. That section identifies the type of information required for the offer of proof. It also provides that, to admit the evidence, the court must determine that the evidence is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice.

In **civil cases**, section 8-2801(c) of the Code of Civil Procedure (735 ILCS 5/8-2801(c); *see* **Appendix F**) requires the defendant to file a written motion at least 14 days before trial describing the evidence and the purpose for which it is offered, and it requires the court to conduct an *in camera* hearing, with the record kept under seal, before allowing admission of the evidence.

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Rule 413. Evidence of Other Offenses in Criminal Cases

(a) Evidence in Certain Cases. In a criminal case for an offense set forth in section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3), evidence of the defendant's commission of another offense or offenses set forth in section 115-7.3 is admissible, as provided in section 115-7.3.

(b) Evidence in Domestic Violence Cases. In a criminal case for an offense related to domestic violence as set forth in section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4), evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, as provided in section 115-7.4.

(c) Evidence of Prior Convictions. In a criminal case for the type of offenses set forth in section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-20), evidence of the defendant's conviction for an offense set forth in that section is admissible when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant, as provided in section 115-20.

Author's Commentary on Ill. R. Evid. 413

IRE 413 was adopted by the Illinois Supreme Court effective October 15, 2015. The rule acknowledges and adopts the statutes that allow admission of offenses which provide propensity evidence that is otherwise prohibited. The statutes that are referred to in each of the three subdivisions of IRE 413 are discussed below.

IRE 413(a) and Section 115-7.3

In the prosecution of certain specified sexual offenses or other specified offenses involving sexual penetration or sexual conduct (listed in the next paragraph), **section 115-7.3** of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3; *see* **Appendix A**), entitled "Evidence in certain cases," allows evidence concerning the defendant's commission of the same or another of the offenses specified in the statute. Note, too, that IRE 404(b) also specifically refers to the provisions of section 115-7.3 as an exception to the general rule prohibiting propensity evidence.

Section 115-7.3 of the Code of Criminal Procedure of 1963 (*see* **Appendix A**) applies to criminal cases in which the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV. It also applies where the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder, when the commission of the offense involves sexual penetration or sexual conduct. It applies, too, where the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

Like FRE 413(a), section 115-7.3(b) provides that evidence of the other offenses it allows "may be considered for its bearing on any matter to which it is relevant." Section 115-7.3(e) provides that "proof may be made by specific instances of conduct, testimony as to reputation ['only after the party opposing has offered that testimony'], or testimony in the form of an expert opinion."

***Donoho* and *Ward*, and Decisions Applying Them**

In *People v. Donoho*, 204 Ill. 2d 159, 177 (2003), the supreme court determined that section 115-7.3, which allows propensity evidence, does not violate equal protection. Although that decision did not directly rule on whether the statute violated due process, the appellate court in *People v. Beaty*, 377 Ill. App. 3d 861 (2007), stated that the supreme court implicitly held that it did not violate that protection. In any case, *Beaty* and *People v. Everhart*, 405 Ill. App. 3d 687 (2010), explicitly held that the statute did not violate due process.

Citing *Donoho* and section 115-7.3, in *People v. Vannote*, 2012 IL App (4th) 100798, ¶¶ 35-42, the appellate court affirmed the trial court's admission of evidence, for propensity purposes, of the defendant's prior conviction for aggravated criminal sexual abuse, in a prosecution for aggravated criminal sexual abuse.

In *People v. Ward*, 389 Ill. App. 3d 757 (2009), citing United States and Illinois Supreme Court precedent, the appellate court upheld the admission of evidence of a prior sex offense, as propensity evidence under section 115-7.3, even though a jury had acquitted the defendant of that prior offense. In its review of that appellate court decision in *People v. Ward*, 2011 IL 108690, noting that it had previously upheld the constitutionality of section 115-7.3 in *Donoho*, and that the defendant had not challenged either the constitutionality or the admissibility of the propensity evidence for its review, the supreme court determined that it did not need to address the appellate court's holding regarding the admission of evidence of the prior sex offense on which there had been an acquittal but, addressing the issue squarely before it, held that the trial court's ruling barring the *evidence of the acquittal* was improper.

In *People v. Rosado*, 2017 IL App (1st) 143741, which involved the admission of evidence to establish identity under Rule 404(b), the appellate court held that the trial court abused its discretion in allowing the admission of a *subsequent* offense of delivery of a controlled substance because such evidence could not bolster identification of the defendant as the person who delivered a controlled substance in the earlier charged offense. Also, as relevant here, the court invoked the supreme

court decision in *Ward* in holding that the trial court erred in not allowing evidence of the earlier acquittal of the defendant for the subsequent offense which had been admitted into evidence for the purpose of establishing identity (as opposed to proof of propensity as in *Ward*).

Time Between Prior Act and Offense on Trial

Citing *Donoho*, *Ward*, and *Vannote*, in *People v. Smith*, 2015 IL App (4th) 130205, the appellate court upheld the admission of prior uncharged sexual abuse offenses, under section 115-7.3, in a prosecution for sexual abuse offenses. Recognizing that the prior offenses had occurred 12 to 18 years prior to the offenses on trial, the court pointed out that the supreme court in *Donoho* had "decline[d] to adopt a bright-line rule about when prior convictions are *per se* too old to be admitted under section 115-7.3," and that the supreme court had noted that the "appellate court has affirmed admission of other-crimes evidence over 20 years old..." *Smith*, at ¶ 29, citing *People v. Donoho*, 204 Ill. 2d 159, 183, 184 (2003), and *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994).

See also the discussion of *People v. Kitch*, 2019 IL App (3d) 170522, ¶ 33, *supra*, in the commentary on IRE 404(b) under the heading *Applying Sections 115-7.3 and 115.7.4*, where the appellate court made the same observation about *Donoho* and approved admission of a prior offense that occurred 13 years before the charged offense.

In *People v. Lobdell*, 2017 IL App (3d) 150074, a majority of the appellate court panel held that during the defendant's bench trial for the offense of criminal sexual assault the trial court had not erred in admitting, for propensity purposes, evidence of a rape conviction 30 years earlier. The majority pointed out that the defendant had been incarcerated for the rape conviction for 28 of the 30 years, and it cited the decisions in *Donoho*, where 12 to 15 years had elapsed between offenses; *Davis*, where a prior sex act occurred over 20 years before; and *Smith*, where 12 to 18 years had elapsed between the offenses. The dissenting justice challenged the admission of the 30-year-old conviction for rape primarily on the basis of her strong disagreement with the majority concerning the similarity of the two offenses.

***People v. Fields*: Possible Consequence of Reversal of Prior Admitted Conviction**

In *People v. Fields*, 2013 IL App (3d) 080829-B, the appellate court held that section 115-7.3(b), which allows "*evidence* of the defendant's commission of another offense or offenses" includes evidence of a prior *conviction* and permits proof of the conviction through the submission to the jury of a certified conviction, thus rejecting the defendant's contention that such proof was improper. In *Fields*, although the prior conviction had been reversed after the defendant's conviction in the case at bar, the appellate court declined to consider the consequence of the reversal, reasoning that the issue had not been before the trial court and thus could not be "reviewed," and that the issue had to be presented in a postconviction petition. The supreme court thereafter directed the court to vacate its judgment and to resolve the issue. In the decision that followed in *People v. Fields*, 2013 IL App (3d) 080829-C, the court first noted that "the reversal of an underlying prior conviction admitted to show propensity does not result in automatic reversal," because it does not qualify as "structural error." *Fields*, 2013 IL App (3d) 080829-C, ¶ 21. Focusing on "the lack of direct evidence" (*id.* at ¶ 22), that "[t]here were no eyewitnesses or physical evidence" (*id.* at ¶ 24), and the emphasis during trial on the defendant's prior *conviction*, one that had been reversed (with the case subsequently dismissed), the appellate court, with one justice dissenting, reversed the conviction and remanded the case to the circuit court.

Notice Provision

Like **FRE** 413(b), section 115-7.3(d) of the Code of Criminal Procedure of 1963 has a notice provision. That statute provides that when "the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown."

IRE 413(b) and Section 115-7.4

In addition to the sex-related offenses listed above, IRE 413(b), consistent with **section 115-7.4** of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4; *see* **Appendix B**), extends the admissibility of evidence provided by FRE 413

concerning sex offenses, to allow evidence of a non-sex offense, specifically, another offense or offenses of domestic violence in a prosecution for domestic violence. Note that IRE 404(b) specifically refers to the provisions of section 115-7.4 (in addition to those of section 115-7.3) as an exception to the general rule prohibiting propensity evidence.

In *People v. Dabbs*, 239 Ill. 2d 277 (2010), the supreme court held that evidence of the defendant's domestic violence on his former wife, evidence admitted during his trial for domestic violence on his girlfriend, was proper. For an appreciation of the impact of the *Dabbs* decision on other-crimes evidence, see the discussion concerning that decision in the *Author's Commentary on Ill. R. Evid. 404(b)*.

IRE 413(c) and Section 115-20

IRE 413(c), consistent with section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-20; *see* **Appendix C**), also broadens the provisions of FRE 413, for it allows evidence of a prior conviction for domestic battery, aggravated battery committed against a family or household member, stalking, aggravated stalking, or violation of an order of protection "in a later prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant." Note, too, that IRE 404(b) specifically refers to the provisions of section 115-20 (as well as those of sections 115-7.3 and 115-7.4) as an exception to the general rule prohibiting propensity evidence.

***Chapman* and *Chambers*: Liberal Application of Section 115-20**

In *People v. Chambers*, 2011 IL App (3d) 090949, the appellate court concluded that language in section 115-20 reflected the legislature's intent to make admissible not only a *conviction* for the prior offenses it lists, but also the *evidence* underlying the conviction. The court noted that, in any event, section 115-7.4 specifically allows evidence related to a prior domestic violence offense in a subsequent prosecution for domestic violence, which was the offense under review in *Chambers*.

In *People v. Chapman*, 2012 IL 111896, the supreme court held that evidence of a prior conviction for domestic battery was properly admitted in a prosecution for first-degree murder, even though murder is not one of the offenses specifically listed in section 115-20. The court held that evidence of the domestic battery conviction was proper because murder is an offense incorporated in section 115-20's language permitting proof of a prior conviction "in a later prosecution for *any of these types of offenses* when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant." *Chapman*, at ¶ 24 (Emphasis in original).

Note that in *People v. Ross*, 2018 IL App (2d) 161079, the appellate court held that *Chapman* did not address the issue in the case at bar, where a nonenumerated conviction (battery; defendant was originally charged with domestic battery but convicted of battery) was admitted for a similar kind of offense (murder), whereas *Chapman* involved an earlier conviction for an enumerated offense (domestic battery) and a later prosecution for murder (one of the "types of offenses" to which section 115-20 applies). Nonetheless, the court held that it "need not resolve the issue, because the other-crimes evidence was admissible under the common law and section 115-7.4." *Ross*, at ¶ 175.

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

[FRE 414 NOT ADOPTED.]

[See Author's Commentary below for statutory counterpart.]

Author's Commentary on an Illinois Statute that is a Counterpart to Fed. R. Evid. 414

FRE 414 was not adopted, but the same subject matter is addressed by statute.

Although Illinois has not adopted FRE 414, section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3), which is discussed above in relation to IRE 413 and is in the appendix at **Appendix A**, applies to prosecutions for predatory criminal sexual assault of a child (see 720 ILCS 5/11-1.40, which addresses sexual offenses on a victim under the age of 13), and applies as well as to other sexual offenses that may have children as victims.

FRE 414, which addresses only child molestation cases, is identical to the provisions of FRE 413, except that the latter applies to sexual offenses generally. The provisions of IRE 413 and section 115-7.3 of the Code of Criminal Procedure, which are explained above, apply equally to adults and to children who are victims of sexual offenses.

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

[FRE 415 NOT ADOPTED.]

[There is no statutory counterpart to the federal rule in Illinois.]

COMMENTARY

Author's Commentary on Non-Adoption of Fed. R. Evid. 415

Illinois has no counterpart to FRE 415 in civil cases.

FEDERAL RULES OF EVIDENCE

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

ILLINOIS RULES OF EVIDENCE

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience.

COMMENTARY

Author's Commentary on Fed. R. Evid. 501

Neither the federal rules nor federal statutes provide rules for privilege. Given these absences, two United States Supreme Court opinions are relevant for providing meaningful historical background for FRE 501, as well as clarity on how and why the common law is used as the foundation for determining the adoption of testimonial privileges.

The Court's earlier decision in *Trammel v. United States*, 445 U.S. 40 (1980), which addresses a revised adoption of marital privilege, provides as follows:

> The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted ... in the light of reason and experience." Fed. Rule Evid. 501. (Citation). The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. That proposal defined nine specific privileges, including a husband-wife privilege which would have codified the *Hawkins* rule and eliminated the privilege for confidential marital communications. See proposed Fed. Rule Evid. 505. In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," (Citations). *Trammel*, 445 U.S. at 47-48.

Later, *Jaffee v. Redmond*, 518 U.S. 1 (1996), which adopted the privilege protecting confidential communications between a psychotherapist and her patient, cites *Trammel* and expands on its rationale:

> Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles ... in the light of reason and experience." The authors of the Rule borrowed this phrase from our opinion in *Wolfle v. United States*, 291 U.S. 7, 12 (1934), which in turn

referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." (Citations). The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship ... should be determined on a case-by-case basis." (Citations). The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." (Citations).

The common-law principles underlying the recognition of testimonial privileges can be stated simply. "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." (Citations). Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." (Citations). *Jaffee*, 518 U.S. at 8-9.

Author's Commentary on Ill. R. Evid. 501

Except for variances to distinguish Illinois proceedings from federal proceedings, IRE 501 is identical to its federal counterpart, before the latter's amendment solely for stylistic purposes effective December 1, 2011. But in contrast to federal proceedings, which do not have statutory privilege rules, there are numerous Illinois statutes that provide testimonial privilege. Also, as in federal proceedings, there are numerous common-law privileges.

Effect of Privileges on Fact-Finding Process

In determining the evidentiary application of both statutory and common-law privileges, it is prudent to consider the observation made by the Illinois Supreme Court in *Brunton v. Kruger*, 2015 IL 117663, that "[t]he existence of a statutory privilege of any kind necessarily means that the legislature has determined that public policy trumps the truth-seeking function of litigation in certain circumstances," as well as its citing with approval the appellate court's statement in *FMC Corp. v. Liberty Mutual Insurance Co.*, 236 Ill. App. 3d 355, 358 (1992), that "[i]n considering any privilege, we must be mindful that privileges, by their nature, tend to adversely affect the fact-finding process and often stand as a barrier against illumination of truth. Therefore, privileges are not to be expansively construed because they are exceptions to the general duty to disclose during discovery." *Brunton v. Kruger*, 2015 IL 117663, ¶ 64.

Note also that "federal courts apply the federal common law of evidentiary privileges—not state-granted privileges—to claims *** that arise under federal law." *Hamdan v. Indiana University Health North Hospital, Inc,* 880 F.3d 416, 421 (7th Cir. 2018) (holding that the Seventh Circuit "has declined to recognize a federal peer-review privilege, reasoning that the need for truth outweighs the state's interest in supplying the privilege"). Thus, "[a] party arguing for a new evidentiary privilege under Rule 501 must confront the general obstacle that evidentiary privileges are disfavored because they impede fact-finding by excluding relevant information." *Id.* at 8, citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, at 189 (1990), and *United States v. Nixon*, 418 U.S. 683, 710 (1974) (privileges "are in derogation of the search for the truth").

Examples of Illinois Statutory Privileges

There are numerous Illinois statutory privileges. Examples of some of the more commonly invoked statutory privileges include:

- marital privilege (725 ILCS 5/115-16; 735 ILCS 5/8-801) (see the discussion under the headings related to Marital Privilege below);
- physician-patient privilege (735 ILCS 5/8-802) (see the discussion under the heading of **Physician-Client Privilege** *infra*);
- privilege for statements made by a victim of a sexual offense to rape crisis personnel (735 ILCS 5/8-802.1);
- privilege for statements made by victims of violent crimes to counselors of such victims (735 ILCS 5/8-802.2);
- informant's privilege (735 ILCS 5/8-802.3 and Ill. S. Ct. R. 412(j)(ii));
- clergy-penitent privilege (735 ILCS 5/8-803) (see *Doe v. The Catholic Diocese of Rockford*, 2015 IL App (2d) 140618, where plaintiff sought the identity of the writer of an allegedly defamatory letter, the appellate court held that defendant could not invoke the privilege because the letter writer had not made a "confession or admission," as required by the statute; see also *People v. Peterson*, 2017 IL 120331, where the supreme court held that statements made by the defendant's missing fourth wife to a clergyman were not subject to the privilege because the clergyman's church had no rules regarding counseling sessions and there were no practices or precepts or customs of his church to which he was bound with respect to the confidentiality of counseling sessions);
- union agent and union member privilege (735 ILCS 5/8-803.5);
- confidential advisor (725 ILCS 5/804, added by P.A. 99-826, eff. 8/21/15);
- reporter's privilege (735 ILCS 5/8-901) (for a case involving a defendant's effort to divest a reporter of the reporter's privilege, see *People v. McKee*, 2014 IL App (3d) 130696, where the appellate court reversed the trial court's divestiture order on the basis that the identity of the reporter's source was not relevant to a fact of consequence in the first-degree murder allegations in the case);
- voter's privilege (735 ILCS 5/8-910);
- language interpreter's privilege (735 ILCS 5/8-911);
- interpreter for the deaf and hard of hearing privilege (735 ILCS 5/8-912);
- mental health therapist-patient privilege (740 ILCS 110/10) See *Reda v. Advocate Health Care*, 199 Ill. 2d 47 (2002) (in applying the privilege, holding that plaintiff "did not place his mental condition at issue merely by claiming damages for what is a neurological injury, *i.e.*, stroke and/or other brain damage," and noting that neurological injury is not synonymous with psychological damage and neurological injury does not directly implicate psychological damage). For two appellate court decisions discussing the breadth of confidentiality under the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/1, *et seq.*), see *Stuckey v. The Renaissance at Midway*, 2015 IL App (1st) 143111), and *Garton v. Pfeifer,* 2019 IL App (1st) 180872. See also *Doe v. Burke Wise Morrissey & Kaveny*, 2022 IL App (1st) 211283 (applying HIPAA, holding that the circuit court improperly dismissed plaintiff's claim under the Act, a claim which alleged that, without his informed consent and after he received an award of more than $4 million, his attorneys issued a press release and an article in the Chicago Daily Law Bulletin about his medical malpractice trial, revealing his real name, his diagnoses, his suicide attempt at the hospital that led to his injuries, and the effects of his injuries), *Sparger v. Yamini*, 2019 IL App (1st) 180566 (discussing *Reda* and distinguishing the decisions in *D.C. v. S.A.*, 178 Ill. 2d 551 (1997), and *Phifer v. Gingher*, 2017 Ill. App. (3d) 160170, (in holding that the trial court erred in compelling a neuropsychologist's report, because plaintiff did not see the neuropsychologist for psychological issues but rather for a neurolog-

ical injury, she did not place her mental condition in issue by claiming brain damage). For a recent decision allowing the identity of a patient's mental health providers and the discovery of her psychiatric records, in the context of a wrongful death action based on suicide, see *Doe v. Great America LLC*, 2021 IL App (2d) 200123, ¶ 21 (holding, "Unlike cases such as *Reda* and *Sparger*, which involved a brain injury without an intervening suicide, a suicide directly implicates a psychological condition or psychological damage. 'Bereft of reason' and 'insanity' implicate a psychological injury."). Though related to FRE 501 and based solely on common law, see *Jaffee v. Redmond*, 518 U.S. 1 (1996) (explaining the rationale for and recognizing, under FRE 501, the appropriateness of a privilege protecting confidential communications between a psychotherapist (a licensed clinical social worker) and her patient, thus protecting communications between them from compelled disclosure in a federal civil action).

- Medical Studies Act (735 ILCS 8-2101, *et seq.*; see *Eid v. Loyola University Medical Center*, 2017 IL App (1st) 143967 (holding that the confidentiality provisions of the Act apply to information generated by a designee of the peer review committee for the use of the peer review committee in the course of internal quality control); see also *Mnookin v. Northwest Community Hospital*, 2018 IL App (1st) 171107 (in medical malpractice and wrongful death action, citing the Act and decisions in reversing friendly contempt for hospital's refusal to tender court-ordered discovery); see also *Less v. Mercy Hospital and Medical Center*, 2022 IL App (1st) 220247 (in a wrongful death action based on the shooting death of plaintiff's daughter (and two others) at the defendant hospital—citing two other appellate court opinions and distinguishing two others—holding that two separate reports requested by the hospital were not privileged under the Act because they were retained to evaluate hospital security measures, not the quality of patient care as contemplated by the Act; and further holding that one of the report writers was not privileged as a work product consultant under Ill. S, Ct. R. 201(b)(3), because the report was not generated in anticipation of litigation).

Additional statutory privileges are contained within chapter 225 of the Illinois Compiled Statutes, entitled "Professions, Occupations and Business Operations." They include:

- clinical psychologist privilege (225 ILCS 15/5);
- licensed clinical social worker or licensed social worker privilege (225 ILCS 20/16(1)(b));
- licensed marriage and family therapist privilege (225 ILCS 55/70);
- licensed professional counselor or licensed clinical professional counselor privilege (225 ILCS 107/75);
- licensed genetic counselor privilege (225 ILCS 135/90);
- licensed or registered certified public accountant privilege (225 ILCS 450/27; see *Brunton v. Kruger*, 2015 IL 117663 (holding that the privilege, as an attribute of the accounting profession, is that of the accountant and not the client).
- restorative justice practices privilege (section 804.5 of the Code of Civil Procedure (735 ILCS 5/804.5), which was adopted in Public Act 102-0100, effective July 15, 2021) (providing a privilege for participation in restorative justice practices by ensuring that anything said or done during the practice, or in anticipation of or as a follow-up to the practice, is privileged and may not be used in any future proceeding unless the privilege is waived by the informed consent of the party or parties covered by the privilege).

See also *Razavi v. Walkuski*, 2016 IL App (1st) 151435 (holding that the absolute privilege that applies to reporting crimes to law enforcement applies to a college student's report to campus security of on-campus sexual violence); and the

later decision in *Razavi v. School of the Art Institute of Chicago*, 2018 IL App (1st) 171409 (offering rationale for again holding that absolute privilege applies where college students report on-campus sexual violence to campus security).

Examples of Common-Law Privileges

The **attorney-client privilege** is an example of a common-law privilege — the oldest of the privileges for confidential communications — one that is also prescribed by the supreme court through the Rules of Professional Conduct (RPC Rule 1.6). *See also Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding the death of the holder of the privilege does not terminate the attorney-client privilege). See also Ill. S. Ct. R. 412(j)(ii) and Ill. S. Ct. R. 201(b)(2), which prohibit discovery of privileged information, including matters subject to the attorney-client privilege and **work-product protection**. See also the definitions for both "attorney-client privilege" and "work-product protection" provided in IRE 502(f).

For an example of the non-application of the attorney-client privilege, see *People v. Peterson*, 2017 IL 120331, ¶ 63, where the supreme court held that statements made by the defendant's missing fourth wife to an attorney who declined to represent her were not privileged and were properly admitted into evidence. Interestingly, the recent appellate court decision in *People v. Peterson*, 2022 IL App (3d) 220206, presents a comprehensive application of the attorney-client privilege—as a prior restraint in anticipation of a postconviction proceeding where Peterson was alleging ineffective assistance of counsel—in rejecting disclosures defendant Peterson made to his attorney, Joel A. Prodsky, about what happened to two of Peterson's former wives.

For a comprehensive analysis of the adoption and application in Illinois of the protection provided by the **"common-interest doctrine"** (also referred to as the "common-interest exception" or "common-interest rule"), an analysis that is a must-read for its rationale and application of the doctrine in both civil and criminal cases, see *Selby v. O'Dea*, 2017 IL App (1st) 151572. In that decision, the appellate court explicitly adopted the common-interest doctrine for Illinois as an exception to the waiver of privilege rule (and not as a separate "privilege"), thus protecting attorney-client privilege and attorney work-product protection for parties with a common interest in litigation against a third party, where privileged information is shared between parties with a common interest in the litigation.

In considering the scope of the protection provided by the common-interest doctrine, *Selby* addressed two issues, the first of which was "whether the parties sharing a 'common interest' must be perfectly aligned in all respects or whether it suffices that they share some common interest in defeating a litigation opponent." *Selby*, at ¶ 77. Based on a review of numerous authorities, the appellate court held that perfect alignment is not required; the parties need not be aligned on every issue.

The second issue addressed was "which statements, precisely, are covered by the common-interest exception to the waiver rule." *Id.* In answering that question, the appellate court listed the following scenarios where the protection of the common-interest doctrine applies:

- Communications between attorneys representing parties with common interests;
- Communications between a party and another party's attorney;
- Communications between a party and that party's attorney with the other party's attorney;
- Communications during a joint conference involving the parties and their attorneys.

The appellate court listed those scenarios because they were relevant to the case under review. Not addressed, because the issue was not relevant to the case, was "whether the common-interest doctrine protects communications directly from one party to the other party in common interest," where no attorney is present. *Id.* at ¶ 97. That question awaits separate appellate review.

Selby is mandatory reading for the issues described above, but also for its discussion of issues not resolved and for guidance concerning the need for a privilege log under Ill. S. Ct. R. 201(n).

For the "**attorney litigation privilege,**" see three relevant appellate court decisions that provide discussions concerning that privilege: *Bedin v. Northwestern Memorial Hospital*, 2021 IL App (1st) 190723; *Scarpelli v. McDermott Will & Emory LLP*,

2018 IL App (1st) 170874; and *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152.

Exceptions to Attorney-Client Privilege

There are exceptions to the attorney-client privilege. One of them is the common-interest doctrine, usually invoked to preserve privilege (see the discussion of *Selby* above) but also used to defeat a claim of privilege where parties who once shared a common interest (usually between insurer and insured) become hostile. In Illinois, the leading case on that exception is *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178 (1991) (in addition to holding that a cooperation agreement in the insurance contract imposed a duty on the insureds to assist in the conduct of litigation, holding that an insured and an insurer shared a common interest in defending against litigation, so that the attorney-client privilege did not bar discovery by the insurer concerning communications or documents of the insured and its counsel, which were created in defense of two previously settled lawsuits, in a subsequent coverage dispute relating to one of those suits).

In its most recent decision involving the common interest doctrine, the supreme court held, in *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2019 IL 123936, that there was no insurer-insured relationship between the parties where the plaintiffs brought suit against an insurance broker based on the broker's negligence in failing to procure appropriate insurance coverage. The supreme court distinguished its holding in *Waste Management*, where it had expanded the common interest doctrine "to the situation involving two parties who do not consult the same lawyer but who are in a 'special relationship' so that they could be treated as if they did retain the same counsel." *McCormick Foundation*, at ¶ 30. Unlike in *Waste Management*, where it had held that the insurer and insured had a special relationship and were in privity of contract and the insurer had a duty to indemnify its insured for the insured's negligence, the court reasoned that here the insured sought indemnification not for the insurer's negligence but for the negligence of its broker. *Id.* at ¶¶ 36-37. The supreme court therefore reversed the appellate court's affirmance of the circuit court's order compelling the insureds to produce discovery of privileged information.

In *Ross v. Illinois Central Railroad Company*, 2019 IL App (1st) 181579, an appeal from a good faith finding that a settlement between the plaintiff and his doctor against whom the defendant had filed a contribution claim, the defendant made discovery requests seeking all communications between the plaintiff, his doctor, and their attorneys. Although noting that the plaintiff and the doctor had not entered any agreements relating to the defense of the case, the circuit court ruled that they shared common interests, and it denied the requested discovery. In reversing the circuit court's ruling, the appellate court held:

> "Even when a common interest exists between parties, it is clear to us that the client must, at the time of disclosure, have an agreement with the receiving party that that party will treat the information as privileged. A disclosure in the absence of such an agreement is simply inconsistent with a desire to maintain the confidentiality of the privileged communication." *Ross*, at ¶ 44.

An exception to the waiver of attorney-client privileged information is addressed in the *Center Partners* decision, provided in the *Author's Commentary on Ill. R. Evid. 502*, where subject-matter waiver of attorney-client communications is discussed in the context of both judicial and extrajudicial proceedings.

Another — the crime-fraud exception — is discussed in *People v. Radojcic*, 2013 IL 114197, where the supreme court held that the State had met its evidentiary burden for the application of the crime-fraud exception to the attorney-client privilege. The court initially noted that it had earlier recognized the essential elements for the creation and application of the attorney-client privilege:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Radojcic*, at ¶ 39.

The court then went on to explain the rationale for the application of the crime-fraud exception:

> "The rationale underlying the crime-fraud exception is intimately connected to the nature of the attorney-client relationship. As we explained in [*In re*] *Decker*, [153 Ill. 2d 298 (1992)], 'in seeking legal counsel to further a crime or fraud, the client does not seek advice from an attorney in his professional capacity.' [Citation]. The client either conspires with the attorney or deceives the attorney. In the former case, the privilege will not apply because it cannot be the attorney's business to further any criminal object. In the latter case, the privilege does not apply because the attorney's advice has been obtained by a fraud." *Radojcic*, at ¶ 42.

Note that, as the supreme court pointed out, the crime-fraud exception is focused on the intent of the client, and not the legitimacy of the services provided by the attorney, who might be completely innocent of wrongdoing. *Id.* at ¶ 49. The court pointed out that the holding in *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456 (2010), was flawed because it required a *prima facie* showing before the trial court could conduct an *in camera* hearing (*Radojcic*, at ¶ 62). The court also held that an *in camera* hearing is not indispensable to a showing that the crime-fraud exception applies. *Id.* at ¶ 60. Finally, and perhaps most important, the supreme court provided this standard in determining whether the crime-fraud exception applies:

> "[T]he proponent of the crime-fraud exception must present evidence from which a prudent person would have a reasonable basis to suspect (1) the perpetration or attempted perpetration of a crime or fraud, and (2) that the communications were in furtherance thereof." *Id.* at ¶ 44, quoting *Decker*, 153 Ill. 2d at 322 (internal quotation marks omitted).

For a recent application of the crime-fraud exception, see *In re Marriage of Stinauer*, 2021 IL App (3d) 190692 (holding that the trial court erred in denying respondent's section 2-1401 hearing without holding an evidentiary hearing, where respondent sufficiently alleged the crime-fraud exception to the attorney-client privilege).

Secret-Surveillance-Location Privilege

Another example of a common-law privilege, one recognized by the appellate court as a qualified privilege in the context of a criminal case, is the secret surveillance location privilege. To invoke the privilege, the State has the burden of proof that the surveillance location was either on private property with permission of the owner or in a useful location whose utility would be compromised by disclosure. See *People v. Price*, 404 Ill. App. 3d 324 (2010) (holding that the privilege "is based on and evolved from the related 'informant's privilege,'" and that its purpose is "to protect sources from retaliation and to encourage their continuing cooperation with law enforcement").

See also *People v. Reed*, 2013 IL App (1st) 113465 (discussing the privilege and holding that the trial court did not abuse its discretion in precluding disclosure of the officer's location); *People v. Flournoy*, 2016 IL App (1st) 142356 (noting the need for a transcript of the *in camera* hearing and reversing application of the surveillance privilege because the trial court abused its discretion in not considering factors that would have weighed in favor of disclosure of the surveillance location); *In re Manuel M.*, 2017 IL App (1st) 162381 (holding that the respondent's rights to effective cross-examination, confrontation, and a public trial were violated where the trial court held an *in camera* hearing with only the police officer and state's attorney and allowed the state's attorney to argue outside the presence of the respondent and his counsel); *People v. Jackson*, 2017 IL App (1st) 151779 (noting that the appellate court "has been less than clear about whether it is permissible for the State to appear and participate in the *in camera* hearing" (*id.* at ¶ 33), and citing *Manuel* in holding it was error for the defense to be excluded while the State was present for the *in camera* hearing); *People v. Palmer*, 2017 IL App (1st) 151253 (trial court erred in denying surveillance location where officer testified he was concealed in a vacant lot by vegetation and defendant properly sought to learn the location to determine whether the vegetation also impaired officer's ability to observe defendant's

conduct); *People v. Sanders*, 2019 IL App (1st) 160718 (emphasizing that only the trial court, the relevant police officer, and the court reporter participated in the *in camera* proceeding, thus distinguishing the case from *In re Manuel M.* and *Jackson* and also distinguishing the facts in *Palmer* and pointing out the trial court's considerable leeway in defendant's cross-examination of the officer, holding the trial court properly denied revelation of the surveillance location).

Marital Privilege Statutes

There are separate Illinois statutes on marital privilege for criminal and civil cases. The statute for criminal cases is in section 115-16 of the Criminal Code of Procedure of 1963 (725 ILCS 5/115-16); the statute for civil cases is in section 8-801 in the Code of Civil Procedure (735 ILCS 5/8-801). With slightly different phrasing, both statutes identically provide that husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except...

What follows the ellipses differs. In the criminal statute, the exception is:

> "in cases in which either is charged with an offense against the person or property of the other, in case of spouse abandonment, when the interests of their child or children or of any child or children in either spouse's care, custody, or control are directly involved, when either is charged with or under investigation for an offense under Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 and the victim is a minor under 18 years of age in either spouse's care, custody, or control at the time of the offense, or as to matters in which either has acted as agent of the other."

In the civil statute, the exception is:

> "in actions between such husband and wife, and in actions where the custody, support, health or welfare of their children or children in either spouse's care, custody or control is directly in issue, and as to matters in which either has acted as agent for the other."

Not surprisingly, the exceptions provided in the criminal statute relate to criminal behavior against the spouse or children for whom they are responsible, while those in the civil statute relate to matters involving actions between the spouses (primarily related to dissolution of the marriage), children for whom they are responsible, or where one spouse acts as the agent of the other.

Though not provided by statute, the federal marital privilege, which is recognized under federal common law, is provided in *Trammel v. United States,* 445 U.S. 40 (1980) (in modifying its previous decision in *Hawkins v, United States*, 358 U.S. 74 (1958), providing historical context for the privilege, and in explaining and applying FRE 501, ruling that the marital privilege is "modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.")

Decisions on Marital-Communication Privilege: *Sanders*, *Trzeciak*, and Appellate Court Decisions

In *People v. Sanders*, 99 Ill. 2d 262 (1983), the supreme court refused to extend the marital privilege to conversations between parent and child.

In *People v. Trzeciak*, 2013 IL 114491, the supreme court reversed the decision of a majority panel of the appellate court, which had held that the marital privilege, provided for in criminal cases by section 115-16 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-16), required the exclusion of the testimony of the defendant's battered wife about threats made to her by her husband against her and the murder victim. The supreme court first noted that, for a communication between spouses to fall within the marital privilege, two elements must be satisfied:

> "First, the communication must be an utterance or other expression intended to convey a message. Second, the message must be intended by the communicating spouse to be confidential in that it was conveyed in reliance on the confidence of the marital relationship." *Trzeciak*, at ¶ 44.

The court concluded that the testimony of the defendant's wife concerning his *conduct* (beating her, tying her up, and other activity) was not barred by the marital privilege. *Trzeciak*, at ¶ 48. The court then concluded that the defendant's threats were not confidential communications, citing numerous cases from other jurisdictions that placed special emphasis on the mutual trust and confidence in the marriage relationship. Three justices specially concurred in the judgment, dissenting on the denial of reconsideration, based on their view that prior Illinois decisions relating to confidential communications justified the court's holding, without the need to rely on out-of-state decisions that placed special emphasis on the health and status of the marriage.

In *People v. Garner*, 2016 IL App (1st) 141583, ¶¶ 37-46, the appellate court also addressed issues related to the marital communication privilege in section 115-16 of the Code of Criminal Procedure. In *Garner*, the defendant, who was charged with murdering her six-year-old daughter after a telephone conversation with her husband about the status of their marriage, contended that the trial court had improperly admitted the testimony of her husband about their conversation—a conversation which formed the basis of the State's evidence regarding the defendant's motive for killing their daughter. Construing the applicable language of the statutory exception, "when the interests of their child or children or of any child or children in either spouse's care, custody, or control are directly involved," and other parts of the statute, the appellate court rejected the defendant's contentions that the conversation was not admissible because the conversation was not about their daughter and it did not concern their child's interests. The court reasoned that it "is evident from the plain text of the exceptions, which by their terms apply in 'cases,' 'matters,' and, as particularly relevant here, 'when,' due to the nature of the proceeding at hand, the 'interests' of the spouse's children are 'directly involved.'" *Garner*, at ¶ 41.

In *People v. Gliniewicz*, 2018 IL App (2d) 170490, the State sought to introduce email and text messages between the now-deceased husband and his now-indicted wife, messages that were taken from the deceased husband's cell phone and that allegedly contained evidence of the criminal conduct of both. Before remanding the case to the circuit court for the State's reopening of proofs on the State's contention that the defendant had waived the privilege after the defendant's successful motion *in limine*, the appellate court made three rulings relevant to the marital-communication privilege of section 115-16. First, in applying the "third-party exception" to the privilege in *People v. Simpson*, 68 Ill. 2d 276 (1977), the court held that in this case the privilege had not been waived because no other party was present for or heard or learned of the communications, even by interception or through loss or misdelivery. Second, even though a "joint-criminal-enterprise" exception has been adopted in other jurisdictions, neither earlier appellate court decisions nor the General Assembly has adopted the exception in Illinois. Third, the appellate court refused to expand the "agency" exception to the privilege because the indictment alleged that the husband and the defendant were co-conspirators. As noted, the case was remanded for evidence on the State's contention that the privilege had been waived.

For an appellate court decision that provides the rationale for affirming the admission of two statements made by the defendant to her estranged husband about her boyfriend's having killed the deceased in a first degree murder case, see *People v. Carr-McKnight*, 2020 IL App (1st) 163245, ¶¶ 85-93.

For a relevant discussion concerning the separate issue of witness *competency* or witness *disqualification*, see the *Author's Commentary on Ill. R. Evid. 601*.

Physician-Patient Privilege

Section 8-802 of the Code of Civil Procedure (735 ILCS 5/8-802) provides the statutory basis for the physician-patient privilege, which did not exist under common law. The supreme court decision in *Palm v. Holocker*, 2018 IL 123152, provides a succinct summary of the statute and its rationale:

> "Section 8-802 of the Code of Civil Procedure provides that '[n]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient.' The statute then lists 14 situations in which the privilege does not apply. The physician-patient privilege exists

> to encourage disclosure between a doctor and a patient and to protect the patient from invasions of privacy. The purpose of the privilege is to encourage full disclosure of all medical facts by the patient in order to ensure the best diagnosis and outcome for the patient. The legislature has recognized that patients have an interest in maintaining confidentiality in their medical dealings with physicians." *Palm*, at ¶16 (citations omitted).

Palm was a personal injury case, involving a defendant-driven vehicle striking the plaintiff-pedestrian. The issue on appeal was from a contempt order imposed on the defense attorney for refusing to answer two interrogatory questions, which the plaintiff alleged were based on a Facebook posting that the defendant was legally blind and had a few other collisions. One of the interrogatories was for the name and address of any physician or health care professional who performed an eye-examination on the defendant in the last five years, and another interrogatory was for the name of a physician or other health care professional who examined and/or treated the defendant within the last ten years. In determining whether the imposed contempt was proper, *Palm*'s specific focus was on the meaning of "an issue" in section 8-802(4), the statute that provides that the physician-patient privilege does not apply in any action "wherein the patient's physical or mental condition is an issue."

The appellate court had held that, because the defendant had not put his health in issue and the plaintiff could not waive someone else's privilege, the section 8-802(4) exception did not apply. Noting, however, that the plaintiff had not alleged the defendant's vision problems as a cause of the accident and that the defendant had not invoked vision problems in defense, and noting further the "legislature's intent in enacting section 8-802(4) is not clear, and the cases interpreting that section are inconsistent in applying it," the supreme court stated:

> "we determine that the issue of whether a plaintiff may put a defendant's medical condition in issue for purposes of section 8-802(4) is ultimately not presented by the facts of this case and that the appellate court said more than it needed to in resolving the appeal. We need not resolve whether a plaintiff may put a defendant's medical condition at issue so as to waive a defendant's privilege under section 8-802(4) because, on the record before us, plaintiff has not put defendant's medical condition at issue." *Id.* at ¶24.

Thus, *Palm* affirmed the decision of the appellate court, but made it clear that, because the "plaintiff had not put defendant's medical condition at issue, it was not necessary for the appellate court to decide that issue." *Id.* at ¶34. And it urged "the legislature to address section 8-802(4) and to make its intentions clear. Specifically, the legislature should clarify how something becomes 'an issue' for purposes of this section, whether one party may put another party's physical or mental condition at issue, and if the rule is any different for civil and criminal cases." *Id.*

In addition to leaving open for now the specific question of whether a party can place in issue another party's medical condition, another holding in *Palm* should be noted. The defendant had answered another interrogatory requesting information about "any medical and/or physical condition which required a physician's report and/or letter of approval in order to drive." In connection with this interrogatory, the supreme court reversed the order of the appellate court that required the plaintiff to relinquish the defendant's medical records that he had received from the Secretary of State. The court reasoned that the defendant had answered the interrogatory and did not assert a privilege. It further reasoned that the defendant had obtained his doctor's report "not for the purposes of receiving treatment but for maintaining his driving privileges." *Id.* at ¶32. It therefore held that the plaintiff was entitled to use the record obtained from the Secretary of State.

In *People v. Bons*, 2021 IL App (3d) 180464, a prosecution for predatory criminal sexual assault of a five-year-old girl who was diagnosed with the sexually transmitted disease of chlamydia, the trial court admitted evidence, over the defendant's objections, that the defendant had been tested for and also received a diagnosis of chlamydia. The issue for the appellate court concerned whether the defendant's diagnosis was properly admitted, as contended by the State, as an exception to

the physician-patient privilege under sections 8-802(4) and 8-802(7) of the Code of Civil Procedure (735 ILCS 5/8-802(4)), (7)). Noting that several appellate decisions allowed the 8-802(4) exception, the court distinguished those cases because they included, as an element of the offense, the defendant's physical or mental state. But this case, the appellate court held, did not contain such an element. Applying the *Palm* rationale, the court held that the 8-802(4) exception did not apply in this case, and the evidence of the defendant's chlamydia diagnosis was therefore improperly admitted. Regarding the section 8-802(7) exception to the physician-client exception—an exception that applies to "actions, civil or criminal, arising from the filing of a report in compliance with the [Abuse and Neglected Child Reporting] Act"—the appellate court noted "there is no indication that defendant's medical records regarding his chlamydia diagnosis and treatment *arose from* the DCFS investigation and report." *Bons*, at ¶ 44 (emphasis by the court). Thus, the exception did not apply under section 8-802(7), and the defendant's diagnosis was improperly admitted under that section as well. Notwithstanding those holdings, the court applied harmless error in affirming the defendant's conviction.

See also *Doe v. Weinzweig*, 2015 IL App (1st) 133424-B, ¶¶ 29-32 (discussing the privilege and holding, as other cases had, that the physician-patient privilege does not apply to examinations ordered under Supreme Court Rule 215); and *People v. Quigley*, 2018 IL App (1st) 172560 (in an appeal from the denial of defendant's petition to rescind statutory summary suspension of his driver's license on the ground that a police officer did not have reasonable grounds to believe that defendant was driving while impaired, because test results were not admitted into evidence, the appellate court declined to determine whether hospital test results related to defendant's blood alcohol would be admissible as substantive evidence in a statutory summary suspension hearing under section 501.4 or section 501.4-1(a) of the Illinois Vehicle Code (the court noting that no published Illinois decision has addressed this exact question), but in applying the exception to the physician-patient privilege in section 8-802(9) of the Code of Civil Procedure, holding that a police officer's testimony regarding the blood alcohol test results learned from a physician was properly admitted and the trial court properly considered those test results in determining whether reasonable grounds existed to believe that defendant had been under the influence of alcohol while he was driving).

People v. Sauls: Trial Court Erred in Not Conducting *In Camera* Review of Pretrial Subpoenaed Confidential DCFS Records to Determine Existence of Evidence Favorable to Defendant

In *People v. Sauls*, 2022 IL 127732, a jury conviction for predatory criminal sexual assault of a child, the defendant sought Department of Children and Family Services (DCFS) records concerning the alleged victim's mother and her "live-in girlfriend." A subpoena *duces tecum* for the DCFS confidential information was issued for the defendant, in the words of the trial court, "to look at unfounded reports for potential impeachment of a witness that testifies at trial." *Id.* at ¶ 9. The Attorney General, on behalf of DCFS, moved to quash the subpoena, and the trial court did so. Relying on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), a majority of the supreme court held that the trial court erred in quashing the subpoena *duces tecum*. And it held that the trial court should have conducted an *in camera review* of the confidential subpoenaed records to determine whether it contained information helpful to the defendant. It therefore remanded "for the trial court to perform an *in camera* review of the documents described in the subpoena to determine whether they contain information that probably would have changed the outcome of defendant's trial." *Id.* at ¶ 49.

Relying on a footnote in *Ritchie*, the two justices who dissented contended that the majority had misconstrued that opinion by not requiring the defendant to establish "a basis for his claim that it (the DCFS record) contains material evidence." *Id.* at ¶ 63, quoting *Ritchie*, 480 U.S. at 58 n.15. The dissenters contended that **"**[t]he majority erroneously creates an automatic right to have a trial judge conduct *in camera* review of unfounded DCFS investigation documents whenever a defendant simply alleges that the documents are material, regardless of whether defendant can make 'some plausible showing' that there is a basis for the claim that the documents contain material evidence." *Id.* at ¶ 63.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Supreme Court Rule 201(p).

(c) Disclosure Made in a Federal or Another State's Proceeding or to a Federal or Another State's Office or Agency. When the disclosure is made in a federal or another state's proceeding or to a federal or another state's office or agency and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Illinois proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Illinois proceeding; or

waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. An Illinois court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

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COMMENTARY

Author's Commentary on Ill. R. Evid. 502

Adoption of IRE 502 and Supreme Court Rule 201(p)

When the Illinois evidence rules were codified, a counterpart to FRE 502 was not adopted. It was thought that Illinois law on the effect of disclosure of privileged communications was deemed to be relatively undeveloped, and the subject was therefore considered not ripe for codification. After its initial adoption of codified evidence rules, however, the supreme court requested that the Committee submit to the court's Rules Committee a proposed evidence rule on the subject of FRE 502, as well as a clawback rule to accompany the proposed rule. The Committee then submitted the proposed rules to the Rules Committee, which approved both rules and submitted them to the supreme court, which in turn issued an order on November 28, 2012, adopting IRE 502 effective January 1, 2013.

On the same date, the supreme court issued another order, also effective January 1, 2013, amending Ill. S. Ct. R. 201 by adding subparagraph (p). Newly added Supreme Court Rule 201(p), referenced in IRE 502(b)(3), is designed to complement IRE 502 through the clawback procedures that occur in the event of the inadvertent disclosure of privileged or protected information. The rule is substantially identical to Federal Rule of Civil Procedure 26(b)(5)(B), which similarly complements the federal rule and is referenced in FRE 502(b)(3). The added supreme court rule reads as follows:

Supreme Court Rule 201(p). Asserting Privilege or Work Product Following Discovery Disclosure.

> If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.

Rule 4.4(b) of the Illinois Rules of Professional Conduct of 2010

Note that, consistent with the goals of IRE 502(b), Rule 4.4(b) of the Illinois Rules of Professional Conduct of 2010 provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender."

Subdivisions of IRE 502

IRE 502, like its federal counterpart, addresses what disclosures of attorney-client-privileged or work-product-protected communications or information are required under certain circumstances where there is either an intentional or an inadvertent disclosure. Note that this opening paragraph of Rule 502, as well as the title to the rule and the wording of IRE 502(a)—all of which are substantively identical to their federal counterparts— apply only to the attorney-client privilege and work-product protection. Thus, other privileged communications, such as the marital privilege, arguably have no application to this rule. But note that Ill. S. Ct. R. 201(p) (provided *supra*) refers generally to "a claim of privilege or of work product protection," so that language may provide for a broader application of clawback ability.

Rule 502(a) addresses subject-matter waiver. It provides that, in an Illinois proceeding, the disclosure of the attorney-client privilege or work-product protection information does not result in subject-matter waiver unless the waiver is intentional and the disclosed and undisclosed communications about the same-subject matter "ought in fairness to be considered together."

Rule 502(b) addresses inadvertent disclosure. It provides that a party may avoid waiver by showing that the disclosure made in an Illinois proceeding was inadvertent and that the "holder of the privilege" (who is not necessarily the disclosing party) took reasonable steps to prevent disclosure and to promptly rectify the error—including following Supreme Court Rule 201(p) where the inadvertent disclosure occurred during discovery.

For an example of a Seventh Circuit Court of Appeals decision addressing and applying FRE 502(b) which, like IRE 502(b), governs inadvertent disclosures of privileged communications or information, see *Carmody v. Board of Trustees of the University of Illinois*, 893 F.3d 397, 404-407 (7th Cir. 2018) (holding that the district court properly ruled that plaintiff could not offer as evidence a document protected by attorney-client privilege that the defense had inadvertently turned over to plaintiff in discovery).

Rule 502(c) addresses a disclosure that has been made in a federal or another state's proceeding. It provides that a foreign-court disclosure that is "not the subject of a court order concerning waiver" does not result in a waiver in an Illinois proceeding if: (1) it would not be a waiver if it had occurred during an Illinois proceeding, or (2) did not constitute a waiver in the foreign court where the disclosure occurred. Note that the rule infers that if the foreign court has issued an order concerning waiver, that order applies. Note also that obtaining a court order under Rule 502(d)—where the disclosure is not subject to a foreign court order concerning waiver—obviates the need to establish either of the two numbered conditions to avoid waiver.

Rule 502(d) addresses the controlling effect of an Illinois court order on the waiver of a privilege or protection. It provides that an Illinois court may issue an order that protects

from disclosure privileged or protected matter pending before the court that issued the order, while also ensuring that any disclosure does not result in a waiver in any other proceeding. This rule allows the parties to seek a court order that specifies the standard of care that must be followed to avoid waiver of the privilege or protection. It allows even an order that provides that no disclosure—regardless of the standard of care—results in a waiver. This important subdivision of IRE 502 provides for a court order that would obviate many disputes related to the waiver of attorney-client privilege or work-product protection, as indicated in the final sentence related to Rule 502(c) in the paragraph above, and in the final sentence related to Rule 502(e) in the paragraph below.

Rule 502(e) addresses the controlling effect of a party agreement on the waiver of a privilege or protection. It provides that an agreement between the parties on the effect of disclosure in an Illinois proceeding binds only the parties to the agreement, "unless it is incorporated into a court order." This rule validates agreements that occur in cases involving the discovery of millions of paper documents or the enormous storage of information in databases, thus allowing, for example, "claw-back agreements," where the parties agree to exchange information with only a limited privilege review, with the producing party able to "claw back" a produced privileged document; or "quick peek agreements," where the producing party allows the requesting party to inspect documents that have not been reviewed for privilege, with the producing party able to then review and retain, on the basis of privilege, documents that the requesting party seeks to have produced. Such agreements are designed to ensure that the disclosure of privileged or protected information does not result in the waiver of the privilege or protection. Note, however, the advisability of having a court order under Rule 502(d), which would bind even those who are not parties to the agreement.

Note that **FRE 502(f)** has no Illinois counterpart. The federal rule has no application to Illinois proceedings.

Illinois' **IRE 502(f)** provides the same definitions that are provided in **FRE 502(g)**. **IRE 502(f)(2)** provides a definition of "work-product protection" that should be considered in conjunction with Supreme Court Rule 201(b)(2), which states that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." For a thorough discussion of Illinois' work-product protection, see *Board of Education of Deerfield Public Schools District No. 109 v. Deerfield Education Association, IEA-NEA*, 2022 IL App (4th) 210359, ¶¶ 46-81 (holding that the work-product protection did not apply to interview notes of outside counsel who investigated the conduct of a school teacher, because there was no evidence that (1) the outside counsel's interview notes contained an attorney's mental impressions or (2) that they were made in preparation for litigation).

FRCP 16(b)(3)(B)(iv) and FRCP 26(f)(3)(D) As They Relate to FRE 502

Note that the permitted contents of scheduling orders under Federal Rule of Civil Procedure 16(b)(3)(B)(iv) may: "include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502."

Note also that under Federal Rule of Civil Procedure 26(f)(3)(D), "[a] discovery plan must state the parties' views and proposals on:" *** "(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502."

Center Partners: Subject Matter Waiver in Judicial and Extrajudicial Proceedings

Note that IRE 502 addresses disclosures made in the context of a "proceeding" or to an "office" or an "agency." It says nothing about disclosures made in extrajudicial settings generally. That issue was addressed by the Illinois Supreme Court in *Center Partners, Ltd. v. Growth Head GP*, 2012 IL 113107, a decision issued on November 29, 2012, the day after the court adopted IRE 502.

In *Center Partners*, the issue was whether the disclosure of attorney-client-privileged information during business negotiations with third parties constituted a waiver not only of the matters discussed at the negotiations, but also a broader

subject matter waiver of related undisclosed information. In ordering the discovery of numerous attorney-client-privileged documents on the basis of the doctrine of subject-matter-waiver of related undisclosed information, the circuit court had concluded that the doctrine applied to extrajudicial proceedings. The appellate court agreed. Both courts reasoned that there was no distinction between disclosures made in court-related proceedings and those made out-of-court.

On review, however, the supreme court reversed the judgments of the circuit and appellate courts. In so doing, it acknowledged the propriety of subject matter waiver in the context of judicial proceedings:

> "Illinois has long recognized the doctrine of subject matter waiver, with this court holding that when a client voluntarily testifies and waives the privilege, such waiver 'extends no further than the *subject-matter concerning which testimony had been given by the client*.' (Emphasis added [by the court].) *People v. Gerold*, 265 Ill. 448, 481 (1914). Our appellate court has refined and elaborated on subject matter waiver:
>
> 'Although voluntary disclosure of confidential information does not effectively waive an attorney-client privilege as to all other non-disclosed communications that may have taken place [citation], where a client reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter.' I*n re Grand Jury January 246*, 272 Ill. App. 3d 991, 997 (1995) (citing *People v. O'Banner*, 215 Ill. App. 3d 778, 793 (1991)).'
>
> "The purpose behind the doctrine of subject matter waiver is to prevent partial or selective disclosure of favorable material while sequestering the unfavorable. [Citation] *** Courts have characterized this reasoning as the "sword" and the "shield" approach, in that a litigant should not be able to disclose portions of privileged communications with his attorney to gain a tactical advantage in litigation (the sword), and then claim the privilege when the opposing party attempts to discover the undisclosed portion of the communication or communications relating to the same subject matter." *Center Partners*, at ¶¶ 38-39.

Having recognized the propriety of subject matter waiver in *judicial* proceedings, the supreme court reversed the judgments of the circuit and appellate courts, concluding that *extrajudicial* disclosures to third parties of attorney-client communications does not waive the attorney-client privilege over private, undisclosed attorney-client communications concerning the same subject matter. The court held that "subject matter waiver does not apply to disclosures made in an extrajudicial context when those disclosures are not thereafter used by the client to gain a tactical advantage in litigation." *Center Partners*, at ¶ 76.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
Rule 601. Competency to Testify in General Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.	**Rule 601. General Rule of Competency** Every person is competent to be a witness, except as otherwise provided by these rules, by other rules prescribed by the Supreme Court, or by statute.

COMMENTARY

Author's Commentary on Ill. R. Evid. 601

The first part of IRE 601 is virtually identical to the first sentence of the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The second sentence of pre-amended (and current) FRE 601 is not codified as unnecessary in Illinois state proceedings.

Recognition of Statutory Provisions

The Illinois rule is adjusted to accommodate a statute such as the Dead-Man's Act (735 ILCS 5/8-201) which, as pointed out by the appellate court in *State Farm Mutual Automobile Insurance Co. v. Plough*, 2017 IL App (2d) 160307, ¶ 5 is "rooted in English common law, [and] has been an evidentiary rule in Illinois in one form or another since 1867." The relevant portion of the Dead-Man's Act reads as follows:

> "In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, except [for the instances specified by the following subsections of the Act]." 735 ILCS 5/8-201.

The Act therefore renders incompetent as a witness an "adverse party or person directly interested in the action," under the circumstances listed.

Decisions Applying the Dead-Man's Act

For an illustrative application of the Dead-Man's Act, see *In re Estate of Crawford*, 2019 IL App (1st) 182703, where the claimant filed a claim against the estates of his son and daughter-in-law who had died in an automobile accident. His claim sought reimbursement of $223,529.59, which he alleged to have loaned to the decedents over a 12-year period. The independent administrator of both estates obtained summary judgment based on his argument that the Dead-Man's Act prohibited the claimant, who was an adverse party directly interested in the action, from providing evidence that he had made any payments to the decedents or that any payments were loans and not gifts. The appellate court affirmed the grant of summary judgment based on the Dead-Man's Act. The court also affirmed the trial court's barring admission of the claimant's handwritten log of the money provided the decedents, which the claimant contended provided an exception to the prohibition of the Dead-Man's Act by virtue of section 8-401 of the Act (735 ILCS 5/8-401), which allows admissibility of account books and records. The court's affirmance was premised on the fact that the log concerned the claimant's personal transactions and was not created in the context of a business transaction.

In *Larry L. Hood, Executor of the Estate of Carl Maxey Hood, Deceased v. George Leighty, Executor of the Estate of Edwrd T. Hampton, Deceased*, 2020 IL App (5th)190338, a negligence action for damages from a vehicular accident, where both drivers survived but died from causes unrelated to the accident

before the filing of the complaint, the circuit court granted summary judgment to the defendant based primarily on the Dead-Man's Act. In reversing the grant of summary judgment, the appellate court held that statements of the deceased drivers to police officers did not violate the Dead-Man's Act and were admissible "provided such statements are otherwise admissible." *Id.* at ¶33. The court reasoned that the statements made to police by defendant's decedent were admissible as statements by a party opponent (see IRE 801(d)(2)(A)), and statements made to police by plaintiff's decedent immediately after the accident were admissible as excited utterances (see IRE 803(2)). The court reversed summary judgment and remanded the case for further proceedings.

See also *Peacock v. Waldeck*, 2016 IL App (2d) 151043 (in a personal injury action alleging that defendant rear-ended plaintiff's car, before defendant died from a cause unrelated to the accident, defendant answered the complaint admitting every allegation (including rear-ending plaintiff's car), but stating she had no knowledge whether plaintiff was stopped at a red light as alleged in plaintiff's complaint, summary judgment for the defendant was properly granted because plaintiff could not testify about having stopped at a red light, and other causes—such as an abrupt stop by plaintiff, road conditions, or plaintiff's possible mechanical problems—were possible but could not be provided).

See, too, *State Farm Mutual Automobile Insurance Co. v. Plough*, 2017 IL App (2d) 160307 (in this jury trial of a subrogation case, holding that the testimony of the driver of a car that collided with the car of the defendant, who was under a legal disability at the time of trial, was erroneously admitted, but because that testimony was merely cumulative of the properly admitted testimony of a police officer who testified that the defendant had admitted to him that the light changed to red as he approached the intersection and that he tried to stop but lost control of his car and hit the plaintiff's car, the improperly admitted testimony was duplicative of the properly admitted testimony, and thus the judgment for the plaintiff-subrogee was affirmed).

See also *Spencer v. Wayne*, 2017 IL App (2d) 160801. In that case, the plaintiff suffered injury from allegedly slipping on a mat while exiting a car in the garage of the now-deceased defendant. Summary judgment was granted in favor of the deceased defendant's estate. The issue for the appellate court was whether the now-deceased defendant was in a position to see what caused the plaintiff to slip, which was dispositive of whether the Dead-Man's Act had been properly applied by the circuit court. The plaintiff contended that the now-deceased defendant was seated in her car when the accident occurred, and thus she could not see what caused the plaintiff to trip. However, pointing out that at her deposition the now-deceased defendant had "answered 'yes' when asked if she saw plaintiff fall" (Spencer, at ¶19), the appellate court held that the circuit court had properly ruled that plaintiff's testimony was inadmissible under the Dead-Man's Act, and that summary judgment was therefore properly entered in favor of the defendant's estate.

In *In re Estate of Weber*, 2021 IL App (2d) 200354, a case involving an attorney's petition to obtain fees from the estate of the now-deceased wife in dissolution of marriage proceedings, the appellate court reversed the circuit court's denial of attorney fees based on the circuit court's determination that the attorney had a conflict of interest in representing both the now-deceased person and her caregiver. The appellate court held that the trial court improperly applied the Illinois Rules of Professional Conduct, which simply provides a framework for the ethical practice of law, in determining the conflict of interest, because that determination was solely for the Attorney Registration and Disciplinary Commission (ARDC). The appellate court reasoned that the attorney was prevented by the Dead-Man's Act from testifying about the deceased person giving him her consent to concurrent representation. Pointing out that the Dead-Man's Act "bars only that evidence the decedent could have refuted" (*Estate of Weber*, at ¶26), the court noted that, in an ARDC disciplinary proceeding, however, "the personal representative would be neither prosecuting or defending; thus, the Dead-Man's Act would not apply and the attorney could testify regarding the decedent's giving of informed consent." *Id.* at ¶28.

For an important supreme court decision applying the exception to the Dead-Man's Act found in section 8-201(d) (735 ILCS 5/8-201(d)), which reads, "No person shall be barred from

testifying as to any fact relating to the heirship of a decedent," see *In re Estate of McDonald*, 2022 IL 126956. There, a 4 to 3 deeply divided court, nonetheless unanimously agreed that the trial court had erred in not applying that statutory provision and in thus barring the respondent's testimony concerning her heirship of her husband's estate based on her claim of a valid marriage to her deceased husband, who had been determined to be a disabled person in need of guardianship and who died intestate. See *In re Estate of McDonald*, for the majority opinion at ¶ 83, and ¶ 123 for the relevant part of its concurrence in part, which was combined with multiple reasons for its dissent in part.

Statutes and Cases on Competency of a Witness

For a statute providing criteria for judging witness competency in a criminal case, see section 115-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-14). Note that the statute provides that "[e]very person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter," unless he or she is "[i]ncapable of expressing himself or herself concerning the matter so as to be understood" or "[i]ncapable of understanding the duty of a witness to tell the truth."

Note, too, that the statute's presumption of competency places the burden of proof on the party challenging competency. *See* section 115-14(c) and *People v. Hoke*, 213 Ill. App. 3d 263, 272 (1991) (holding that it was the defendant's "burden to establish that the children who testified were incapable of understanding the duty of a witness to tell the truth"), and *Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012) (in Illinois prosecution, trial court erred in requiring defendant, as proponent of witness, to prove that five-year-old witness was competent to testify). For an appellate court decision discussing the burden of proof and both the rule and section 115-14, see *People v. Jackson*, 2015 IL App (3d) 140300, ¶¶ 43-49.

See also section 115-16 of the same Code (725 ILCS 5/115-16) as well as section 8-101 of the Code of Civil Procedure (735 ILCS 5/8-101), both of which make admissible evidence from an interested witness or a witness with a criminal conviction, such status being relevant only to the weight of the evidence. Both the second paragraph of section 115-16 of the Code of Criminal Procedure and section 8-801 of the Code of Civil Procedure (735 ILCS 5/8-801) address what is and is not admissible under the spousal privilege. *See also People v. Garcia*, 97 Ill. 2d 58, 74 (1983) (degree of intelligence and understanding of a child, and not the child's chronological age, determines capacity to testify as a witness).

For an appellate court decision discussing various issues concerning the competency of a witness under IRE 601, see *People v. Jackson*, 2015 IL App (3d) 140300, ¶¶ 42-49.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

COMMENTARY

Author's Commentary on Ill. R. Evid. 602

IRE 602 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008) ("the testimony of a lay witness must be confined to statements of fact of which the witness has personal knowledge," quoting *People v. Brown*, 200 Ill. App. 3d 566, 578 (1990)). See also IRE 701, which provides the standards of admissibility for opinions or inferences of lay witnesses, one of which is that they are "rationally based on the perception of the witness." *See also People v. Enis*, 139 Ill. 2d 264 (1990) (prosecutor's cross-examination of defendant on matters about which defendant lacked knowledge was improper).

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation, administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

COMMENTARY

Author's Commentary on Ill. R. Evid. 603

IRE 603 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. For a statute that provides comparable requirements, see section 115-14(b)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-14(b)(2): disqualifying a person from being a witness if that person is "[i]ncapable of understanding the duty of a witness to tell the truth").

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

COMMENTARY

Author's Commentary on Ill. R. Evid. 604

IRE 604 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. In Illinois, interpreters are provided for by statute in civil cases (735 ILCS 5/8-1401); in criminal cases (725 ILCS 140/0.01 *et seq.*); and for deaf persons (735 ILCS 5/8-1402).

The *Illinois Supreme Court Language Access Policy* is a nine-page document that is accessible on the Illinois Supreme Court website under the "Other Language Resources" tab. It is necessary reading for judges and those involved in proceedings where language interpretation is necessary. Its preamble states that it is offered to provide "a blueprint for the courts of Illinois to develop a unified approach for the provision of statewide language access services." Relevant to IRE 604, section VI of the Policy, entitled "An Oath Requirement for Interpreters" (which includes the provided italicized comment), reads as follows:

> Before beginning to interpret in any legal proceeding, or before interpreting for several legal proceedings in one day, every unregistered interpreter shall swear or affirm in open court that he or she will make a true and impartial interpretation using his or her best skill and judgment in accordance with the standards prescribed by law and the ethics of the interpreter profession and that he or she will, in the English language, fully and accurately, repeat the statements of such person to the court before such proceeding takes place, and will repeat all statements made during such proceeding from English to sign language or a Limited English Proficient Person's native language fully and accurately.
>
> *Comment: Interpreters listed on the Administrative Office of the Illinois Courts' registry shall sign a written oath that can be maintained on file by the local court. Unregistered interpreters may sign a written oath to keep on file at the local courts' discretion. This simplifies the court's inquiries in open court during procedural hearings. It is recommended, however, that an oath be read and sworn to in open court in all proceedings conducted before a jury.*

Although not related to "interpreters," *People v. Betance-Lopez*, 2015 IL App (2d) 130521 presents an interesting analysis related to the trial court's use, during a bench trial, of a transcript of a recorded interview of the defendant, with questions in English, translated into Spanish, and answered in Spanish, with the Spanish portions translated into English. Though, in such instances, the recording is deemed to be the substantive evidence, the appellate court approved the trial court's use of and reliance on the transcript containing the translations.

Rule 605. Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

COMMENTARY

Author's Commentary on Ill. R. Evid. 605

IRE 605 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See People v. Ernest*, 141 Ill. 2d 412, 420 (1990) (upholding contempt finding on attorney who issued a subpoena for the discovery deposition of a judge presiding over a matter in which the attorney was appearing as counsel). See also Canon 3C(1)(e)(iv) of the Code of Judicial Conduct (Ill. S. Ct. R. 63C(1)(e)(iv)) (requiring judicial disqualification where the judge "is likely to be a material witness in the proceeding").

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Rule 606. Competency of Juror as Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify (1) whether any extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received concerning a matter about which the juror would be precluded from testifying.

COMMENTARY

Author's Commentary on Ill. R. Evid. 606(a)

IRE 606(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

In *Schaffner v. Chicago & North Western Transportation. Co.*, 129 Ill. 2d 1 (1989), during the testimony of an expert witness, two jurors were allowed to hold a bicycle's front wheel assembly in order to feel the gyroscopic force produced by the spinning wheel. The supreme court said this about that activity:

> "The use of jurors as assistants or subjects in evidentiary demonstrations of evidence at trial may have the effect of converting the participant into a witness for the party conducting the test. The juror may acquire knowledge that is not directly available to the other jurors, and opposing counsel is unable to cross-examine him on his experience. These concerns militate against the involvement of jurors in evidentiary demonstrations." *Schaffner*, 129 Ill. 2d at 30.

People v. Holmes, 69 Ill. 2d 507 (1978), has limited relevance to the rule—limited because the jurors involved were not actual witnesses. There, several jurors went to a shoe store to investigate shoe heels after police testimony regarding a heel print, attributed to that of the defendant, was found at the crime

scene. The appellate court held that the jurors' investigation constituted prejudicial error.

Author's Commentary on Fed. R. Evid. 606(b)

See Tanner v. U.S., 483 U.S. 107 (1987) (noting that "Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences," and holding that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict).

See also *United States v. Roy*, 819 F.3d 998 (7th Cir. 2016), which illustrates the discretion afforded the trial court and the difficulty of challenging a jury verdict absent external influence. Also, see *United States v. Daniels*, 803 F.3d 335 (7th Cir. 2015) (after a jury verdict against two defendants was returned and the jury was polled, a juror later in the day expressed reservations and told a court staff member that she felt bullied into making the decision and she later left a voicemail message for the court saying that she wanted to change her vote because she felt bullied and railroaded during the jury deliberation process and that she could not live with the verdict she handed down, holding that, because there was no evidence of any external influence on the juror, no hearing was required and the judgment was affirmed).

See, too, *Krik v. Exxon Mobil Corporation*, 870 F.3d 669, (7th Cir. 2017), where the 7th Circuit found no basis for reversing the district court's finding that no prejudice had occurred as a result of a defense investigator's interview of a friend of a juror about the friend's birthday party that was attended by the juror and about which the juror had expressed uncertainty as to whether the plaintiff had attended. But the court gave a stern admonition that "investigating a sitting juror is fraught with danger" (*id.* at 681), because of juror perceived intimidation or harassment. The court stated: "We do not condone such behavior and would encourage, as the district court proposed, that such a practice be evaluated by the court's rules committee or chief judge." *Id.*

Finally, see the *Author's Commentary on Ill. R. Evid. 606(b)*, just below, for the discussion of the United States Supreme Court decision in *Pena-Rodriguez v. Colorado*, which provided an exception to the no-impeachment rule for juror racial bias.

Decisions Related to the Polling of Jurors

Although it is not specifically addressed in Rule 606(b), *United States v. Lowe*, 2 F.4th 652 (7th Cir. 2021), provides noteworthy information related to the polling of jurors. In that case, the defendant sought reversal of his criminal conviction based on an "equivocal" answer about his individual verdict in jury polling. The juror's response to the district court's question was "Yes. Barely." In response to the court's query—"You said yes?"—"the juror said, "Yes ma'am." After the court entered the verdict, the defendant asked for a mistrial based on the jurors' not having reached a unanimous verdict and also asked that the juror be questioned "outside the presence of the other jurors to see why he came to a verdict." *Id.* 2 F.4th at 655. Both requests were denied. Construing Federal Rule of Criminal Procedure 31(d), which provides that if a jury poll "reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury," the Seventh Circuit held that the jury poll did not reveal a lack of unanimity. It reasoned that the juror's "yes" answer was unequivocal and that "barely" merely indicated that "the stated conclusion was narrowly reached." *Id.* 2 F.4th at 658. Moreover, the court noted, the juror's affirmative response to the trial court's follow-up question—"You said yes?"—showed that the trial court did not just accept the verdict without further inquiry or other action, and the juror's "response could not have been clearer." *Id.* 2 F.4th at 659.

Lowe is noteworthy also for its compilation of prior Circuit decisions that revealed a "lack of unanimity" required by Fed. R. Crim. P. 31(d). It identifies "several exemplar cases in which jurors' polling answers did just that" (*id.* 2F.4th at 658):

I was "[f]orced into" it, "I suppose so," "I don't know how to answer that," and "I feel like I need more time." *United States v. Banks*, 982 F.3d 1098, 1101 (7th Cir. 2020).

"Yes. With reasonable doubt." *Sincox v. United States*, 571 F.2d 876, 877 (5th Cir. 1978).

"It's my verdict, but I am still in doubt." *United States v. Edwards*, 469 F.2d 1362, 1366 (5th Cir. 1972).

"Yes, with a question mark." *United States v. McCoy*, 429 F.2d 739, 741 (D.C. Cir. 1970).

Lowe also provided a couple of Seventh Circuit decisions where coercion was determined by the trial court in response to a juror's response:

See *Banks*, 982 F.3d at 1103–05 (finding coercion where judge "continu[ed] to press [the juror] for a different answer," polled the rest of the jury to expose that juror as the only holdout, and only then ordered further deliberations); [*United States v.*] *Williams*, 819 F.3d [1026 (7th Cir. 2016),] at 1033–35 (finding coercion where a lone juror unambiguously rejected the verdict but the court continued to twice poll the remaining jurors and then instructed the jury "to continue with their deliberations until they have reached a unanimous verdict").

Author's Commentary on Ill. R. Evid. 606(b)

IRE 606(b) is identical to FRE 606(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for a couple of minor and irrelevant word substitutions.

See People v. Holmes, 69 Ill. 2d 507, 516 (1978) (adopting FRE 606(b) and holding that private investigation by jurors resulted in prejudicial error); *People v. Hobley,* 182 Ill. 2d 404 (1998) (noting the general rule that a verdict may not be impeached by juror testimony or affidavit related to the motive, method or process by which the jury reached its verdict, while holding that juror testimony and affidavits are properly offered as proof of extraneous influences on the jury; and analyzing various allegations of improper jury influence to determine whether evidentiary hearings were or were not required).

See also McGee v. City of Chicago, 2012 IL App (1st) 111084 (new trial ordered because circuit court abused its discretion in denying defendant's request to *voir dire* jurors about a juror's extraneous Internet research on an issue that had a direct bearing on the case, *i.e.*, plaintiff's alleged memory lapses; reasoning that "the circuit court should have determined what was brought into the jury room, what it contained, and who had read it," in order to determine whether the extraneous information was prejudicial); *People v. Caguana,* 2020 IL App (1st) 180006 (reversing and remanding murder conviction based on the probable prejudicial impact on two jurors who extraneously learned of the effort of defendant's father to solicit the killing of the two witnesses who identified defendant as the killer).

The recent decision in *Ittersagen v. Advocate Health and Hospitals Corp.*, 2021 IL 126507, provides a comprehensive discussion of what constitutes a juror's implied bias, highly relevant in determining whether a prospective juror should be rejected during *voir dire*, and the relevant question on appeal as to whether a juror alleged to have had implied bias was improperly allowed to serve on the jury.

In *Ittersagen*, midway through a jury trial, a juror informed the trial court that he belatedly realized that he had a business relationship with the defendant corporation, a relationship that had nothing to do with a medical malpractice suit brought against the defendant. After questioning the juror and learning that he had no direct involvement with the defendant, that he was not a fiduciary of the defendant, and that he could be fair, the trial court denied the plaintiff's motion to strike the juror.

In its review, the supreme court first cited an early United States Supreme Court holding that, "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." In affirming the decision of the appellate court which had affirmed the trial

court's ruling, the supreme court cited decisions of the U.S. Supreme Court and its own decisions, as well as those of the appellate court, all of which led to the court's ruling and all of which is relevant to those who address a contention of a juror's implied bias.

In *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017), two jurors provided affidavits that, during jury deliberations in that criminal case, another juror had expressed anti-Hispanic bias toward the defendant and his alibi witness. Noting the general rule against impeaching a jury verdict under common law and under codified evidence rules (including that of Colorado, which is substantially identical to the Illinois rule), the United States Supreme Court held that the Sixth Amendment provides an exception to the no-impeachment rule for addressing racial bias in a jury verdict. The Court held that, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 137 S. Ct. at 869.

Note that the holding in *Pena-Rodriguez* cannot be garnered from the wording of Rule 606(b). But the application of the rule (in both its federal and Illinois forms), where clear statements of racial bias are expressed by one or more jurors, violates the Sixth Amendment's guarantee of a trial by an impartial jury. In such cases, the Supreme Court's interpretation of the constitution must prevail.

In *United States v. Norwood*, 982 F.3d 1032 (7th Cir. 2020), after the return of a guilty verdict, in a phone conversation in the presence of the defendant and his counsel and the prosecutor, a juror informed the trial court that she felt pressure from the other jurors to return a guilty verdict. In upholding the discretion of the trial court in not holding a full hearing on the validity of the verdict, the Seventh Circuit cited *United States v. Daniels*, 803 F.3d 335 (7th Cir. 2015) (see the discussion of *Daniels* in the *Author's Commentary on Fed. R. Evid. 606(b)* just above), pointing out that the juror impeachment exceptions contained in Rule 606(b) apply only where certain *external* pressure is present, and further pointing out that *Pena-Rodriguez* requires a clear statement of overt racial bias, which was not present in this case. *Norwood*, 982 F.3d at 1055-58,

Application of 735 ILCS 5/1106(b)

Although not directly relevant to the rule, the decision in *Bosman v. Riverside Health System*, 2016 IL App (3d) 150445, is worthy of note. In that case, the trial court interviewed a holdout juror and the foreman of the jury and, after determining that the holdout juror had withheld information during *voir dire* examination, it excused the holdout and replaced her with an alternate juror. The jury was instructed to begin discussions anew and it soon reached a verdict. On review, the appellate court held that the trial court had violated section 2-1106(b) of the Code of Civil Procedure (735 ILCS 5/2-1106(b)) in not excusing the alternative jurors when the jury retired to consider its verdict. Holding that violation of that provision of the statute does not give rise to reversible error without a showing of prejudice, the appellate court held that prejudice was established here because the jurors knew of the interview of the holdout juror and "they were then exposed to the outside influences of the juror inquiry, which suggested to them the reason for [the juror's] eventual replacement." *Bosman*, ¶ 26. The judgment was reversed and the case remanded.

Supreme Court Resolution of Intradistrict Conflict on the Effect of Video Played for the Jury in the Courtroom in the Presence of Judge, Attorneys, and Defendant, after Commencement of Jury Deliberations

Although not directly related to any codified evidence rule, it is important to be aware of the Illinois Supreme Court decision in *People v. Hollahan*, 2020 IL 125091, and three prior appellate court split decisions in the Third District resulting in intradistrict conflicts about the propriety of playing a video—at the request of the jury after jury deliberations had begun—in the courtroom in the presence of the jury, the judge, the attorneys, and the defendant. In each case, all those present merely viewed the requested video; and, consistent with the judge's instructions, no comments were allowed. The issue in each case was rooted in the fundamental tenet that "jury deliberations shall remain private and secret," an honored rule that "is intended to protect the jury from improper influence." *People v. Jones*, 2019 IL App (3d) 160268, ¶ 23.

The first decision to address the issue was *People v. Johnson*, 2015 IL App (3d) 130610. Applying the principle that the appellate court reviews outside jury intrusions for prejudicial impact, a court majority affirmed the defendant's conviction, holding that the record showed no evidence of prejudice . The dissenting justice contended that the procedure employed by the trial court presumptively caused a chilling effect on the jury's deliberations.

The second decision, which caused the split, was *People v. Hollahan*, 2019 IL App (3d) 150556. In that case, authored by a justice not involved in *Johnson* but who was joined in concurrence by the dissenting justice in that earlier case, the appellate court majority acknowledged that, in addition to *Johnson*, two other appellate court districts had declined to find reversible error in similar circumstances (*i.e.*, *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶¶ 97-100 (no error in similar replaying of 911 tape in courtroom); *People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 78-79 (no error in similar courtroom view of surveillance footage)). But the court majority found structural error under the second prong of plain error analysis, holding that the procedure followed by the trial court "clearly inhibited the jurors' deliberations and restrained their freedom of expression and action" (*id.* at ¶ 21) and "should be deemed presumptively prejudicial" (*id.* at ¶ 30). The dissenting justice, the author of *Johnson*, invoked that decision in his dissent.

The final split decision was *People v. Jones*, 2019 IL App (3d) 160268. Noting the intradistrict conflict, the author of the majority decision—who authored *Johnson* and dissented in *Hollahan* and was joined in concurrence by the justice who concurred in *Johnson*—followed *Johnson's* reasoning by reviewing the trial court's procedure for prejudicial impact, concluding that the "record contains no indication that the presence of the nonjurors affected the jury's viewing of the video." *Jones*, at ¶ 27. The dissenting justice was the author of *Hollahan*. He invoked that decision in his dissent.

After granting leave to appeal the appellate court's decision in *Hollahan*, the supreme court reversed that decision in *People v. Hollahan*, 2020 IL 125091. The court specifically rejected the notion that "deliberations, once begun, cannot be suspended by the trial court." *Id.* at ¶ 25. Declining to find any error in the proceedings that occurred in the trial court, the supreme court found that "defendant has demonstrated no prejudice attributable to 'clear or obvious error'—for purposes of plain error review—in the way the trial court chose to proceed in this case." *Id.* at ¶ 23.

Subsequent to the supreme court decision in *Hollahan*, in *People v. Reynolds*, 2021 IL App (1st) 181227, ¶¶ 67-75, during jury deliberations and at the jury's request, the trial court allowed the jury to hear recordings of jail calls in the courtroom in similar fashion to the cases summarized above. There, the appellate court applied *Hollahan* in rejecting the defendant's contention that the process followed by the trial court constituted plain error by inhibiting the jurors' deliberations.

Note that in *People v. Cavitt*, 2021 IL App (2d) 170149-B, a case the supreme court remanded to the appellate court in the exercise of its supervisory authority based on its holding in *Hollahan*, the appellate court distinguished the holding in *Hollahan*, and reversed defendant's convictions and remanded the case for retrial based on the trial court's refusal to send a surveillance video on a laptop computer to the jury room after the jury requested the video during its deliberations, and based on the trial court's comments to the jury about not overemphasizing one piece of evidence and its limiting the jury's view in the courtroom to a single viewing, where the video lacked clear images and did not play in real time, and where the trial court had itself reviewed the video numerous times and even overturned an attempted murder verdict based on that review. Reasoning that the jury should have had unrestricted access based on those considerations, the appellate court held that the trial court's actions had resulted in second-prong plain error.

Subsequent to all of the decisions described above, in *People v. McLaurin*, 2021 IL App (3rd) 180122, the deliberating jury asked to listen to the audio recording of the statement given to police by the victim of the defendant's shooting, a statement previously entered into evidence to impeach the victim's testimony that the defendant was not involved in the shooting. The audio was played in the courtroom a single time by a bailiff. In addition to the jury and the bailiff, the trial judge and the court reporter were present. On plain error review on appeal, the defendant contended that the procedure employed by the

trial court hindered the jurors' ability to deliberate privately. Conceding that "the supreme court has found acceptable the practice employed by the court" in this case (id. at ¶ 12), the appellate court rejected that contention and affirmed the defendant's conviction. The author of *Hollahan's* appellate decision, who also authored *McLaurin*, concluded by asserting that "best practice prescribes allowing the jury to listen to such a recording outside the presence of anyone else." *Id.*

Note that, in each of the cases summarized above, the defendant did not object to the procedure employed by the trial court. The analysis applied by the supreme court and the appellate court thus was based on the propriety of applying the plain error rule—a rule that need not be invoked where a defendant preserves the issue by objecting and by including the issue in a posttrial motion. Whether or not a defendant objects, the trial court should be aware that deliberating jurors might be improperly influenced or improperly restricted in its review. The most obvious remedy for the trial court is to provide sufficient means for the deliberating jury to control its own review of a video in the jury room. If, however, only the courtroom allows for such review, the most prudent course is for the trial judge to ensure that only jurors are present and that they are solely able to operate and replay the device that allows playback.

Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803.

COMMENTARY

Author's Commentary on Ill. R. Evid. 607

The first two clauses of IRE 607 are identical to all of FRE 607 before the latter's amendment solely for stylistic purposes effective December 1, 2011. They also are identical to Illinois Supreme Court Rule 238(a). The exception that provides the requirement to show affirmative damage when there is impeachment by a prior inconsistent statement that is not admissible for substantive purposes is not present in the federal rule, and is added in the Illinois rule to codify Illinois common law. *See, e.g.*, *People v. Cruz*, 162 Ill. 2d 314, 359-60 (1994) (to be affirmatively damaging, as opposed to being merely disappointing to the prosecution's case, the witness's testimony must give "positive aid" to the defendant's case; "the enactment of section 115-10.1 of the Code of Criminal Procedure of 1963, subsequent to these crimes, supports a rigorous enforcement of the damage requirement under Rule 238(a). [Citing to what is now 725 ILCS 5/115-10.1]. Now that a party can admit into evidence a 'turncoat' witness' prior inconsistent statement by complying with section 115-10.1, the introduction of oral inconsistent statements under the guise of impeachment should be foreclosed."). See also *People v. McCarter*, 385 Ill. App. 3d 919, 933 (2008) (same), and *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 47 (citing both *Cruz* and *McCarter* and holding "[n] order for witness testimony to be affirmatively damaging, as opposed to merely disappointing to the prosecution's case, the testimony must give 'positive aid' to the defendant's case").

The intent of the codified Illinois exception—previously provided only by common law and not by Ill. S. Ct. R. 238(a), which permits impeachment of one's own witness but does not provide the exception—is to prevent a party's ploy of calling a witness for the purpose of presenting the jury, through cross-examination, a favorable prior inconsistent statement that is not admissible substantively. *See e.g.*, *People v. Weaver*, 92 Ill. 2d 545, 563 (1982) ("No possible reason exists to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the attention of the jury"). The Illinois rule prohibits that type of impeachment in the absence of a showing of affirmative damage, which is unnecessary when the prior inconsistent statement is admissible substantively, which is the case under the evidence rules cited in the last sentence of the rule.

For an example of a decision where, without citing the rule but relying solely on common law, the appellate court held that affirmative damage had occurred to the State's case by virtue of a witness's testimony, see *People v. Perez*, 2018 IL App (1st) 153629, ¶ 33 (holding that impeachment of the witness was proper because essentially his "testimony was that defendant could not and did not shoot" the victim). See also *People v. Cook*, 2018 IL App (1st) 142134, ¶ 48 (holding that, though a witness's prior inconsistent statement was not admissible as substantive evidence, it was admissible for impeachment purposes because his testimony did affirmative damage to the

State's case, where he inconsistently testified that an incident between defendant and the deceased shooting victim occurred at a different time and in a different place, and no gunshots were fired; and where he disavowed his prior signed statement and grand jury testimony which identified defendant and another as the offenders, claiming that the prior signed statement was a forgery).

Lack of Memory Does Not Constitute "Affirmative Damage"

In *People v. Leonard*, 391 Ill. App. 3d 926, 933 (1994), the Third District of the appellate court held that "[w]hen a witness professes a lack of memory regarding a prior statement, his testimony may be considered damaging." In *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 45, however, the First District rejected that holding, concluding "that a witness's professed lack of memory, standing alone, does not 'affirmatively damage' a party's case for the purpose of impeaching one's own witness." Later, in *People v. Blakey*, 2015 IL App (3d) 130719, ¶ 50, another panel of the Third District cited *Wilson* in holding that "*Leonard* was incorrect."

FEDERAL RULES OF EVIDENCE

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

ILLINOIS RULES OF EVIDENCE

Rule 608. Evidence of Character of Witness for Truthfulness or Untruthfulness

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Author's Commentary on Fed. R. Evid. 608(b)

IRE 608 does not incorporate **FRE** 608(b). But inquiry into specific instances of conduct, both to attack and to support a witness's character for truthfulness, is a frequent occurrence in federal trials, particularly in criminal cases.

Inquiry about Specific Acts of Conduct

The ability of federal prosecutors to inquire into specific instances of conduct often results in a defendant opting not to testify. And such examination is utilized frequently by defense attorneys in federal criminal cases, particularly where alleged joint offenders or coconspirators testify for the government and against the defendant.

The trial of William Cellini for attempted extortion illustrates its use in such cases. There, defense attorney Dan Webb cross-examined an admittedly corrupt Stuart Levine after his direct testimony on behalf of the government. According to a newspaper account (*see* "Corruption witness grilled," *Chicago Tribune*, October 15, 2011, page 4), Webb questioned Levine "about how he felt about it all." When Levine did not answer Webb's inquiry about how many "acts of dishonesty" he engaged in, Webb said, "I'll take an estimate," asking whether it was a number "over 500." When Levine said he didn't know how to "quantify it," Webb asked, "Is it fair to say there has been so many you can't give an estimate of a total?" And this was just within the first hour of the cross-examination concerning the witness's specific instances of conduct, a total examination that lasted approximately three days.

Likewise, if he were a witness in a federal trial, former NBC news anchor Brian Williams could be cross-examined about his statements that his military helicopter was under fire and was even hit by a rocket-propelled grenade in Iraq in 2003, and about his having observed a dead body floating by his hotel in the (relatively dry) French Quarter of New Orleans during Hurricane Katrina. Hilary Clinton could be cross-examined about her recollection that, during the war in Bosnia in 1996, her plane landed under fire and she had to scurry off, when in fact she was greeted on the tarmac by schoolchildren bearing flowers. Ronald Reagan could be cross-examined about his claim to have witnessed the liberation of Nazi concentration camps, when he was stateside during the war.

Again, the types of inquiry described above are not permitted under Illinois' version of Rule 608.

Prohibition on Extrinsic Evidence of Specific Acts of Conduct

Inquiry about specific acts of conduct under FRE 608(b) must be distinguished from *the presentation of extrinsic evidence* as proof of specific acts of conduct. In federal cases, inquiry about specific acts of conduct is allowed when there is a good faith basis for making inquiry. Proof of specific acts of conduct, however, is prohibited either as direct or rebuttal evidence where the witness (who may be a witness who has testified about another witness's character for truthfulness or untruthfulness, or a witness whose own credibility is being attacked) denies that the specific act occurred. Stated another way: (1) extrinsic evidence of specific acts of conduct is not admissible as stand-alone evidence to prove character for truthfulness or untruthfulness, and (2) extrinsic evidence of specific acts of conduct is not admissible to impeach either a witness who denies knowledge of the inquired-about conduct or a witness who denies that the inquired-about conduct occurred. The testimony of such a witness must be accepted by the examining party.

But *United States v. Fernandez*, 914 F.3d 1105 (7th Cir. 2019), presents an exception to the general rule prohibiting the admission of specific acts of conduct where the witness denies the acts. In that case, the defendant questioned a defense witness about text messages she allegedly received from a key prosecution witness against the defendant. The defendant contended that the messages showed bias against the defendant and the witness and provided a motive for the witness's inculpating the defendant. Because the prosecution witness had denied sending the text messages, the trial court refused to allow the defense witness to testify to the contents of the messages, citing FRE 608(b). Holding that the trial court's ruling was erroneous, the Seventh Circuit pointed out that "Fed. R. Evid. 608(b) allows proof of specific instances of conduct to establish bias or prior inconsistent statement." *Fernandez*, 914 F.3d at 1114. In support of its ruling, the Seventh Circuit cited its prior holdings in *United States v. McGee*, 408 F.3d 966, 981-82 (7th Cir. 2005), and *United States v. DeMarco*, 784

F.3d 388, 394 (7th Cir. 2015). The court held that "[o]nce [the prosecution witness] was confronted with the texts and effectively denied sending them, the door was opened to extrinsic evidence of the texts pursuant to Rule 613(b), contrary to the district court's understanding." *Id.*

Differences Between FRE 608(b) and FRE 609

The differences between FRE 608(b) and FRE 609 should be noted. One difference is that FRE 608(b) gives discretion to the trial court to allow cross-examination of any witness (including an accused) about specific acts of conduct related to truthfulness or untruthfulness, by applying the balancing test of Rule 403, which bars evidence if the prejudicial effect substantially outweighs probative value. FRE 609 also allows evidence of a felony conviction of a mere witness by applying the balancing test of Rule 403, but requires a different balancing test for an accused, one that shifts the burden by allowing the evidence of conviction only if its probative value outweighs its prejudicial effect. Another difference is that FRE 609 bars admission of convictions more than 10 years old (with the exception provided for under FRE 609(b)). In contrast, FRE 608(b) has no time-limit restriction.

Perhaps the most significant difference between the two rules is that FRE 608(b) allows the admission of facts underlying offenses, even where there has been no conviction or where evidence of a conviction has been barred. For example, the trial court may bar evidence of a conviction under the exercise of its discretion under FRE 609 or based on the conviction's being time-barred under FRE 609(b), but still allow evidence (sometimes referred to as "back-door" admission), not about the fact of *conviction*, but about the facts (the prior bad acts) that underlie an event for which there either was or was not a conviction (*e.g.*, the trial court's disallowing questions about a 15-year-old perjury conviction under FRE 609(b), but allowing questions about the witness having lied under oath under FRE 608(b)).

***U.S. v Abair*: Opposing Views on Application of FRE 608(b)**

United States v. Abair, 746 F.3d 260, (7th Cir. 2014), presents interesting opposing views concerning the application of FRE 608(b) and the standard of review on appeal. In that case, the defendant was prosecuted for structuring currency transactions in order to evade federal reporting requirements. She was convicted by a jury of multiple counts of that offense, which were merged into one count for sentencing purposes, and she was sentenced to two years probation and ordered to sell her newly purchased home and to forfeit to the government all the proceeds of that sale, amounting to $67,060. The defendant, who emigrated from Russia in 2005 and married an American citizen whom she later divorced, garnered much sympathy from the judges who reversed her conviction and even from the dissenting judge. The majority referred to the defendant as "at most a one-time offender who committed an unusually minor violation" and expressed "serious doubts that the forfeiture of her home's entire $67,000 value comports with the 'principle of proportionality' that is the 'touchstone of the constitutional inquiry about the Excessive Fines Clause.'" The dissent referred to the case as being an "overzealous prosecution for a technical violation of a criminal regulatory statute — the kind of rigid and severe exercise of law-enforcement discretion that would make Inspector Javert proud," and stated that, "I would affirm, although not without serious misgivings about the wisdom of this prosecution."

The majority found that the trial court abused its discretion in allowing the defendant to be cross-examined, under FRE 608(b), about false statements on her joint income tax return and the student aid forms she filed while attending nursing school. Her divorced husband testified that he completed the tax return and she testified that she had played almost no role in preparing it; and, as to the financial aid forms, there was evidence that the forms she completed allowed her to skip questions about her assets that were irrelevant to her application. The majority concluded that the government did not demonstrate a sufficient reason to believe that the defendant actually lied, and held that the trial court therefore abused its discretion in allowing cross-examination on the financial filings because the government did not provide a sufficient basis to believe the filings were probative of the defendant's character for truthfulness.

The dissent, on the other hand, stressed the deferential standard of review and the fact that, although the evidence gave rise to competing inferences, one permissible interpretation was

that the defendant provided false information on her financial filings and that the cross-examiner needed only to have a good faith factual basis to support the proposed line of questioning.

Author's Commentary on Ill. R. Evid. 608 and Non-Adoption of Fed. R. Evid. 608(b)

Except for the title, which previously had incorrectly read "Evidence of Character Witness" and which was corrected by the supreme court effective January 6, 2015, IRE 608 is identical to FRE 608(a) before the latter's amendment solely for stylistic purposes effective December 1, 2011. FRE 608(b) has not been adopted. There therefore is no subdivision designated (a) or (b) in IRE 608.

The Illinois rule permits the credibility of a *witness* to be attacked or supported by opinion or reputation evidence, with two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness (and not to specific instances of conduct), and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Note that all of IRE 608 is identical to the wording of pre-amended FRE 608(a), both rules addressing "evidence of character." The rule, which allows reputation or opinion evidence concerning the *character* for truthfulness or untruthfulness of a witness, necessarily relates to the testimony of a witness about the character for truthfulness or untruthfulness of another witness or the witness providing such character evidence. It is consistent with Illinois common law, except that allowing *opinion* evidence concerning character represents a substantive change in Illinois law because, before this codification, Illinois allowed proof of character only through reputation testimony. *See People v. Cookson*, 215 Ill. 2d 194, 213 (2005) (noting that the supreme court has "consistently held" that only reputation evidence and not opinion evidence or evidence of specific past instances of untruthfulness could be used to impeach a witness's reputation for truthfulness).

Non-Adoption of FRE 608(b)

FRE 608(b) (known as the impeachment by "prior bad acts rule" to distinguish it from Rule 609's impeachment by "prior criminal conviction rule") has not been adopted in Illinois.

FRE 608(b) allows proof of "specific instances of conduct," as such conduct relates to the character of a witness for truthfulness or untruthfulness. Under the federal rule, a testifying witness may be *cross-examined* (1) about specific instances of the witness's own conduct related to truthfulness or untruthfulness, or (2) about specific instances of conduct related to truthfulness or untruthfulness of another witness about whose character the witness has testified. That type of inquiry (referred to as "specific-act impeachment," generally related to questioning about specific instances of untruthfulness or questions about "prior bad acts") is not permitted in Illinois.

See *People v. Cookson*, 215 Ill. 2d 194 (2005) (pointing out that the supreme court has consistently held that impeachment of a witness's reputation for truthfulness is not permitted by use of specific past instances of untruthfulness); *People v. Santos*, 211 Ill. 2d 395 (2004) (trial court properly disallowed questioning of 16-year-old sexual abuse victim about her lying to medical personnel about having sex with another man within previous 72 hours of alleged offense; because of prohibition of specific-act impeachment, supreme court rejected defendant's argument that "if the jury knew that the witness had lied on a previous occasion, the jury would be more likely to believe she was lying in her testimony regarding the facts at issue in the case").

Testimony on a Witness's Credibility Prohibited

Also, in Illinois it is improper to ask one witness to comment directly on the credibility of another witness. See *People v. Becker*, 239 Ill. 2d 215 (2010) (citing cases and excluding expert testimony about reliability/credibility of hearsay statements of a child witness concerning a sexual assault). See also *People v. Stevens*, 2018 IL App (4th) 160138 (citing other Illinois decisions and IRE 608 in holding "[a] witness is only permitted to express an opinion about another witness's character for truthfulness after their character for truthfulness has been attacked by reputation or opinion evidence." *Id.* at ¶ 47).

Examples of Limited Permissible Inquiries Related to Credibility

Nevertheless, it should be noted that, for the purpose of attacking general credibility, Illinois does allow inquiry concerning a witness's prior wrongdoings that may be related to a possible bias, interest, or motive for giving false testimony, such as where a prosecution witness expects to receive a lesser sentence for his testimony. *See People v. Bull*, 185 Ill. 2d 179 (1998) (holding that, where evidence of arrest or commission of an offense is sought to be introduced, "the evidence that is used must give rise to the inference that the witness has something to gain or lose by his or her testimony. Therefore, the evidence used must not be remote or uncertain."). Such inquiry also is allowed concerning a witness's disreputable occupation *(see People v. Winchester*, 352 Ill. 237, 244 (1933) (allowing cross-examination regarding witness's operation of a "house of prostitution")), and a witness's narcotics addiction either at the time of testifying or at the time of the occurrence (*see People v. Collins*, 106 Ill. 2d 237, 270 (1985) (inquiry is proper because it goes to the witness's credibility and the ability of the witness to recall)).

Required Acceptance of Answer to Question about Collateral Matter

Consistent, however, with the federal rule and the discussion in the heading just below, Illinois requires that an answer to a question concerning a collateral matter (*i.e.*, one not relevant to a material issue in the case and sought to be introduced only to contradict) must be accepted, and the impeachment may not be completed by the presentation of extrinsic evidence (*i.e.*, evidence other than the witness's testimony). *See Esser v. McIntyre*, 169 Ill. 2d 292, 304-05 (1996) (failure to inquire about witness's occupation as prostitute during evidence deposition meant that, in absence of the witness, no inquiry could be made on the subject at trial); *Poole v. University of Chicago*, 186 Ill. App. 3d 554, 562 (1989) (denial by plaintiff's expert witness during cross-examination that he was subject to pending medical disciplinary proceedings in another state was a collateral matter that bound defendant, thus rendering erroneous the admission of proof of the disciplinary proceedings for impeachment purposes).

Extrinsic Evidence of Specific Acts of Conduct Prohibited

In addition to not permitting *inquiry* concerning specific instances of conduct (except for the limited circumstances described above), and consistent with FRE 608(b), Illinois does not permit *proof* of specific instances of conduct by extrinsic evidence to support or attack a witness's character for truthfulness. *See People v. West*, 158 Ill. 2d 155 (1994) (rejecting the argument that evidence of specific acts of untruthfulness should be admitted to impeach a child witness because the child was too young to have developed a reputation in the community); *People v. Williams*, 139 Ill. 2d 1 (1990) (complainant's seventh and eighth grade teachers could not testify at trial that she was an "inveterate liar"); *Podolsky and Assocs. L.P. v. Discipio*, 297 Ill. App. 3d 1014 (1998) (rejecting adoption of FRE 608(b) and holding that the trial court properly refused to allow evidence of a lawyer's suspension from the practice of law).

Exceptions to the General Rule Prohibiting Evidence of Specific Acts of Conduct

That Illinois permits proof of specific instances of conduct pursuant to certain criminal statutes should not be confused with the fact that Illinois does not permit such evidence for establishing the truthfulness or untruthfulness of a witness. Examples of statutes that permit inquiry into specific instances of conduct, for propensity purposes, include those cited in IRE 404(b) and discussed in the author's comments to that rule, as well as those cited in IRE 413 and the author's comments to that rule.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3), in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

COMMENTARY

Author's Commentary on Ill. R. Evid. 609(a)

For impeachment by evidence of conviction of a prior crime, Illinois has adopted the standard provided by *People v. Montgomery*, 47 Ill. 2d 510 (1971). In *Montgomery*, the Illinois Supreme Court adopted the standard contained in the 1971 *draft version* of Federal Rule of Evidence 609, and not the federal rule that ultimately was adopted. IRE 609 thus is not identical to what ultimately became FRE 609.

Differences Between FRE 609(a) and IRE 609(a)

Dissimilarities between the two sets of evidence rules exist in the balancing test applied to prior felony convictions of the accused and in the test for prior convictions that involve dishonesty or false statement:

(1) For proof of a prior felony conviction of a mere witness, both the pre-amended and current versions of FRE 609(a)(1), like IRE 609(a), apply the balancing test of Rule 403. But, unlike IRE 609(a), FRE 609(a)(1) applies a different test where the evidence of conviction is to be introduced against the accused. *When the witness is the accused*, the standard applied by FRE 609(a)(1) deviates from the standard provided by Rule 403 by allowing admission of the evidence of the conviction if the probative value of admitting it outweighs the danger of unfair prejudice. In contrast, the Illinois rule, which adheres to the balancing test of IRE 403, allows admission of the evidence of the prior conviction if the danger of unfair prejudice does not substantially outweigh its probative value. The two rules therefore provide very different tests where the accused is the witness.

(2) Unlike IRE 609(a), both the pre-amended and current versions of FRE 609(a)(2) allow admission of evidence of the conviction of a crime that involved dishonesty or false statement without regard to considerations of probative value and prejudicial effect. In contrast, IRE 609(a) applies the IRE 403 balancing test to such convictions.

In sum, IRE 609(a) applies the same balancing test regarding the admission of evidence of prior convictions that is supplied by Rule 403 (*i.e.*, it prohibits the admission of such evidence only where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice), without dis-

tinguishing between a mere witness and a witness who is the accused, and without regard for whether the prior conviction was for an offense involving dishonesty or false statement. As noted above, FRE 609(a) provides a standard different for a witness who is the defendant, and no standard for admitting proof of a dishonest act or false statement.

Related Civil Statute

In a civil case, section 8-101 of the Code of Civil Procedure (735 ILCS 5/8-101) provides that the interest of a witness "or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any fact not of record, either by the witness himself or herself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence."

The Section 115-20 Propensity Exception

Note that IRE 609 (like FRE 609) allows proof of a conviction for a prior offense only for impeachment purposes, *i.e.*, to challenge the credibility of a witness. Such evidence is not permitted to prove propensity. See, for example, the Seventh Circuit's decision in *Viramontes v. City of Chicago*, 840 F.3d 423 (7th Cir. 2016), where, although holding that the error was cured by a curative instruction, the court was critical of defense counsel's argument that the plaintiff's earlier felony conviction reflected "his unwillingness to conform his conduct to the law."

Nevertheless, Illinois has a statute, section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-20; *see* **Appendix C**), that permits proof of prior convictions in specified criminal cases to prove the propensity of a defendant to commit any of the types of offenses listed in the statute against the same victim. The statute, not to be confused with the provisions of IRE 609, allows evidence of a prior conviction for domestic battery, aggravated battery committed against a family or household member, stalking, aggravated stalking, or violation of an order of protection "in a later prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant."

Treatment of Defendants in Criminal Cases

Most appellate and supreme court cases that address the proper application of the principles contained in what is now codified in IRE 609(a) involve the admissibility of prior convictions of defendants for impeachment purposes in criminal cases.

Illinois decisions require that, in a criminal case, evidence of a prior conviction of the defendant for impeachment purposes must be proved through the introduction of a certified copy of the judgment of conviction, and not through cross-examination of the defendant. *See People v. Naylor*, 229 Ill. 2d 584, 594 (2008); *People v. Coleman*, 158 Ill. 2d 317, 337 (1994); *People v. Flynn*, 8 Ill. 2d 116 (1956). Thus, it would be improper for a prosecutor in an Illinois trial court to ask the defendant in a criminal case a question similar to that propounded by the federal prosecutor of a former Illinois governor: "Mr. Blagojevich, you are a convicted liar, correct?"

In *People v. Bey*, 42 Ill. 2d 129 (1969), however, the supreme court approved the cross-examination of the defendant, where he had given incomplete testimony on direct examination concerning his convictions. *See also People v. Nastasio*, 30 Ill. 2d 51 (1963). On the other hand, in *People v. Harris*, 231 Ill. 2d 582 (2008), where the defendant's testimony on direct examination opened the door to admission of his prior juvenile adjudication, the supreme court reiterated its preference for proof by certified documents in response to the defendant's contention on appeal that he should have been cross-examined about the matter to allow him the opportunity to explain the apparent inconsistency in his testimony.

Nevertheless, despite the general rule that the State is required to offer proof by the record of conviction and not by cross-examining the defendant about the fact that he was convicted, violation of the rule does not require reversal. In *People v. Long*, 2018 IL App (4th) 150919, the appellate court noted that in *People v. Madison*, 56 Ill. 2d 476, 488 (1974), the supreme court held that " the presentation of a prior conviction through cross-examination does not require reversal 'unless the error has deprived [the] defendant of substantial justice or influenced the determination of his guilt.'" *Long*, at ¶ 91. In applying that principle in the case at bar, the appellate court

found no error in the State questioning the defendant about his having been convicted of three separate offenses, holding that "[t]he State presented strong evidence of defendant's guilt, and the record fails to reflect he sustained unfair prejudice due to the manner in which his prior convictions were admitted into evidence." *Id.* at ¶ 92.

Requirement of a Judgment of Conviction

In order to impeach by a prior conviction under IRE 609 there must be a judgment of conviction. In *People v. Salem*, 2016 IL App (3d) 120390, the State was permitted to impeach the defendant with proof that he had pleaded guilty to a felony offense in a different county, but that he had not yet been sentenced. After reviewing the statutory definitions of "conviction" and "judgment" and considering decisions in other cases, the appellate court held that the admission of that evidence was error. And, since the defendant had not objected to the admission of the mere plea of guilty, the court further held that the error was structural in nature and thus constituted plain error. *Salem* also is noteworthy because evidence of the defendant's 11 previous federal offenses, which were more than 10 years old and which the State conceded were erroneously introduced, were also admitted into evidence for impeachment purposes. The court held this too was plain error.

Addressing Motions *In Limine*

In *People v. Patrick*, 233 Ill. 2d 62 (2009), the supreme court held that a trial court's arbitrary ruling (as a blanket policy) not to rule on a defendant's pre-trial motion *in limine* concerning the admissibility of prior convictions constitutes an abuse of discretion. A *Patrick* violation (where a trial court, with sufficient information to make a ruling, delays ruling on a defendant's motion *in limine* to bar admission of a prior conviction) is not a structural error, and is therefore subject to harmless error analysis. *People v. Mullins*, 242 Ill. 2d 1 (2011); *People v. Averett*, 237 Ill. 2d 1 (2010); *Patrick*. The factors that are considered in harmless error analysis are (1) the defendant's need to testify; (2) the type of reference, if any, to the defendant's conviction in closing argument; (3) the strength of the evidence against the defendant. *Mullins*.

Preserving Error Regarding Admissibility Rulings

Averett and *Patrick* are authority for the principle that, to preserve appellate review concerning error in the court's denial of the defendant's motion *in limine* to exclude proof of a prior conviction, the defendant must testify – even where, as in *Averett*, the court erred in arbitrarily refusing to consider a motion *in limine*. See also, *People v. Washington*, 2012 IL 107993, ¶ 42, where the supreme court cited *Averett* in holding that the *Patrick* issue is not reviewable when the defendant chooses not to testify.

The principle that the defendant must testify to preserve appellate review of the denial of the defendant's motion to exclude proof of a prior conviction is consistent with the United States Supreme Court decision in *Luce v. United States*, 469 U.S. 38 (1984). Also, in *Ohler v. United States*, 529 U.S. 763 (2000), the Supreme Court held that, where the defendant's motion *in limine* to bar a prior conviction is denied, but the defendant testifies to the conviction on direct examination, he waives his right to appeal the court's motion *in limine* ruling.

Rejection of "Mere Fact" Method of Proof

In *People v. Atkinson*, 186 Ill. 2d 450 (1999), and in *People v. Cox*, 195 Ill. 2d 378 (2001), the supreme court rejected the "mere fact" method of proving a prior conviction, *i.e.*, that as part of its balancing test, the trial court should consider permitting admission merely of the fact of the conviction rather than allowing a designation of the offense and sentence. The court reasoned that it is "the nature of the past conviction not merely the fact of it, that aids the jury in assessing a witness's credibility." *Atkinson*, 186 Ill. 2d at 458. Also, the "mere fact" method inevitably invites the jury to speculate about the prior offense.

Note, however, that the "mere fact" rule is not violated by not identifying a predicate felony offense where the impeaching offense is based on the commission of an offense by a felon, such as the offense of possession of a weapon by a felon. *People v. Catchings*, 2018 IL App (3d) 160186, ¶¶ 49-51.

Admissibility of Conviction for Same Offense

In *Atkinson* and in *People v. Mullins*, 242 Ill. 2d 1 (2011), the supreme court held that, where the proper balancing test has been applied by the trial court, the defendant's prior convic-

tion for the same offense for which he is on trial is admissible for impeachment purposes. For an appellate court decision reaching the same conclusion and citing other appellate court decisions, see *People v. Raney*, 2014 IL App (4th) 130551, ¶¶ 24-31. See also *People v. Carr-McKnight*, 2020 IL App (1st) 163245, ¶¶ 80-81 (affirming the admission of defendant's prior misdemeanor theft conviction).

Author's Commentary on Ill. R. Evid. 609(b)

The first part of IRE 609(b) is identical to FRE 609(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except that the portion of the pre-amended and the now-current federal rule that permits admission of the prior conviction that violates the "10-year rule" has not been accepted in Illinois. *Montgomery* prohibits the admission of evidence of a prior conviction, with or without notice, where the conviction (or the release from incarceration, whichever is later) occurred more than 10 years prior.

In Illinois, "the operative dates under *Montgomery* are the date of the prior conviction or release from confinement, whichever occurred later, and the date of trial." The date on which the subsequent offense occurred is not controlling. *People v. Naylor*, 229 Ill. 2d 584 (2008). Because the date of the witness's release from confinement is controlling, any time spent on parole or mandatory supervised release is not relevant. *People v. Sanchez*, 404 Ill. App. 3d (2010).

Author's Commentary on Ill. R. Evid. 609(c)

Although worded differently, IRE 609(c) is similar to FRE 609(c) before the latter's amendment solely for stylistic purposes effective December 1, 2011. The only difference is that the Illinois rule, in contrast to the federal rule, does not expressly provide that a conviction for a subsequent felony is a basis for allowing evidence of a prior conviction that was otherwise annulled. (Note that Illinois generally uses terms such as "clemency," "pardon," "commutation," and "reprieve" (*see, e.g.*, 730 ILCS 5/3-3-13), rather than "annulment" and "certificate of rehabilitation," which are used in other states.)

Author's Commentary on Ill. R. Evid. 609(d)

IRE 609(d) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the deletion of "in a criminal case" in what is now FRE 609(d)(1) because, under Illinois common law, the exception applies both to civil and criminal cases.

***People v. Harris*: Opening the Door for Admission**

In *People v. Harris*, 231 Ill. 2d 582 (2008), the supreme court held that juvenile adjudications are admissible for impeachment purposes against a testifying defendant when the defendant opens the door to such evidence. Because its holding was based on the defendant's own misleading testimony (he testified that "I don't commit crimes"), the court declined to consider whether section 5-150(1)(c) of the Juvenile Court Act of 1987 (705 ILCS 405/5-150(1)(c)), which seemed to be statutory authority for use of juvenile adjudications against mere witnesses and had been interpreted as statutory authority for such use against a testifying criminal defendant, overrides the common law prohibition against such use. (The statute is provided in its entirety in this guide at **Appendix G**.)

***People v. Villa*: *Montgomery* Applies; No Statutory Conflict**

In *People v. Villa*, 2011 IL 110777, a case in which it had granted leave to appeal two days after adopting these rules, the supreme court, in a 4-to-3 opinion, resolved a conflict in the holdings of two districts of the appellate court by concluding that the common law rule, as provided by the *Montgomery* decision (and by IRE 609(d)), presents the applicable evidentiary rule. The court reached that conclusion by considering the history of the statute, with particular emphasis on the fact that the statute makes juvenile adjudications admissible against a testifying criminal defendant "only for purposes of impeachment and pursuant to the rules of evidence for criminal trials." The court concluded that the retention of that language in the statute represented the General Assembly's intention to allow "the admission of juvenile adjudications against a testifying defendant for impeachment only in accordance with *Montgomery* and its progeny." *Villa*, at ¶ 41. In *People v. Rodriguez*, 2012 IL App (1st) 072758-B, the appellate court, with one judge dissenting, affirmed the defendant's convictions for first degree murder and

other offenses, holding, after harmless error analysis, that the erroneous admission of the defendant's juvenile adjudication was harmless beyond a reasonable doubt. In reaching that conclusion, the majority distinguished the facts and the use (or non-use) of the juvenile adjudication in the case at bar from the facts, use, and importance of the juvenile adjudication in *Villa*, which had necessitated the reversal of that defendant's convictions.

Deletion of the Committee Comment on IRE 609

When the evidence rules were first codified, the Committee provided a Comment to this rule, stating that the codification of the ***Montgomery*** holding was not intended to resolve the possible conflict between that holding and the statute discussed above and addressed in *Villa*. See also the "Statute Validity" discussion in the Committee's general commentary on page 2 of this guide. The reason the Committee kept the issue an open question was that, when it presented the codified rules to the supreme court, it was aware of the possible conflict between the statute and the *Montgomery* holding and, more important, of the conflict in the holdings of the appellate court brought about by the Second District's opinion in *People v. Villa*, 403 Ill. App. 3d 309 (2010) and the Fourth District's opinions in *People v. Bond*, 405 Ill. App. 3d 499 (2010) and *People v. Coleman*, 399 Ill. App. 3d 1150 (2010). There is no longer an open question. The supreme court's decision in *Villa* firmly established the evidentiary principles provided by IRE 609(d)—at least in the absence of further legislative action. And for that reason, the Committee Comment that originally accompanied IRE 609 has been deleted by the supreme court, effective January 6, 2015.

Author's Commentary on Ill. R. Evid. 609(e)

IRE 609(e) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

FEDERAL RULES OF EVIDENCE

Rule 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

ILLINOIS RULES OF EVIDENCE

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

COMMENTARY

Author's Commentary on Ill. R. Evid. 610

IRE 610 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness, which include matters within the knowledge of the witness that explain, qualify, discredit or destroy the witness's direct testimony. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile or an unwilling witness or an adverse party or an agent of an adverse party as defined by section 2–1102 of the Code of Civil Procedure (735 ILCS 5/2–1102), interrogation may be by leading questions.

COMMENTARY

Author's Commentary on Ill. R. Evid. 611(a)

IRE 611(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

The rule or one or more of its subdivisions, sometimes in conjunction with another evidence rule, provides the basis for most objections based on the form of a question or the witness's response to a question.

Author's Commentary on Ill. R. Evid. 611(b)

IRE 611(b) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for Illinois' addition at the end of the first sentence the words, "which include matters within the knowledge of the witness that explain, qualify, discredit or destroy the witness's direct testimony." That clause was added to the rule by the Illinois Supreme Court, effective October 15, 2015, merely as a clarification of the preceding phrase, "matters affecting

the credibility of the witness," and is based on the decision in *People v, Stevens*, 2014 IL 116300, which is discussed just below.

The rule is consistent with the well-established principle that cross-examination concerning a witness's bias, prejudice, interest, or motive in testifying is proper and is protected by both the Federal and Illinois constitutions (U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, sec. 8). See *People v. Gonzalez*, 104 Ill. 2d 332, 337 (1984). As noted by the U.S. Supreme Court in *Davis v. Alaska*, 415 U.S. 308 (1974), "[t]he partiality of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of his testimony. *** [T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 315-17 (internal quotation marks omitted).

The *Stevens* Clarification

The Illinois Supreme Court's decision in *People v. Stevens*, 2014 IL 116300, provides the rationale for the supreme court's addition of the clause described above. In *Stevens*, the defendant was cross-examined about another sexual offense that had occurred years after the sexual offense for which he was on trial, the evidence of the subsequent offense having been admitted during the State's case-in-chief under section 115-7.3(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3(b); see **Appendix A**). During his testimony on direct examination, the defendant testified only about the offense on trial, offering a consent defense, and said nothing about the subsequent offense. Nevertheless, the State was permitted to cross-examine him about the subsequent offense. Framed by the defendant's contention that the State had exceeded the scope of his direct examination and that he had not waived his fifth amendment right involving the subsequent offense, the issue before the supreme court concerned the propriety of the State's cross-examination.

In addressing that issue, the supreme court held that the defendant's fifth amendment right against self-incrimination had not been violated because, by taking the stand and testifying in his own behalf, he opened himself up to legitimate cross-examination. The court noted, moreover, that in an earlier opinion it had "modified the general rule that had previously limited cross-examination to the subject matter inquired into on direct examination." *Stevens*, at ¶ 24. The court explained that it had "modified the rule to the extent that '[i]t is proper on cross-examination to develop all circumstances within the knowledge of the witness which explain, qualify, discredit or destroy his direct testimony.'" *Id.* In this case, the court held, the cross-examination had a proper purpose: to discredit the defendant's consent defense and test his credibility. The court therefore held that the State's cross-examination of the defendant concerning the offense about which he had not testified was proper.

The earlier case referred to and quoted by the supreme court in *Stevens* is *People v. Williams*, 66 Ill. 2d 478 (1977). The entire quote from the *Williams* opinion is:

> "Although, as a general rule, cross-examination is limited to the subject matter inquired into on direct examination, the general rule is modified to the extent that 'It is proper on cross-examination to develop all circumstances within the knowledge of the witness which explain, qualify, discredit or destroy his direct testimony although they may incidentally constitute new matter which aids the cross-examiner's case.' (Gard, Illinois Evidence Manual R. 471 (1963)." *Williams*, 66 Ill. 2d at 486-87.

The holdings of the supreme court in *Stevens* and *Williams* signaled that the subject-matter limitation on cross-examination is merely a general limitation — one that is subject to the exceptions spelled out in those cases. The addition of the explanatory clause in IRE 611(b) provides notice as to what is included in the phrase, "matters affecting the credibility of the witness."

Similar Seventh Circuit Case—Without Reliance on Rule 611(b)

United States v. Boswell, 772 F.3d 469 (7th Cir. 2014), presents a scenario similar to that in *Stevens*. In *Boswell*, during cross-examination in a prosecution for the charge of felon in possession of a firearm where there was evidence that the defendant sold two firearms, the defendant denied the charge, testifying that he did not like guns. The government then was permitted to cross-examine him about the tattoo of a firearm

on his neck. Without referring to Rule 611(b), the Seventh Circuit approved the cross-examination based on relevancy under Rule 401, holding additionally that there was no unfair prejudice under Rule 403.

Improper to Deny Recross Examination as a Matter of Course

In *People v. Garner*, 2018 IL App (5th) 150236, the appellate court held that the denial of a defendant's right to recross a witness as a blanket policy, especially when new matter is presented on redirect, is improper. In *Garner*, the trial court had ruled that there was no right to recross and, though the defendant made no offer of proof as to what was lost as a result of the trial court's ruling and failed to raise the issue in his posttrial motion , the appellate court applied plain error in reversing the conviction and remanding for retrial.

Author's Commentary on Ill. R. Evid. 611(c)

IRE 611(c) is almost identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the deletion of the phrase "a witness identified with an adverse party," which is now in FRE 611(c)(2). The inclusion of that phrase would have represented an expansion of Illinois law, which is capsulized in section 2-1102 of the Code of Civil Procedure (735 ILCS 5/2-1102), entitled "Examination of adverse party or agent." A "witness identified with an adverse party" is broader than the concept of "party" or the "agent of a party," as defined in the Illinois statute. Acceptance of that phrase also would have altered the provisions of Supreme Court Rule 238(b), which allows questions as if under cross-examination of a "hostile or unwilling" witness, without any reference to "a witness identified with an adverse party." Section 2-1102 of the Code of Civil Procedure and Rule 238 are provided in the appendix to this guide at **Appendix H**.

Regarding leading questions, see *People v. Schladweiler*, 315 Ill. 553, 556 (1925), where the supreme court stated:

> "The test of a leading question is whether it suggests the answer thereto by putting into the mind of the witness the words or thought of such answer. Leading questions, to be incompetent, must refer to material matters, and occur where no necessity for them appears. Whether or not such necessity exists is a matter resting largely in the discretion of the trial court, an abuse of which discretion will amount to prejudicial error. Questions merely directing the attention of the witness to the subject-matter of the inquiry are not suggestive or leading in any proper sense."

Although the rule does not address the situation where an adverse party, as defined by section 1102 of the Code of Civil Procedure, is "cross-examined" by that party's attorney, Illinois common law requires questions that are non-leading. See, for example *Estate of Griffin v. Subram*, 238 Ill. App. 3d 712 (1992) (holding that leading questions by the party's own attorney during cross-examination of the party as an adverse party witness are improper, as are questions on new matters not brought out by the initial examination of the adverse party). Those restrictions, however, do not apply where the court orders or the parties agree that an adverse party will be examined only once and will not be recalled.

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Rule 612. Writing Used To Refresh Memory

If a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence for the purpose of impeachment those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

COMMENTARY

Author's Commentary on Ill. R. Evid. 612

IRE 612 is identical to FRE 612 before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for: (1) the deletion of the reference to 18 U.S.C. § 3500, which is now in FRE 612(b) and which does not apply in Illinois; (2) the deletion of the phrase in current FRE 612(a)(2) that grants discretion regarding admissibility to the court when a witness refreshes his or her memory before testifying; and (3) the addition in the Illinois rule of the phrase "for the purpose of impeachment," in order to limit admission of the refreshing document only for that purpose.

Note that, as held in *Baxter International v. Becton, Dickinson and Co.*, No. 17 C 7576 (N.D. Ill. November 22, 2019), review of privileged information to refresh memory may result in waiver of the privilege.

Note, too, that the rule does not address the right to have memory refreshed (which is a well accepted common-law

rule); rather, it addresses the options of an adverse party when a witness uses a writing to refresh memory.

FEDERAL RULES OF EVIDENCE

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

ILLINOIS RULES OF EVIDENCE

Rule 613. Prior Statements of Witnesses

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

(c) Evidence of Prior Consistent Statement of Witness. Except for a hearsay statement otherwise admissible under evidence rules, a prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:

(i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or

(ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred.

Author's Commentary on Ill. R. Evid. 613(a)

IRE 613(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The portion of the rule that does not require showing the statement or disclosing its contents to the witness arguably represents a change in Illinois law (but not necessarily in practice), because in *Illinois Central Railroad Co. v. Wade*, 206 Ill. 523 (1903), consistent with the requirement established in Queen Caroline's Case in 1820, the supreme court required that written statements be shown to the cross-examined witness. See section (4) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide. Contrary to the assertion that the abrogation of that requirement represents a change in Illinois law, however, note that IRE 613(a) addresses merely the method of questioning a witness about a prior statement, while IRE 613(b) addresses the prerequisites for admitting the extrinsic evidence in order to complete the impeachment of the witness, which includes affording the witness an opportunity to explain or deny the prior statement, and affording the opposing party an opportunity to question the witness about it.

Author's Commentary on Ill. R. Evid. 613(b)

IRE 613(b) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the clarifying addition of the word "first" in the phrase "unless the witness is *first* afforded an opportunity to explain or deny," and the substitution of "opposing" in the phrase "opposing party" for the pre-amended federal rule's use of "*opposite* party" and the current federal rule's use of "*adverse* party."

A more recent change in the rule occurred as the result of the Illinois Supreme Court's amendment that was effective on October 15, 2015. That amendment substituted the word "statements" for the word "admissions" in IRE 613(b)'s final sentence. That amendment is consistent with the supreme court's simultaneous substitution of the word "statement" for the word "admission" in the title of IRE 801(d)(2), which now reads "Statement by Party-Opponent." Both of those amendments were made in recognition that "statements" of a party-opponent are admissible against that party whether or not they are "admissions." Note that the last sentence of this subdivision, which refers to statements that are substantively admissible as statements of a party opponent under IRE 801(d)(2), should be considered along with the provisions of IRE 806, which bears the title "Attacking and Supporting Credibility of Declarant."

For an appellate court decision addressing IRE 613(b), see *People v. Evans*, 2016 IL App (3d) 140120, ¶¶24-52 (in first-degree murder prosecution, holding that the prosecutor improperly questioned the co-defendant, who had been convicted in a separate trial and had been given use immunity, on his prior "inconsistent" statements without laying a proper foundation and without offering proof of the prior statements to complete the "so-called impeachment," as required by IRE 613(b), and also holding that the confrontation clause was violated because, despite the grant of use immunity, the co-defendant witness continued to invoke the fifth amendment and refused to answer the prosecutor's leading questions about the offense, thus providing no evidence or basis for cross-examination—in contrast to situations where the witness gives testimony inconsistent with prior statements or claims a loss of memory).

Author's Commentary on Ill. R. Evid. 613(c)

IRE 613(c) represents a codification that was made effective by the supreme court on January 6, 2015. As discussed in the *Author's Commentary on IRE 801(d)(1)* under the heading *2014 Amendment of FRE 801(d)(1)(B) and Its Non-Adoption in Illinois*, which fully discusses its common-law roots, the rule reflects well-established Illinois common law. It has no counterpart in the federal rules. That is so because the Illinois rule addresses the same subject matter as prior consistent statements in what is now FRE 801(d)(1)(B)(i), but in a very different manner. **FRE** 801(d)(1)(B)(i) provides substantive weight—as not hearsay—for the witness's prior consistent statements used to rebut an express or implied charge that the testimony of the witness/declarant is a recent fabrication or subject to recent influence or motive in testifying. IRE 613(c) permits the admis-

sion of the same prior consistent statements under the same circumstances as the federal rule, but solely for rehabilitative purposes, and without providing those statements substantive weight—that is, without admitting prior consistent statements as a hearsay exclusion or as an exception to the hearsay rule.

In short, IRE 613(c) provides Illinois' counterpart to FRE 801(d)(1)(B)(i) for the admission of prior consistent statements, separate and apart from Rule 801(d), which provides exclusions from the hearsay rule, and Rules 803 and 804, which provide exceptions to the hearsay rule.

Effective September 17, 2019, the supreme court amended the rule to add the initial phrase, "Except for a hearsay statement otherwise admissible under evidence rules." That was done because of an appellate court decision—since withdrawn—that had held that the pre-amended rule did not permit an excited utterance (which was consistent with the witness's testimony) to be admitted. In doing so, the court abrogated the holding in *People v. Watt*, 2013 IL App (2d) 120183, which had held that a prior consistent statement could be admitted as an excited utterance. It also would have abrogated a statue such as the one addressed in *People v, Applewhite*, discussed *infra*. The supreme court's amendment is designed to make clear that the rule does not deny admissibility to consistent statements that are otherwise admissible.

Note that generally a prior consistent statement is admitted *after* an attempt during questioning at trial to create an express or implied charge that "the witness acted from an improper influence or motive to testify falsely" or that the "witness's testimony was recently fabricated." But there are appellate court decisions that allow witness rebuttal during direct examination where a party had suggested in opening statement that witnesses would fabricate their testimony or have a motive for testifying falsely. See, for example, *People v. Doering*, 2021 IL App (1st) 190420; *People v. Ursery*, 364 Ill. App. 3d 680 (2006); and *People v. Nicholls*, 236 Ill. App. 3d 275 (1992).

Regarding evidence admitted under IRE 613(c), judges and criminal law practitioners would do well to heed the advice of the appellate court regarding limiting instructions. In *People v. Randolph*, 2014 IL App (1st) 113624, the court cited *People v. Lambert*, 288 Ill. App. 3d 450, 461 (1997), in advising that "[e]ven in cases where prior consistent statements are properly admitted, such evidence must be accompanied by a limiting instruction informing the jury that the evidence should not be considered for its truth, but only to rebut a charge of recent fabrication." *Randolph*, at ¶ 20. The *Randolph* court also advised that "it is improper for the State to refer to the prior consistent statements as substantive evidence in closing arguments." *Id*. In ruling on the substantive issue in *Randolph*, the appellate court held that the trial court erred in allowing admission—as prior consistent statements—information in a police report that was consistent with a police officer's trial testimony, where the defendant had used the police report only for the purpose of impeachment by omission.

People v. Ruback, 2013 IL App (3d) 110256, is an interesting decision that predates the January 6, 2015 adoption of IRE 613(c). There, the three judges, who wrote separately, expressed different views as to whether charges of improper motive or improper influence and recent fabrication should be treated separately, and whether the completeness doctrine (*see* IRE 106) justified or did not justify the trial court's ruling barring the contested statements. The adoption of IRE 613(c) should settle questions about circumstances that justify the admission of prior consistent statements, while making clear that such prior consistent statements do not carry substantive weight.

In *People v. Applewhite*, 2016 IL App (4th) 140588, shortly after the offense, the 11-year-old victim informed her mother and a nurse and two police officers of the sex act the defendant committed on her. Her detailed description of the act, as well as two other previous acts involving the defendant, were testified to by her and by those who had interviewed her, pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10; see **Appendix U**), which allows, as exceptions to the hearsay rule, statements made by a person under age 13 who is the victim of certain physical and sexual offenses. Also, a videotaped police interview in which she described the sex act and the two previous similar acts was played for the jury.

In approving the admission of this evidence, the appellate court rejected the defendant's contention that section 115-10, in allowing the admission of prior consistent statements of witnesses, conflicts with IRE 613(c) which denies substantive

admission of such statements. The court held that section 115-10 specifically provides for a hearsay exception and is thus an exception to Rule 613(c).

In *People v. Fillyaw*, 2018 IL App (2d) 150709, the trial court allowed the admission in evidence of a recording of a detective and a witness concerning the circumstances of the witness's out-of-court identifications of the two defendants in the case. The recording was made just after the beginning of a retrial of the two defendants. The primary purpose of the recording was to establish that the witness had identified the two defendants without police influence. The trial court admitted the recording as "substantive evidence to perfect impeachment" based on section 115-10.1 of the Code of Criminal Procedure. *Fillyaw*, at ¶ 70. Reasoning that the statements were clearly prior consistent statements that could not be admissible substantively, the appellate court pointed out the exception that such statements are "admissible to rebut a charge that the witness is motivated to testify falsely or rebut a charge of recent fabrication" and that "[t]he party seeking to introduce the prior consistent statement predates the alleged fabrication or predates the motive to testify falsely." *Id.* at ¶ 71. Those conditions were not satisfied. Noting that a prior consistent statement is not admissible whenever there is a contradiction of a statement or merely to corroborate another's testimony, the appellate court held that no hearsay exception applied to the admission of the witness's statements and that, although it did not refer to IRE 613(c), by implication no exception applied under that rule as well.

In *People v. Tatum*, 2019 IL App (1st) 162403, ¶¶ 99-106, on appeal from a murder conviction, the defendant contended that the State improperly elicited prior consistent statements made by two witnesses to police, prosecutors, and the grand jury to bolster the credibility of their trial testimony. Providing the entirety of the five alleged consistent statements of the witnesses (see *id.* at ¶ 100), the appellate court pointed out that the complained-of statements showed that the witnesses had indeed testified that they had talked to the police, prosecutors, and the grand jury, informing them as to what they knew about the case, but without informing the jury of the content of their statements. The court thus held that there was no impropriety in the witnesses' providing unspecified information about the case before testifying at trial and that, "[i]f the content of the witnesses' prior statements was not introduced, there is no sense in which their statements were introduced at all." *Id.* at ¶ 103. Because the *content* of their prior statements were not disclosed, the witnesses' testimony was not bolstered by prior consistent statements, and the admitted statements did not constitute error.

Rule 614. Court's Calling or Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

COMMENTARY

Author's Commentary on Ill. R. Evid. 614(a)

IRE 614(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See *People v. Sidney*, 2021 IL App (3d) 190048, where the appellate court quoted IRE 614(a) in noting that the trial court may, on its motion or the suggestion of a party, call witnesses and may interrogate such witnesses, as long as it does not assume the role of advocate. In applying the rule, the appellate court held that the court had properly called the defendant's attorney to bring out the truth regarding the defendant's claims of ineffective counsel and, although the attorney's answers to those questions did not support the defendant's claim, the questions did not render the court an advocate for the State. *Id.* at ¶¶ 28-29.

Author's Commentary on Ill. R. Evid. 614(b)

IRE 614(b) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See People v. Falaster*, 173 Ill. 2d 220, 231-32 (1996) (court must avoid conveying to jury its views regarding merits of the case, veracity of witness, and weight of evidence). See also *People v. Johnson*, 327 Ill. App. 3d 203, 205 (2001) ("In the proper exercise of discretion, the trial court may pose questions for the purpose of clarifying any ambiguities that may exist and to help elicit the truth.") Citing *People v. Santucci*, 24 Ill.2d 93, 98 (1962).

Author's Commentary on Ill. R. Evid. 614(c)

IRE 614(c) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. *See People v. Westpfahl*, 295 Ill. App. 3d 327, 330 (1998), where the court reasoned:

> "Although there is a general rule that failure to raise a timely objection at trial waives consideration of an issue on appeal (*See, People v. Enoch*, 122 Ill. 2d 176 (1988)), we note precedent holding that a less rigid application of the rule prevails where the basis for the objection is the conduct of the trial judge. *People v. Tyner*, 30 Ill. 2d 101, 106 (1964); *People v. Sprinkle*, 27 Ill. 2d 398 (1963); *People v. Dorn*, 46 Ill. App. 3d 820 (1977). As the issue in the instant matter involves the questioning of a witness by the trial judge, we hold that the defendant properly preserved this issue for review by registering an objection outside the presence of the jury and prior to the introduction of further evidence."

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by law to be present.

COMMENTARY

Author's Commentary on Ill. R. Evid. 615

IRE 615 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the non-substantive substitution of "law" for "statute," which appears at the end of the pre-amended federal rule and in what is now FRE 615(d).

Trial Court's Need to Exercise Discretion

In *People v. Dixon*, 23 Ill. 2d 136 (1961), the supreme court reviewed cases and other authority in concluding that a motion to exclude witnesses should normally be allowed, but that a ruling is within the trial court's sound discretion. The court held that where there is no exercise of sound discretion by the trial court, as in this case, and the court's denial of the motion to exclude witnesses is arbitrary, there is no need to show prejudice and reversal is proper.

Constitutional Right to Public Trial in Criminal Cases

Though not directly related to this rule, judges and parties must be mindful of the constitutional right to a public trial provided by the Sixth Amendment for criminal trials. See, for example, *Waller v. Georgia*, 467 U.S. 39 (1984) (right to a public trial applies even to pretrial suppression hearings); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982) (press and public have a qualified First Amendment right to attend a criminal trial); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (right to a public trial applies also to the *voir dire* proceeding in which the jury is selected); *Presley v. Georgia*, 558 U.S. 209 (2010) (extending *Press-Enterprise Co.* to include a single relative of the defendant).

The applicable rules for denying open proceedings, as articulated by the United States Supreme Court are:

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

People v. Evans, 2016 IL App (1st) 142190, highlights the need for care in excluding persons from the courtroom. In that case, the step-grandmother of the defendant was excluded from the courtroom before *voir dire* of prospective jurors occurred, because of the trial court's concern about possible juror contamination and because of the courtroom's small gallery, which could barely accommodate the 45 prospective jurors who had been summoned to the courtroom. Relying heavily on the

near-identical case of *Presley v. Georgia*, 558 U.S. 209 (2010), where the defendant's uncle was excluded from the courtroom for the same reasons, the appellate court noted that, in *People v. Thompson*, 238 Ill. 2d 598 (2010), the Illinois Supreme Court had included the denial of a public trial as structural error requiring automatic reversal without the need to show prejudice. And noting further that, as in *Presley*, the trial court could have taken steps to accommodate the presence of the step-grandmother (which included "calling the potential jurors into the room in smaller groups"), the appellate court reversed the defendant's conviction for first degree murder, which had resulted in a 100-year prison sentence, and remanded the case for a new trial.

In *People v. Smith*, 2020 IL App (3d) 160454, the trial court closed the courtroom during jury *voir dire*, thus excluding the defendant's mother from the courtroom during jury selection. The reason for the closure was that the courtroom could barely accommodate the prospective jurors. Although there was no contemporaneous objection and the defendant did not raise the issue in a posttrial motion, the majority of the appellate court panel applied the plain error rule in reversing the defendant's convictions. The dissenting justice, relying on the similar appellate court case of *People v. Radford,* 2018 IL App (3d) 140404, cited that case and *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), in concluding that the trial court had satisfactorily explained the reason for the closure. (The supreme court decision in *Radford* is discussed just below.)

In *Weaver*, the defendant's mother and his minister had been excluded from the courtroom during jury selection, without objection by the defendant. Later, the defendant sought a new trial based on ineffective assistance of counsel for counsel's not having objected to the closure. The Supreme Court held that in this instance the defendant needed to demonstrate prejudice to obtain a new trial, but he had failed to offer evidence or legal argument that the outcome of his case likely would have differed had the courtroom not been fully closed to the public.

Weaver and the Illinois Supreme Court decision in *Radford* define the limitations on the sixth amendment right to a public trial.

In *People v. Radford,* 2020 IL 123975, the appeal from the appellate court case referred to above, the defendant was charged with the murder of his two-year old daughter. Because of the limitations on the courtroom size based on the number of prospective jurors required, the trial court ordered a partial closure of the courtroom during jury selection, limiting for public admission two persons chosen by the defendant and two persons from the victim's family. Neither side objected to the trial court's order. Considering its plain error review based on the defendant's failure to contemporaneously object to the partial closure of the courtroom, the problems associated with the courtroom size, and the care of the trial court in fashioning an appropriate remedy, the supreme court held that the partial closure of the courtroom did not constitute clear or obvious error by depriving the defendant his sixth amendment right to a public trial. *Radford*, at ¶¶ 22-42.

Section 115-11: Statutory Basis for Courtroom Exclusion

It should be noted that the only *statutory* basis in Illinois for excluding persons from the courtroom is in section 115-11 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-11). Where a prosecution is for the listed sex offenses in that statute and "where the alleged victim of the offense is a minor under 18 years of age," the statute allows the court to "exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except for the media."

For a definitive application of the statute, see *People v. Falaster*, 173 Ill. 2d 220, 225-28 (1996) (holding that "the more stringent limitations established by the United States Supreme Court for the closure of judicial proceedings to the press and public" did not apply (*id.* at 226-27), that section 115-11 is constitutional, and that the trial court did not err in excluding from the courtroom three persons who were not members of the defendant's immediate family (two nephews of the defendant and the grandfather of one of the nephews), and because the trial court did not close the trial but merely removed spectators during the testimony of the 14-year-old victim and did not exclude members of the press, the trial court thus complied with the statute's requirements related to the testimony of that

14-year-old girl, who was sexually abused by her father beginning when she was eight or nine years old).

See also *People v. Martinez*, 2021 IL App (1st) 172097, ¶¶ 47-58 (applying *Falaster* in holding that, although the trial court did not identify the identity of persons excluded from the courtroom, the defendant did not allege that the excluded persons had a direct interest in the case, thus distinguishing the holding in the appellate court decision in *People v. Schoonover*, 2019 IL App (4th) 160882).

In its review of the appellate court decision referred to above, in *People v. Schoonover*, 2021 IL 124832, the supreme court reversed the appellate court's holding. The issue before the court, as framed by the appellate court, was whether the trial court had violated section 115-11 by not making an express determination as to whether each spectator excluded from the courtroom had a direct interest in the case during the testimony of the under-13-years-of-age girl who was a victim of a number of counts of predatory criminal sexual assault of a child. In its *de novo* review of whether the defendant's constitutional right to a public trial under the sixth amendment had been violated, the supreme first noted that because the defendant had forfeited the issue, it needed to determine whether plain error could be applied. In reversing the convictions, the appellate court had held that second-stage plain error had occurred. Citing and adhering to *Falaster*, the supreme court pointed out that, as in *Falaster*, the trial court had temporarily removed spectators and did not close the trial, the persons excluded were not immediate family members of the defendant and thus did not have a direct interest in the outcome of the case, and the court did not impose any restrictions on the media, who were allowed continued access to the proceedings. *Schoonover*, at ¶ 34. The supreme court noted that the trial court had inquired about the identity of persons in the courtroom and received no response from either side. *Id.* at ¶ 38. Thus, there was no basis for concluding that close family members had been excluded from the courtroom. In construing section 115-11, the court held that, contrary to the appellate court's holding, "nothing in the statute requires an express finding to be made" (*id.* at ¶ 40), and thus the trial court did not violate section 115-11. Citing relevant United States Supreme Court decisions not inconsistent with its holdings, in reversing the decision of the appellate court, the supreme court held that its inquiry under the plain error doctrine had ended.

Closed Circuit Television Proceedings

Although it is not directly related to this rule—but with relevance related to the right to confrontation in a criminal case—it should be noted that section 106B-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/106B-5) allows testimony "taken outside the courtroom and shown by means of a closed circuit television" for "[t]estimony by a victim who is a child or a person with a moderate, severe, or profound intellectual disability or a person affected by a developmental disability" victimized by listed sexual offenses or aggravated battery or aggravated domestic battery. This provision was held to satisfy confrontation clause requirements in both *Maryland v. Craig*, 497 U.S. 836, 851-52 (1990) and *People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005).

In *People v. Martinez*, 2021 IL App (1st) 172097, ¶¶ 38-46 (cited *supra* for a different reason), conceding that the statute's proper procedure was not followed because, in this bench trial, the victim testified in the courtroom, while the defendant was placed in a separate room where he viewed the victim's closed circuit testimony, the appellate court held that the defendant was "unable to show that his absence from the courtroom resulted in an unfair proceeding or caused him to be denied an underlying substantial constitutional right." *Id.* at ¶ 45).

Decisions Related to a Trial Judge's Review of Evidence in a Criminal Case Outside the Presence of the Defendant,

Recent appellate court decisions related not to the closure of the courtroom (where typically the sixth amendment right to a public trial applies) are noteworthy. For example, in *People v. Lucas*, 2019 IL App (1st) 160501, a majority of a panel of the appellate court held reversible error occurred where, in a bench trial that included charges for resisting arrest and DUI, the trial court viewed a video recording of the defendant's traffic stop in chambers in the presence of the prosecutor and defense counsel, but outside the presence of the defendant. The majority noted that although she understood that the trial court would view the video in the manner described, the defendant was not informed that she had a right to be present, that she never

waived that right, and that as a result she "was not afforded the opportunity to confront the evidence against her and aid in her defense." *Id.* at ¶ 15. Over the dissent, the majority held that her due process right to be present for a critical stage of the proceedings resulted in second prong plain error.

Later, in *People v. Groebe*, 2019 IL App (1st) 180503, after a police officer testified in a bench trial concerning the underlying facts related to the charge of aggravated DUI that "he had reviewed the video before his testimony and that the video represented a true and accurate recording of the traffic stop and defendant's performance of the field sobriety tests" (*id.* at ¶ 37), during a break in the trial the trial court viewed the video recording of the traffic stop and field sobriety tests in chambers. Relying in part on *Lucas*, the defendant contended that her right to a public trial had been violated. The appellate court disagreed. Reasoning that photographs frequently are not presented in open court and that the police officer had laid a sufficient foundation for the admission of the video, and noting that—unlike in this case—in *Lucas*, the basis of the court's decision was "the impact on the defendant's ability to aid in her own defense and to decide whether to testify" (*id.* at ¶ 49), the appellate court held that the trial court had not denied the defendant her right to a public trial.

In a case cited for different reasons a couple of times *supra*, in *People v. Martinez*, 2021 IL App (1st) 172097, ¶¶ 59-69, a bench trial involving sexual abuses of a child, the trial court announced that it would review the victim sensitive report (VSI) taken by a licensed clinical social worker, a report already placed in evidence through the testimony of the social worker, and already reviewed by the defendant and his counsel. In rejecting the defendant's contention on appeal that, by reviewing the VSI out of the courtroom, the trial court had violated the defendant's right to a public trial or his right to be present for all critical stages of his trial, the appellate court adopted the rationale of *Groebe* and, as that case had done, distinguished the holding in *Lucas*.

In an appellate court decision fully analyzing the decisions provided above and other decisions related to a trial judge's review of evidence outside the defendant's presence and without the defendant's explicit approval, see *People v. Richardson*, 2021 IL App (1st) 190821, ¶¶ 45-62. In that case, where, under plain error review after a conviction and sentence for two counts of aggravated battery, the defendant contended that, though his attorney had waived his presence, he did not knowingly and voluntarily waive his right to be present when the trial court viewed videotaped evidence *in camera* during a pretrial section 115-10 (725 ILCS 5/115-10) hearing regarding the admissibility of a six-year-old boy's outcry statements, the appellate court held that the defendant's claim did not involve a critical stage of his trial, where his attorney had waived his presence and, during the trial, the defendant heard the evidence considered by the trial court during its pretrial review.

People v. Bartels, 2022 IL App (3d) 190635, is the most recent decision involving a trial judge's in-chambers review of evidence—video and audio recordings of offenses occurring in a gas station—outside the defendant's presence. In that case, the appellate court distinguished the holdings in *Lucas* and *People v. Lofton*, 194 Ill. 2d 40 (2000), and relied on *People v. Young*, 2013 IL App (4th) 120228, where in a bench trial during a section 115-10 hearing (725 ILCS 5/115-10) in open court, with the defense counsel's agreement, the trial court viewed the victims' recorded interviews in chambers at the court's leisure. In that case, the defendant had been present at the section 115-10 hearing and was aware of the evidence against him, so the appellate court reasoned that the trial court's viewing of the interviews in chambers was not a vital or critical stage and thus defendant could affirmatively waive his presence. As in *Young*, the court reasoned that the presentation of evidence in the in-chambers review was not new, testimony was not presented, argument was not made, and defendant was aware of the evidence against him. Therefore, as in *Young*, the in-chambers viewing was not a critical stage of the proceedings, and defendant's attorney could waive his presence. Moreover, the court pointed out, defense counsel suggested the in-chambers viewing. Agreeing that the majority's decision is consistent with existing caselaw, the special concurring justice nonetheless expressed criticism of *Young* and the majority's reliance on it.

Decision on the Failure of the Trial Court to Poll a Single Juror

Another decision not directly involved in this or any other rule, but one deserving of attention is *People v. Jackson*, 2021 IL

App (1st) 180672, *PLA allowed on September 29, 2021*, Docket No. 127256. (For another unrelated but interesting discussion related to responses of jurors during polling by the trial court, see the discussion *supra* under the heading entitled *Decisions Related to the Polling of Jurors* in the *Author's Commentary on Fed. R. Evid. 606(b)*.)

In *Jackson*, the defendant was found guilty by a jury of first degree murder of one victim and attempted armed robbery of another victim. After the jury returned its signed verdict forms, defense counsel asked the trial court to poll the jury. Eleven jurors were polled and answered that this was and is their verdict. The court then dismissed the jury without polling the twelfth juror. This failure was not preserved for appeal by the defendant through objection and a posttrial motion.

Reviewing the issue under the plain error doctrine, a majority of the appellate panel reversed the convictions, holding that "leaving out of the poll of the jury even one juror calls into question the integrity of the judicial process and, so, constitutes second-prong plain error." *Id.* at ¶ 3. In making its determination, the majority disagreed with the holding in *People v. McGhee*, 2012 IL App (1st) 093404, where the appellate court denied relief in the defendant's postconviction proceeding which was based on ineffective assistance of defense counsel for failing to object after counsel had asked for polling of the jury and the trial court did not do so. The majority also found *People v. Sharp*, 2015 IL App (1st) 130438, which involved an incomplete poll, unhelpful based on its reliance on *McGhee*. The dissenting justice relied on *McGhee* and *Sharp*, and contended that the trial court's error did not rise to the level of second-prong error,

As noted, the supreme court has allowed leave to appeal in *Jackson*, so it will have the final word on whether second-prong plain error occurred in that case.

FEDERAL RULES OF EVIDENCE

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

ILLINOIS RULES OF EVIDENCE

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

COMMENTARY

Author's Commentary on Ill. R. Evid. 701

IRE 701 is identical to the federal rule before the latter's amendment, solely for stylistic purposes, effective December 1, 2011.

General Principles

For application of the rule, see *Freeding-Skokie Roll-Off Serv., Inc. v. Hamilton*, 108 Ill. 2d 217 (1985) (formally adopting FRE 701 as well as FRE 704, the latter of which allows admission of lay opinion evidence even where such evidence embraces an ultimate issue to be decided by the trier of fact; and noteworthy for its holding that lay opinion evidence is not "helpful" when the witness can adequately communicate to the jury the facts upon which the opinion is based, so that the jury can draw its own inferences and conclusions); *People v. Novak*, 163 Ill. 2d 93 (1994) (discussing lay opinion evidence, while holding that opinions of witnesses were improperly admitted as lay opinions but properly admitted as expert opinions); *People v. Sykes*, 2012 IL App (4th) 111110 (relying on *Freeding-Skokie Roll-Off* in holding impermissible the testimony of a witness about what he saw on a videotape shown to the jury, where he had not seen the events depicted on the tape and was relying on a clearer version of an original videotape that he had reviewed but which had not been admitted into evidence).

Typical subjects for lay opinion evidence include whether a vehicle was going fast or slow (*see e.g., Hester v. Goldsbury*, 64 Ill. App. 2d 66 (1965)) and whether a person was happy, sad, angry, or inebriated.

People v. Thompson: Standards for Lay Opinion Identification Evidence from Photos or Video

The current and growing prevalence of surveillance cameras is bound to result in many cases where a person is depicted in the commission of an offense or in negligent conduct or in doing something that provides conclusive or circumstantial evidence of guilt or liability. In such cases, lay opinion identification testimony is likely to be offered for the purpose of identifying persons depicted in a photo or a video. The supreme court decision in *People v. Thompson*, 2016 IL 118667, provides essential standards for the admission of lay opinion identification testimony in such cases.

In *Thompson*, a surveillance camera produced video of a man stealing anhydrous ammonia, an ingredient for manufacturing methamphetamine, from the tanks of a farm supply company. During his jury trial for violating the Methamphetamine Control and Community Protection Act, a layperson and law enforcement officers gave testimony identifying the defendant

as the person depicted in the video or in still images of the video. Defense objections to this evidence were overruled.

On appeal from the defendant's conviction focused on the admissibility of the identification evidence, the appellate court relied on the two-part test furnished by the earlier decision in *People v. Starks*, 119 Ill. App. 3d 21 (1983): (1) that the witness must have been familiar with the defendant before the offense, and (2) that the testimony must resolve the issue of identification without invading the province of the trier of fact, giving as examples of non-invasion: where a defendant's appearance has changed since the time of the recording or where the recording is unclear or a limited depiction. *People v. Thompson*, 2014 IL App (5th) 120079, ¶ 29. The appellate court held that *Starks'* first requirement had been satisfied, but it held that none of the witnesses had a better perspective than the jury to interpret the surveillance recording and none had alluded to a change in appearance nor was there any evidence of such a change in the record. *People v. Thompson*, 2014 IL App (5th) 120079, ¶ 33. The appellate court thus concluded that neither the witnesses who identified the defendant from a photo or from the video had any better ability to identify the defendant than did the jury. The appellate court therefore held that the lay opinion identification testimony had been improperly admitted for it had invaded the province of the jury.

In its review of the appellate court decision, the supreme court first observed that IRE 701 is modeled after the federal rule, and therefore the court "may look to federal law, as well as state decisions interpreting similar rules for guidance." *People v. Thompson*, 2016 IL 118667, ¶ 40. Accordingly, the supreme court engaged in a thorough analysis of federal and out-of-state decisions that had addressed the factors relevant to the type of identification evidence presented in this case, drawing the following conclusions:

> "Based on the above principles, we now hold that opinion identification testimony is admissible under Rule of Evidence 701 if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Lay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the jury. A showing of sustained contact, intimate familiarity, or special knowledge of the defendant is not required. Rather, the witness must only have had contact with the defendant, that the jury would not possess, to achieve a level of familiarity that renders the opinion helpful.
>
> "We adopt a totality of the circumstances approach and agree with the above authorities that the following factors should be considered by the circuit court in determining whether there is some basis for concluding the witness is more likely to correctly identify the defendant: the witness's general familiarity with the defendant; the witnesses' familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording; whether the defendant was disguised in the recording or changed his/her appearance between the time of the recording and trial; and the clarity of the recording and extent to which the individual is depicted. However, the absence of any particular factor does not render the testimony inadmissible.
>
> "Accordingly, we decline to adhere to the rules for admission of lay identification testimony set forth in *Starks*, which the appellate court relied on. The two-part test of *Starks* is at odds with the great weight of authority. Specifically, as stated above, a witness need not have familiarity with the defendant before or at the time of the recording to testify. Moreover, we reject *Starks* to the extent it limits identification testimony solely to those instances where either the defendant's appearance has changed between the time of the recording and trial or where the recording lacks clarity to render such testimony admissible.

> "We also agree with the majority view that the extent of a witness's opportunity to observe the defendant goes to the weight of the testimony, not its admissibility. Moreover, review of the circuit court's decision to admit lay opinion identification testimony is reviewed for an abuse of discretion.
>
> "Thus, we hold that lay identification testimony is admissible under the foregoing principles, with the proviso, however, 'it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' Illinois Rule of Evidence 403 (eff. Jan. 1, 2011). If such testimony is admitted under the above standards, it would not invade the province of the jury because the jury is free to reject or disregard such testimony and reach its own conclusion regarding who is depicted in the surveillance recording." *People v. Thompson*, 2016 IL 118667, ¶¶ 50-54.

After spelling out the foregoing principles that relate to lay witness identification evidence generally, the supreme court then addressed separate issues raised by the appellate court decision: the admissibility of the identification testimony of law enforcement officers, and under what circumstances law enforcement officers may provide such testimony. The relevance of these issues is based on concern about possible prejudice to defendants due to the difficulty of "complete and uninhibited cross-examination regarding the witness's familiarity" with the defendant, which "could reveal information about the defendant's criminal past and unfairly cause the jury to focus on that." *People v. Thompson*, 2016 IL 118667, ¶ 55. On this issue, too, the supreme court examined the decisions of numerous federal courts of appeal, resulting in the following principles:

> "We hold, therefore, that when the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury. This will provide the defendant with an opportunity to explore the level of the witness's familiarity as well as any bias or prejudice. Moreover, it will allow the circuit court to render a more informed decision as to whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice. Although a witness may identify himself as a law enforcement officer, his testimony involving his acquaintance with the defendant should consist only of how long he knew the defendant and how frequently he saw him or her. Moreover, to lessen any concerns regarding invading the province of the jury or usurping its function, the circuit court should properly instruct the jury, before the testimony and in the final charge to the jury, that it need not give any weight at all to such testimony and also that the jury is not to draw any adverse inference from the fact the witness is a law enforcement officer if that fact is disclosed." *People v. Thompson*, 2016 IL 118667, ¶ 59.

After furnishing the guiding principles for admission of lay identification evidence—both for lay persons and for law enforcement officers—the supreme court ruled as to the admissibility of the evidence of the four witnesses who had provided identification testimony in the case at bar. It held that the testimony of a lay witness met the standards it had supplied, that two of the law enforcement officers had met the applicable standards but their testimony was erroneously allowed because the trial court had not engaged in the precautionary procedures required for law enforcement witnesses, and that there had been an inadequate foundation for the admission of the testimony of the third law enforcement officer. Despite the erroneous admission of the testimony of the law enforcement officers, the supreme court found harmless error based on the strength of the State's case, which included incriminating admissions by the defendant. The defendant's conviction was affirmed.

Application of *Thompson*

People v. Mister, 2016 IL App (4th) 130180-B, is an opinion issued by the appellate court after the supreme court issued a supervisory order directing the court to reconsider its earlier decision in light of the *Thompson* decision. In that case, a

surveillance shift supervisor of a Joliet gambling casino testified about numerous surveillance videos, in the casino and in a parking lot, that depicted the activities of the defendant and another related to an armed robbery of a victim who had won a sizable amount of money in the casino. In its earlier decision, the court had declined to follow the appellate court's decision in *Thompson*. After its own review following remand, the appellate court concluded that its previous legal findings were consistent with those of the supreme court in *Thompson* and, with the supreme court's additional guidance, it determined that, although he had not seen the actual events depicted in the videos in real time, the surveillance shift supervisor's testimony about what he saw based on his repeated viewings of the videos was rationally based on his perception of them and was helpful to the trier of fact. His testimony was therefore properly admitted under IRE 701.

In *People v. Gharrett*, 2016 IL App (4th) 140315, the appellate court relied on the principles in *Thompson*, applying them not for the identification of a person, but for the identification of a partially obstructed object in a person's hand. In that case, a prosecution for burglary, a witness testified that a depiction in an office video admitted in evidence "was consistent" with the defendant's holding a wad of money that the witness had previously placed in a drawer in the office. The appellate court upheld the admission of that testimony as lay witness opinion evidence that was rationally based on the perception of the witness and helpful to the jury's determination of a fact in issue.

In *People v. Stitts*, 2020 IL App (1st) 171723, without an indication whether the trial occurred before or after the *Thompson* decision, the appellate court found that the trial court had failed to follow the procedures mandated by *Thompson*. Although the defendant had forfeited the issue, the appellate court applied plain error analysis, held that the evidence was closely balanced, and considered the issue. In this case involving a shooting, where part of the evidence included a detective testifying that his review of surveillance tape showed the defendant holding a gun and fleeing from the scene of the offense with others, the court held that the trial court failed to afford the defendant an opportunity to examine the officer outside the presence of the jury, so that defendant's counsel could determine the witness's level of familiarity with the defendant and any other bias or prejudice.

Silent Witness Theory of Admissibility

Though not directly related to lay witness testimony, in considering the admission of photos and videos generally, it is important to be aware of the "silent witness" theory, under which "a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation. In such a case, the evidence is received as a so-called silent witness or as a witness which speaks for itself." *People v. Taylor*, 2011 IL 110067, ¶ 32 (citations and internal quotation marks omitted). For a discussion of *Taylor*, where the issues were unrelated to lay opinion testimony under IRE 701, see the *Author's Commentary on Ill. R. Evid. 104(a)*.

Testimony About Ultimate Issue

IRE 704 provides the rule that allows the admission of lay opinion evidence regardless of whether that opinion embraces an ultimate issue to be decided by the jury. In *People v. Richardson*, 2013 IL App (2d) 120119, the appellate court cited IRE 701 in holding that a police officer was properly allowed to provide lay opinion evidence that the defendant wore a vest that was "body armor" (an element of the charged offense) under his clothing, based upon his personal experience as a police officer. Responding to the defendant's contention that the officer improperly provided an opinion on an ultimate issue in the case, the court cited IRE 704 that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* at ¶ 19.

For a recent decision emphasizing the demise of the previous principle that lay opinion evidence could not embrace an ultimate issue, see *People v. Walker*, 2021 IL App (4th) 190073, ¶¶ 35-36 (citing earlier decisions that prohibited lay opinions of ultimate questions of fact, but were overruled by *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542 (1995), and subsequent supreme and appellate court decisions, as well as the requirements of IRE 701, fortified by IRE 704).

Distinctiveness and Similarities in Handwriting

In *People v. Jaynes*, 2014 IL App (5th) 120048, ¶¶ 50-53, the appellate court held that the trial court did not abuse its discretion in overruling the defendant's objection to allowing a detective to testify as to his opinion regarding distinctiveness and similarities in handwriting when he possessed no handwriting-comparison qualifications, and in allowing, under IRE 701, the admission of the detective's testimony that certain letter "E"s on labels on compact discs looked similar. The court noted that the detective did not offer any conclusions about whether the "E"s were written by the defendant, and that his opinion satisfied the requirements of IRE 701.

Lay Opinion Evidence on the Credibility of a Witness Is Improper

As indicated *infra*, expert opinion testimony about the credibility of a witness is not permitted in Illinois. Also prohibited is lay opinion evidence on the credibility of a person outside the context of a trial or other court proceeding. *People v. O'Donnell*, 2015 IL App (4th) 130358, is illustrative. In that case, a police officer testified that the defendant, who was on trial for the offense of driving under the influence, showed deception about not being the driver of his abandoned wrecked car when the officer interrogated him at the police station, because "[h]e looked away, and he looked down" when she asked him if he was the driver of the car. Citing its earlier decision in *People v. Henderson*, 394 Ill. App. 3d 747 (2009), which had referred to similar evidence as "human lie detector" testimony, the appellate court quoted a sentence from that opinion in holding that the testimony was improper: "Using such a witness as a 'human lie detector' goes against the fundamental rule that one witness should not be allowed to express his opinion as to another witness's credibility." *O'Donnell*, 2015 IL App (4th) 130358, ¶32, quoting *Henderson*, 394 Ill. App. 3d at 753-54.

The takeaway: It is proper for a witness to testify that a person "looked away, and he looked down;" but it is not proper for the witness to state an opinion that the person lied or was being deceptive.

Previous Opinions on Credibility by Non-Expert Witnesses Do Not Constitute Improper Lay Opinions

Although a witness is not permitted to provide opinion testimony concerning another witness's credibility, a number of Illinois decisions hold that testimony about past lay opinions concerning a criminal defendant's credibility or guilt—in contrast to testimony concerning present opinions—does not constitute improper opinion evidence. *People v. Hanson*, 238 Ill. 2d 74 (2010), presents a prime example of that principle. In that case, the State was allowed to admit evidence that the defendant's sister told a detective that she believed the defendant had committed the murder of the four victims in the case, and that the detective informed the defendant that his sister "thinks you did this." Pointing out that neither the detective nor the sister in this case testified that they believed the defendant was guilty, and that no evidence was admitted about the sister's present opinion of the defendant's guilt or innocence, the supreme court rejected the defendant's contention that the admitted testimony constituted improper opinion evidence. Rather, the court concluded "that the evidence was relevant in that it provided some context for why the investigation was focusing on defendant." As for the defendant's contention that the testimony constituted inadmissible hearsay, the court stated:

> "In this case, the State did not seek to admit [the sister's] statements to prove that defendant was guilty or even to prove that [the sister] thought defendant was guilty. Instead, [the detective's] testimony provided context for his investigation and for testimony pertaining to defendant's state of mind based on defendant's response to [the detective's] questioning."

Decisions applying *Hanson* include *People v. Degorski*, 2013 IL App (1st) 100580, where the witness (then an assistant state's attorney and at the time of trial a judge) testified in a non-responsive way that "his statement to me was reliable," in response to a cross-examination question about a statement that the witness took from the defendant; *People v. Martin*, 2017 IL App (4th) 150021, where, having responded to a car in a ditch off the interstate and having been told by the defendant that his wife had been driving and that she had hailed a car to seek help, a State trooper testified that at that time he believed that the defendant had been driving and that the defendant's story did not make sense to him; and *People v. Whitfield*, 2018 Ill App (4th) 150948, ¶¶58-59, where questions and statements

made by police officers to the defendant during a videotaped interview did not constitute improper lay witness opinions on the defendant's credibility, were helpful to the jury by placing the defendant's statements in context and were not testimony, and did not provide any *present* opinion from the investigating officers.

Both *Degorski* and *Martin* distinguished the contrary holding in *People v. Crump*, 319 Ill. App. 3d 538 (2001), where in response to the State's question, "did you have reason to believe that the defendant in this case committed this offense?" a police officer responded, "Yes, I did." The primary distinction made by the two cases was that *Crump* predated *Hanson*, and was inconsistent with its holding.

People v. Suggs, 2021 IL App (2d) 190420, is consistent with the holdings in *Crump* and *Degorksi*, in holding that a police officer's testimony about his opinion at the time of the alleged offense was proper, but it reached a different decision based on the officer's further testimony that may have communicated his present opinion about the guilt of the defendant. In that domestic battery prosecution, defendant's mother, who had called 911, told police that defendant (her daughter) had stopped her from falling by grabbing her wrist, thereby causing fingernail punctures in three places on her daughter's wrist. She provided the same testimony at her daughter's jury trial. A police officer, who responded to the 911 call, testified in response to the State's question that, after speaking with defendant's mother, he had the opinion that a crime had occurred. Then, in response to the State's next question, "And what crime was that?" the officer testified, "Domestic battery." In its plain error review, after discussing *Crump* and *Degorski*, the appellate court reasoned that the officer's first response was properly in the past tense, when the officer formed the opinion at the scene; but the response to the second question, the court reasoned, meant that "the jury almost certainly would have understood that language as a reference to an opinion [the officer] held when he testified." *Id.* at ¶ 18. Based on its conclusion that the evidence was close, the court reversed defendant's conviction and remanded the case to the circuit court for a new trial.

Distinguishing Lay Opinion Evidence from Expert Opinion Evidence

The distinction between lay and expert opinion evidence is sometimes difficult to determine—especially in relation to police officer testimony. In *United States v. Jones*, 739 F.3d 364 (7th Cir. 2014), the Seventh Circuit pointed out that it had discussed the distinction in numerous opinions and provided the following general principles:

> "Lay testimony is based upon one's own observations, with the classic example being testimony as to one's sensory observations. *** [T]he Rule 701 standard is essentially an importation of the personal knowledge requirement. In contrast, testimony moves from lay to expert if an officer is asked to bring her law enforcement experience to bear on her personal observations and make connections for the jury based on that specialized knowledge. [Citation.] This differentiation arises frequently in cases in which officers testify as to the meaning of code words used in drug transactions." *Jones*, 739 F.3d at 369.

In *Jones*, the issue before the court was whether a police officer's testimony about a dye pack that had exploded after a bank robbery was lay opinion evidence or expert opinion testimony. If the latter, the testimony may have been incompetent because the witness had not been properly qualified and because the government had failed to make proper disclosure. Applying the principles in the quote above, the court concluded that the officer's testimony about the aftermath of an exploding dye pack—something he had witnessed on three to five occasions—clearly constituted lay opinion evidence. On the other hand, the officer's testimony—"that the dye packs were all manufactured by one company, that they contained a timer which could be set to detonate the dye pack within 10 to 30 seconds of exiting the bank, that the dye packs instantly burned at 400 degrees, and that timers were set based upon the environment of the bank so as to ensure they would go off shortly after the exit from the bank so as to maximize the possibility for witnesses outside the bank"—"was based on technical, specialized knowledge obtained in the course of his position, and was not based on personal observations acces-

sible to ordinary persons," and therefore fell within Rule 702. *Jones*, 739 F.3d at 369.

United States v. Malagon, 964 F.3d 657 (7th Cir. 2020), also illustrates the difference between expert opinion testimony and lay opinion testimony. In that case, the Seventh Circuit relied on the training and experience of a DEA Task Force Officer to provide expert testimony concerning drug trafficking practices and the use of drug codes. The Seventh Circuit rejected the defendant's contention that, though that expert witness never referred to his "training and experience" to decode narcotics code words, an examination of the transcript of the officer's testimony showed that he had indeed relied on such experience. As for another DEA officer's evidence, admitted as lay opinion testimony, the Seventh Circuit reasoned that the officer:

> "testified as to the meaning of the words used in a conversation between himself and [the defendant]. As a party to the conversation, his testimony as to the meaning of the words used by the parties in the conversation falls within Rule 701 as lay testimony in that it is rationally based on his perception as a witness and helpful to understanding his testimony and determining a fact in issue. Nothing in his testimony indicates that his testimony is based on specialized knowledge, as opposed to his understanding of the conversation as a participant in it." *Malagon*, 964 F.3d at 662.

Dual-Role Testimony

The Seventh Circuit's decision in *United States v. Jett*, 908 F.3d 252 (7th Cir. 2018) addresses in depth the problems associated with "dual-role testimony" (a witness testifying from personal contemporaneous or past observations and also providing expert opinions), in the context of an FBI agent's testimony interpreting certain words in text messages between defendants. As in *Jones*, the testimony of the agent did not distinguish between lay or expert opinion evidence. Acknowledging inconsistencies in prior Seventh Circuit decisions, the court provided precautions to be taken by district court judges in admitting such evidence, as well as a recommended jury instruction. *Jett*, affirmed based on plain error review, is recommended reading when such dual-role testimony is involved.

A subsequent dual-role-testimony case, *United States v. Thomas*, 970 F.3d 809 (7th Cir. 2020), heavily relies on *Jett*, and is likewise recommended reading. In that case, an FBI special agent testified concerning his knowledge of the recovery of two firearms and a bag of methamphetamine from the glove compartment of the defendant's car and he also offered his opinions about the significance of the presence of the firearms related to drug dealing. As in *Jett*, despite the district court's erroneous failure to follow the correct procedures for admitting the dual-role testimony, the convictions were affirmed on plain error review.

For Illinois procedures, even more highly recommended for reading is the decision of the Illinois Appellate Court in *People v. Loggins*, 2019 IL App (1st) 160482, ¶¶ 76-106. There, to address the issue of whether the defendant possessed cocaine with the intent to deliver, a police officer testified to opinions about items found in the defendant's house where cocaine was located: several hundred small plastic bags, two blenders, and a bottle of inositol (a dietary supplement used to cut cocaine). On appeal, the defendant contended that the officer's testimony about the paraphernalia obtained from his house—offered as lay opinions—constituted expert opinion testimony and thus was improperly admitted, because the State failed to lay a proper foundation for such testimony. Noting that IRE 701 is substantively identical to its federal counterpart, the appellate court relied on numerous Seventh Circuit opinions in agreeing with the defendant's contention. The standards applied by the appellate court for distinguishing lay opinion evidence from expert opinion evidence may be summarized as follows:

> "To count as lay opinions, they must be based on the officer's personal observations of the underlying events, and they cannot require the officer to draw on any specialized knowledge or expertise. They must be opinions that anyone in the same position, not just a trained officer, would have been qualified to offer. *** If the opinion rests in any way on the officer's specialized knowledge, it is expert testimony, and it must meet the foun-

dational requirements of Rule 702." *Loggins*, at ¶¶ 88, 89 (interior quotation marks and citations omitted).

In applying those standards, the appellate court held that the officer's opinions about plastic bags, blenders, and inositol as evidence of the defendant's intent to deliver cocaine were based, not on what the officer observed in the defendant's house (which would have satisfied Rule 701's requirement that the opinions were "rationally based on the perception of the witness"), but rather were based on the officer's specialized knowledge or experience as governed by Rule 702. The court emphasized that it is commonplace for law-enforcement officers to testify as dual-capacity *witnesses*, but:

> "there is no such thing as dual capacity *testimony*. Any given piece of testimony is either lay or expert testimony; it cannot be both. Rule 701 says this plainly: Lay opinions and inferences are 'limited to' those which are '*not* based on scientific, technical, or other specialized knowledge *within the scope of Rule 702*.' [Citing IRE 701(c)]. If an opinion falls within the scope of Rule 702, it is 'by definition outside of Rule 701.'" *Id.* at ¶ 103 (all emphases added by the court).

Despite its holding that the officer's opinions on the paraphernalia were improperly admitted, the appellate court held that the error was harmless, because the defendant failed to object and, if he had, the officer would have been qualified as an expert. *Id.* at ¶¶ 108-114.

In *People v. Price*, 2021 IL App (4th) 190043, a prosecution for first degree murder, a paramedic with 20 years experience testified that the victim's body had obvious rigor mortis. Over the defendant's objections that rigor mortis is a specialized term that required expert testimony and that the State had not provided the foundation for such testimony, the trial court admitted the testimony.

On appeal, the appellate court affirmed the admission of the term. The court reasoned that the term could have been considered a lay opinion, reasoning that the paramedic had not explained what he meant by the term, and a "lay person's understanding of the term rigor mortis is a stiffness of a body that sets in after the person has died, and others testified that [the victim's] body was cold and stiff." *Id.* at ¶ 179. But because "the State offered [the paramedic's] training and experience as foundation for his observation that the body had rigor mortis instead of simply rephrasing the question to have [the paramedic] describe the body's condition" (*id.* at ¶ 181), the court reasoned that the paramedic "was qualified based on his training and experience to offer testimony about signs that a person is dead, and he testified he was trained that rigor mortis is one of these signs." *Id.* at ¶ 183. The court further reasoned that "[e]ven if improperly admitted, the testimony was not prejudicial," because the paramedic "did not testify what 'rigor mortis' meant at all, much less in a technical, medical sense. He further did not say how it occurred or whether it meant a person had been dead for any particular amount of time. In fact, [the paramedic] disclaimed any knowledge about these latter subjects." *Id.* at ¶ 184.

Expert Opinion Evidence Unnecessary in Determining Whether Motorist Was Under the Influence of Drugs

In the supreme court decision in *People v. Gocmen*, 2018 IL 122388, involving the statutory rescission of the defendant's suspension of his driver's license for refusing to submit to chemical testing, the primary issue was whether an inexperienced police officer had reasonable grounds to arrest the defendant. Reversing the judgments of the circuit and appellate courts, which had held that expert opinion evidence was necessary in determining whether a motorist was under the influence of drugs, the supreme court held that there was no requirement that a police officer "could not opine as to whether a motorist was under the influence of drugs without being qualified as an expert witness." *Gocmen*, at ¶ 38. The court made its holding explicit:

> "Expert testimony is not required in every case for an officer to testify to his opinion that a motorist was under the influence of drugs based on his inference from the totality of the circumstances. When, as here, the totality of circumstances at the time of the arrest is sufficient to lead a reasonably cautious person to believe that an individual was

driving under the influence of drugs, probable cause exists." *Id*. at ¶ 62.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

Committee Comment to Rule 702

Rule 702 confirms that Illinois is a *Frye* state. The second sentence of the rule enunciates the core principles of the *Frye* test for admissibility of scientific evidence as set forth in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 767 N.E.2d 314 (2002).

COMMENTARY

Author's Commentary on Fed. R. Evid. 702

FRE 702 differs from its Illinois counterpart. The difference is found in FRE 702(b), (c), and (d), which have not been adopted in Illinois. Those three subdivisions—which originally were numbered (1), (2), and (3), the current letters of the alphabet having resulted from amendments solely for stylistic purposes effective December 1, 2011— were added in 2000 in affirmation of the earlier *Daubert* test, based on the 1993 U.S. Supreme Court decision discussed just below. Before its year 2000 amendment, FRE 702 consisted of a single sentence that was identical to the first sentence of IRE 702. Under the test supplied by *Daubert*—together with what is now FRE 702(b), (c), and (d)—the trial court acts as a gate-keeper whose role is to determine whether the expert's testimony rests on a reliable foundation and is relevant to the facts at issue.

Illinois has not adopted the *Daubert* test. It remains a *Frye* state—providing a test that applies only to new or novel scientific methodologies or principles and is defined in the final sentence of IRE 702. Where the *Frye* test has been satisfied in Illinois, subdivisions (b), (c), and (d) of the federal rule have application only for the determination by the trier of fact the weight to be given to the expert's testimony, not for the trial judge's acting as a gate-keeper in determining admissibility in the first instance.

An understanding of the rules relating to expert opinion evidence in the Federal Rules of Evidence begins with three key decisions of the United States Supreme Court, sometimes referred to as the "*Daubert* trilogy."

Daubert v. Merrell Dow Pharmaceuticals, Inc.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court held that the general acceptance test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) was superseded by the adoption of FRE 702, which at the time was a single sentence identical to the first sentence of current IRE 702. Interpreting the rule as providing a "screening" or "gate-keeping" role for the trial court, the Court held that, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The trial court must therefore make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."

The considerations that bear on the trial court's inquiry in determining "whether a theory or technique is scientific knowledge that will assist the trier of fact will be [1] whether it can be (and has been) tested" (*i.e.*, whether the methodology has been tested or is testable); (2) "whether the theory or technique [*i.e.*, methodology] has been subjected to peer review and publication;" (3) whether the methodology has a "known or potential rate of error, *** and the existence and maintenance of standards controlling the technique's operation;" and (4) whether the methodology has general acceptance within the relevant scientific community (*i.e.*, the *Frye* test). The Supreme Court stressed that the inquiry is a flexible one, and that the focus "must be solely on principles and methodology, not on the conclusions they generate."

Note that *Daubert* does not exclude expert testimony that may be deemed to be "incorrect" merely because it may not be reconcilable with other testimony. This is illustrated by the decision of the Seventh Circuit Court of Appeals in *Stuhlmacher v. Home Depot U.S.A., Inc.*, 774 F.3d 405 (7th Cir. 2014). There, the magistrate judge struck the testimony of an accident reconstruction expert about a defect in the ladder from which the plaintiff fell, a defect that caused instability in the ladder. The judge initially had found the expert's testimony admissible, but struck his testimony based on the conclusion that the expert's testimony could not be reconciled with the testimony of the plaintiff, who had not testified about the instability of the ladder. In sum, although the judge found the expert's testimony reliable, he struck it as irrelevant under *Daubert* because he found the expert's version and the plaintiff's version to be irreconcilable. Reasoning that the jury could have found that the expert's theory was credible and that the plaintiff's testimony merely reflected his memory of the event as it was happening, the Seventh Circuit reversed the judgment for the defendants and remanded for further proceedings, holding:

> "It is not the trial judge's job to determine whether the expert's opinion is correct. Instead, under the relevancy prong, the judge is limited to determining whether expert testimony is pertinent to an issue in the case. Here, the judge improperly expanded his role beyond gatekeeper to trier of fact." *Stuhlmacher*, 774 F.3d at 409 (internal citations omitted).

In *Burton v, E.I. Du Pont De Nomours, and Company, Inc*. 994 F. 3d 791 (7th Cir. 2021), the Seventh Circuit explained the role of the trial judge gatekeeper in this fashion:

> "Although Rule 702 'places the judge in the role of gatekeeper for expert testimony, the key to the gate is not the ultimate correctness of the expert's conclusions,' but rather 'the soundness and care with which the expert arrived at her opinion' *Schultz* [v. *Azko Nobel Paints, LLC*,] 721 F. 3d [426 (7th Cir. 426 (2014)] at 431. 'So long as the principles and methodology reflect reliable scientific practice, '"[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of accepting shaky but admissible evidence.'" Citing *Daubert*, 509 U.S. at 596. *Burton*, 994 F. 3d at 826.

In *United States v. Tingle*, 880 F.3d 350 (7th Cir. 2018), the circuit court criticized the district court's practice of not identifying expert witnesses:

> "The Federal Rules of Evidence and Supreme Court precedent make clear that courts must examine the qualifications of expert witnesses and consider

whether the expert's testimony will be helpful to the jury. The district court cannot use such procedures [the practice of not identifying expert witnesses] to avoid its gatekeeper responsibility." *Tingle*, 880 F.3d at 854.

General Electric Co. v. Joiner

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court held that abuse of discretion, which is the standard ordinarily used to review evidentiary rulings, also is the proper standard for review of a trial court's admission or exclusion of expert scientific evidence. Applying standards provided by *Daubert*, the Court approved the trial court's exclusion of the experts' opinions in this case because studies cited by the experts about experiments on infant mice were dissimilar to what allegedly occurred to the adult human plaintiff, and the epidemiological studies relied upon by the experts did not constitute a sufficient basis for their conclusions. In rejecting the argument that the trial court had erred by failing to adhere to language in *Daubert* that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate," the Court stated:

> "But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or 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." *General Electric Co. v. Joiner*, 522 U.S. at 146.

In other words, while *Daubert* stressed the importance of methodology, *Joiner* holds that the expert's conclusion also must correlate with supportive data. The expert's mere statements (his *ipse dixit*) alone are insufficient.

Kumho Tire Co. v. Carmichael

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that, although *Daubert* referred only to scientific testimony because that was the expertise at issue in that case, the trial court's gate-keeping responsibility regarding relevance and reliability applies not only to "scientific" testimony but to all expert testimony—that involving technical and other specialized knowledge as well. Pointing out *Daubert's* description of the Rule 702 inquiry as a "flexible one" that allows consideration of other specific factors as well as non-application of some of those provided in *Daubert*, the Court stressed that the factors mentioned in *Daubert* do not constitute a "definitive checklist or test," and that the gate-keeping inquiry must be tied to the facts of a particular case.

Seventh Circuit Summary of *Daubert* Principles

In *Krik v. Exxon Mobile Corp.*, 870 F.3d 669 (7th Cir. 2017), a decision citing other circuit opinions and one that negated causation theories that posit that any exposure to asbestos fibers whatsoever, regardless of the amount of fibers or length of exposure constitutes an underlying cause of injury to the exposed individual, the Seventh Circuit provided the following summarization of *Daubert* principles:

> "The Supreme Court has interpreted Rule 702 with a flexible standard that boils down to two over-arching requirements for expert witness testimony. The expert testimony must be 'ground[ed] in the methods and procedures of science' and must 'assist the trier of fact to understand or determine a fact in issue.' *Daubert*, 509 U.S. at 590–91. *Daubert* requires the district court to act as an evidentiary gatekeeper, ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. *Id.* at 589. To do this a trial judge must make a preliminary assessment that the testimony's underlying reasoning or methodology is scientifically valid and properly applied to the facts at issue. *Id.* at 592–93. The district court holds broad discretion in its gatekeeper function of determining the relevance and reliability of the expert opinion testimony. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999). Our circuit has given courts the following guidance to determine the reliability of a qualified expert's testimony under *Daubert*, stating that they are to consider, among other things: "(1) whether the proffered theory can be and has been

> tested; (2) whether the theory has been subjected to peer review; (3) whether the theory has been evaluated in light of potential rates of error; and (4) whether the theory has been accepted in the relevant scientific community." *Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838, 844 (7th Cir. 2017); *see also Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000). Despite the list, we have repeatedly emphasized that "no single factor is either required in the analysis or dispositive as to its outcome." *Smith*, 215 F.3d at 719; *see also Kumho Tire Co.*, 526 U.S. at 151–52. The district court may apply these factors flexibly as the case requires. *United States v. Brumley*, 217 F.3d 905, 911 (2000). Indeed *Daubert* itself contemplated a flexible standard with broad discretion given to district court judges. *Daubert*, 509 U.S. at 593." *Krik v. Exxon Mobile Corp.*, 870 F.3d at 674.

The *Krik* court also provided the following guidance regarding the standard of review:

> "Whether the district court applied the *Daubert* framework properly is a question we review de novo but we review the decision to exclude or admit the expert witness testimony for an abuse of discretion only. *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015). The party seeking to introduce the expert witness testimony bears the burden of demonstrating that the expert witness testimony satisfies the standard by a preponderance of the evidence. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009)." *Krik v. Exxon Mobile Corp.*, 870 F.3d at 673. Note, however, that where the district court fails to perform a *Daubert* analysis, the admissibility of the expert testimony must be reviewed *de novo*. *Kirk v. Clark Equip. Co.*. 991 F.3d 865, 872-73 (7th Cir. 2021) (collecting cases).

Examples of 7th Circuit's Application of *Daubert*

For a decision that provides helpful guidance in applying FRE 702 and *Daubert* standards, see *Gopalratnam v. Hewlett-Packard Company*, 877 F.3d 771 (7th Cir. 2017), an appeal from a products liability suit involving a death caused by fire, which allegedly was caused by a defective lithium battery cell in a laptop computer, where the Seventh Circuit affirmed the district court's grant of summary judgment in favor of the defendants based on the unreliability of the opinions of two plaintiff experts.

Another application of *Daubert* is found in *Varlen Corporation v. Liberty Mutual Ins. Co.*, 924 F.3d 456 (7th Cir. 2019). In that case, to be indemnified by its insurer for groundwater contamination, plaintiff needed to prove that chemical leaks or discharges that caused the contamination on two of its sites were "sudden and accidental." Determining that plaintiff's expert testimony was not based on reliable methods or principles, the district court held that plaintiff did not meet *Daubert* requirements in establishing sudden and accidental discharges and struck his testimony, granting summary judgment to the insurer, which the Seventh Circuit affirmed.

Smith v. Illinois Department of Transportation, 936 F.3d 554 (7th Cir. 2019), was a Title VII action based on allegations of a hostile work environment and a wrongful firing in retaliation for plaintiff's complaints about racial discrimination. In granting summary judgment for the defendant, the district court declined to consider the deposition testimony of plaintiff's expert witness, an expert in industrial relations, based on the fact that her opinions were not based on "sufficient facts or data." Affirming the district court's rejection of the expert's testimony, the Seventh Circuit noted that the expert did not interview plaintiff or his supervisors and she did not review any sworn deposition testimony. She appeared to rely only on what appeared to be "plaintiff-curated records." As for the retaliation claim, the court noted that the expert asserted that plaintiff's evaluations became more negative after he filed his complaints, but "she admitted that she had no information about whether any of these supervisors even *knew* about [plaintiff's] complaints at the time that they submitted negative evaluations." *Smith*, at 559 (emphasis by the court). Quoting *United States v. Mamah*, 332 F.3d 475, 475 (7th Cir. 2003), the court stated "[i]t is critical under Rule 702 that there be a link

between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support." *Id.*

In *United States v. Truitt*, 938 F.3d 885 (7th Cir. 2019), a jury convicted the defendant of false claims against the U.S. and theft of government of funds, by falsely claiming entitlement to and receiving a refund of $300,000 from the IRS. Her defense was based on her claim that she lacked the requisite *mens rea* for the crimes because she was a member of a "charismatic group," which had a strong influence on her "to comply with the group's behavioral norms, and assigning charismatic and sometimes divine powers to the group and its leadership." *Truitt*, at 888. To support her defense, she intended to offer the testimony of a forensic psychologist, but the district court granted the government's motion *in limine* based on *Daubert* requirements. The sole argument on appeal was the challenge to the exclusion of the psychologist's testimony. The Seventh Circuit affirmed. It first held that the district court correctly ruled that the psychologist, who was qualified in other areas, was not qualified to answer the specific questions presented because he lacked experience with charismatic groups and was not qualified to answer specific questions about the religious themes in play in the case. The court also held that the psychologist's methodology was inadequate and thus not scientifically reliable. It pointed out that, though he interviewed the defendant, he did not interview other members of the group to evaluate whether there was a "shared belief system," a "high level of social cohesiveness," and a "strong influence to comply with the group's behavioral norms." *Id*. at 890.

In *Owens v. Auxilium Pharmaceuticals, Inc*. 895 F.3d 971 (7th Cir. 2018), the Seventh Circuit affirmed the district court's exclusion of a doctor's expert testimony because the testimony did not fit the facts of the case, and thus was not likely to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 973. In this case, the expert opinion did not note that plaintiff improperly used his prescribed medication, which he alleged caused his deep vein thrombosis, so the witness's opinion was irrelevant, resulting in the district court properly exercising its gatekeeping responsibility in excluding the evidence.

Need for Expert Opinion to Help the Trier of Fact

United States v. Dewitt, 943 F.3d 1092 (7th Cir. 2019), a prosecution relating to the production, distribution, and possession of child pornography, illustrates Rule 702's requirement that the expert opinion "help the trier of fact to understand the evidence or to determine a fact in issue." In that case the defendant contended that the law required the government to present expert testimony about the subjects' ages before images could be received into evidence. Conceding that in some difficult cases expert testimony may be necessary and that the issue should be determined on a case by case basis, the Seventh Circuit held that there is no requirement for expert testimony and "[j]urors are capable of drawing on their own perceptions to determine a subject's age because these types of assessments are 'regularly made in everyday life.'" *Id.* at 1096.

United States v. Wehrle, 985 F.3d 549 (7th Cir. 2021), cited *Dewitt* in holding that a police officer's testimony that seized devices contained child pornography "was properly admitted as fact testimony because it was an ordinary and accepted way to describe what she had observed." *Wehrle*, at 555. But the case is noteworthy for a different issue due to the contrasting views of the majority and the concurring judge. The majority held that the trial judge erred in failing to qualify the police officer as an expert witness when she provided testimony in describing the methods she used in extracting data about child pornography from the defendant's digital devices. The majority reasoned that the officer testified to technical concepts beyond ordinary knowledge, but it held that the admission of the evidence constituted harmless error because of the overwhelming evidence of the defendant's guilt. Citing decisions from other circuits that concluded "that testimony regarding the mere extraction of data from a cell phone does not require expert certification under Rule 702" (*Wehrle*, at 558), the concurring judge reasoned that, "[a]lthough members of the general public may not be familiar with the particular programs she used to do so, the average person would be familiar with the concepts of extracting data from a device and preserving the data on the origin device." *Id.*

Note that failure to request a *Frye* hearing or failure to object to testimony on the basis that a *Frye* hearing should have

been held results in forfeiture of the issue for appellate review. See *Snelson v. Kamm*, 204 Ill. 2d 1, 24-25 (2003); *Young v. Wilkinson*, 2022 IL App (4th) 220302, ¶¶ 73-76.

Author's Commentary on Ill. R. Evid. 702

Acceptance of *Frye* and Rejection of *Daubert*

Before the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), **FRE** 702 consisted of a single sentence that was identical to the first sentence in what is now IRE 702. In 2000, after the 1993 *Daubert* decision, **FRE** 702 was amended—in affirmation of *Daubert*—adding three numbered phrases that were substantially identical to the three subdivisions that now bear the letters (b), (c), and (d). Those subdivisions received alphabetical designations as a result of the amendments to the federal rules solely for stylistic purposes effective December 1, 2011. So, the first sentence of IRE 702 is substantially identical to the first portion of FRE 702 before the latter's 2000 amendment that added numbered subdivisions and the 2011 amendments that provided alphabetical designations for the subdivisions.

Illinois applies the *Frye* test (*Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)) to expert witness testimony based on new or novel scientific methodology or principle (*see, e.g., Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63 (2002) (reiterating the *Frye* standard and rejecting the "*Frye*-plus-reliability" test, by reasoning that reliability is naturally subsumed by the inquiry into whether the methodology is generally accepted in the relevant scientific field)). Because Illinois rejects the *Daubert* standard, which is codified in what is now subdivisions (b), (c), and (d) of the federal rule, those subdivisions have not been adopted. Instead, the second sentence of the Illinois rule, expressing the *Frye* standard, has been added to emphasize that Illinois remains a *Frye* state.

But note that the *Frye* test applies only where new or novel *scientific* methodologies or principles are involved. Thus, except for relevancy and the standards contained in the first sentence of the rule (*i.e.*, (1) specialized knowledge or skill possessed by a witness qualified as an expert (2) that will assist the trier of fact to understand the evidence or to determine a fact in issue), IRE 702 offers no guidance as to the standards necessary for the *admission* of expert opinion evidence where new or novel scientific methodologies or principles are not involved. That is so because Illinois has not adopted the requirements provided by FRE 702(b), (c), or (d), nor has it provided other codified standards for the threshold determination of the *admissibility* of expert opinion evidence.

Nevertheless, the standards provided by FRE 702(b), (c), and (d) do apply in Illinois, but only insofar as they are relevant to the trier of fact's determinations regarding relevance and reliability. In other words, despite the absence of the guidance of a codified rule or of an Illinois Pattern Jury Instruction on the subject, the standards provided by the federal rule are relevant for the determinations by the trier of fact concerning the weight to be given to the evidence. Though Illinois courts are required to deny admissibility of expert testimony where the witness lacks expert qualifications (as required also under IRE 104(a)) or where the testimony will not assist the trier of fact to understand the evidence or a fact in issue, the other federal standards are not used by an Illinois trial court for the gate-keeping function to determine *admissibility* of expert testimony.

Applying *Frye*

There are two requirements for the application of the *Frye* standard: (1) the requirement that a "new or novel" *scientific* methodology or principle is involved, which is a prerequisite that leads to (2) the requirement that the methodology or principle must have "gained general acceptance." *See People v. McKown*, 236 Ill. 2d 278, 282-83 (2010) ("the Frye test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel'"). "General acceptance" of a methodology does not mean "universal acceptance," and "it does not require that the methodology *** be accepted by unanimity, consensus, or even a majority of experts." *In re Commitment of Simons*, 213 Ill. 2d 523, 530; *Donaldson*, 199 Ill. 2d at 76-77. As IRE 702 itself makes clear, the proponent of the evidence bears the

burden of showing general acceptance. *See also McKown*, 236 Ill. 2d at 294.

As shown from the above quote from *McKown*, and as further shown in the earlier *McKown* decision in *People v. McKown*, 226 Ill. 2d 245, 254 (2007), and *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004), the Illinois Supreme Court has made it clear that *Frye* applies only where a new or novel *scientific* methodology or principle is involved. For an example of the application of that principle, see *People v. Wilson*, 2017 IL App (1st)143183, ¶¶ 45-47, where the appellate court held that, because historical cell site analysis (HCSA—reading coordinates of cell sites from phone records and plotting them on a map) does not qualify as scientific evidence, the defendant's contention that his attorney provided ineffective assistance in failing to request a *Frye* hearing lacked validity. For another example, see *People v. Coleman*, 2014 IL App (5th) 110274, where the defendant challenged the trial court's ruling allowing an expert linguist to testify on the issue of authorship attribution (comparison of handwriting), contending that the trial court erred in admitting the evidence after a *Frye* hearing, held "in the interest of safety." The appellate court rejected the defendant's argument based on its finding that the subject matter of the expert's testimony did not involve scientific methodology or principle, but was based on the expert's observation and experience, and thus was not subject to *Frye*; and that, in any event, the expert's testimony presented nothing new or novel. *Coleman*, at ¶¶ 111-120.

For a recent decision where summary judgment was granted to the defendant after the circuit court improperly applied *Frye*'s general acceptance test to ban the testimony of the plaintiff's two expert witnesses related to the plaintiff's claim of exposure to various toxic substances and carcinogens, see *Molitor v. BNSF Railway Company*, 2022 IL App (1st) 211486. The 34-page opinion provides a comprehensive discussion concerning application of the *Frye* test and why the test did not apply because the testimony of the experts was not new or novel, and their testimony went only to the weight of their testimony and not to admissibility.

Meaning of "or otherwise" in the Phrase "in the form of an opinion or otherwise"

Most expert testimony is provided by opinion. But what is intended by "or otherwise" in the phrase "in the form of an opinion or otherwise" is not readily ascertainable. The 1972 note of the Federal Advisory Committee on Rule 702, equally applicable to the Illinois codification, supplies the explanation:

> "Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.***[I]t seems wise to recognize that opinions are not indispensable and to recognize the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference."

The note goes on to explain that, in addition to allowing the trier of fact to draw its own inference from evidence provided by an expert witness, the use of expert opinions may still be used "to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." And, although the trier of fact may draw inferences on its own from the evidence provided by an expert witness, during closing arguments counsel is allowed to draw inferences from the evidence to assist the trier in drawing an appropriate inference.

General Principles for Expert Testimony

General principles that apply to testimony of experts in Illinois are provided succinctly by *Thompson v. Gordon*, 221 Ill. 2d 414 (2006), which predates the codification of Illinois evidence rules:

> "With regard to expert testimony, it is well settled that the decision whether to admit expert testimony is within the sound discretion of the trial court. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons,

> and where his testimony will aid the trier of fact in reaching its conclusions.' *People v. Miller*, 173 Ill. 2d 167,186 (1996). 'There is no predetermined formula for how an expert acquires specialized knowledge or experience and the expert can gain such through practical experience, scientific study, education, training or research.' *Miller*, 173 Ill. 2d at 186. Thus, '[f]ormal academic training or specific degrees are not required to qualify a person as an expert; practical experience in a field may serve just as well to qualify him.' *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 459 (1992). An expert need only have knowledge and experience beyond that of an average citizen. *Miller*, 173 Ill. 2d at 186. Expert testimony, then, is admissible 'if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence.' *Snelson*, 204 Ill. 2d at 24." *Thompson v. Gordon*, 221 Ill. 2d at 428.

The supreme court's recent decision in *People v. King*, 2020 IL 123926, provides similar as well as additional general principles applicable to expert testimony:

> "'In Illinois, generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion.' *People v. Enis*, 139 Ill. 2d 264, 288 (1990). In addressing the admission of expert testimony, the trial court should balance the probative value of the evidence against its prejudicial effect to determine the reliability of the testimony. *Id.* at 290. In addition, in the exercise of its discretion, the trial court should carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting that testimony for the jury's consideration. *Id.* This court has held that expert testimony is necessary only when 'the subject is both particularly within the witness' experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion.' *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). Expert testimony addressing matters of common knowledge is not admissible 'unless the subject is difficult to understand and explain.' *People v. Becker*, 239 Ill. 2d 215, 235 (2010). When determining the reliability of an expert witness, a trial court is given broad discretion. *Enis*, 139 Ill. 2d at 290. Therefore, we review the trial court's decision to admit evidence, including expert witness testimony, for an abuse of that discretion. *Becker*, 230 Ill. 2d at 234. An abuse of discretion occurs only where the trial court's decision is 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' *People v. Rivera*, 2013 IL 112467, ¶ 37." *King*, at ¶ 35.

Dual Standard of Review

In *In re Commitment of Simons*, 213 Ill. 2d 523 (2004), the supreme court altered its standard of review concerning expert scientific testimony by adopting a dual standard. It did so in order to allow a broader review of the validity of a trial court's *Frye* analysis:

> "Accordingly, we hereby adopt a dual standard of review with respect to the trial court's admission of expert scientific testimony. The decision as to whether an expert scientific witness is qualified to testify in a subject area, and whether the proffered testimony is relevant in a particular case, remains in the sound discretion of the trial court. The trial court's *Frye* analysis, however, is now subject to *de novo* review. In conducting such *de novo* review, the reviewing court may consider not only the trial court record but also, where appropriate, sources outside the record, including legal and scientific articles, as well as court opinions from other jurisdictions."

Thus, under *Simons*, abuse of discretion remains the standard of review regarding the qualifications of the expert

witness and the relevance of the expert's testimony, but the standard of review for expert scientific testimony concerning whether a novel methodology has gained general acceptance under the *Frye* analysis is now *de novo* which, as the above quote indicates, includes considering relevant sources outside the record. This holding reversed the portion of *Donaldson* and *People v. Miller*, 173 Ill. 2d 167, which (consistent with the general standard for review of rulings on the admissibility of evidence), had held that the *Frye* determination by the trial court was subject to the abuse of discretion standard. *Simons'* adoption of the *de novo* standard of review was consistent with views expressed by Justice McMorrow in special concurrence in both *Miller* and *Donaldson*.

Diagnosis Is Subject to *Frye* Hearing

In a supreme court case relevant to the *Frye* test, *In re the Detention of New*, 2014 IL 116306, a jury found that the respondent New was a sexually violent person under the Sexually Violent Persons Commitment Act. During the trial, the State and New disputed the validity of a diagnosed mental disorder. The State's two experts testified that New's diagnosed mental disorder was proper (one diagnosed paraphilia not otherwise specified, sexually attracted to adolescent males or alternatively sexually attracted to early pubescent males, ranging from age 11 to 14 years old; the other diagnosed paraphilia not otherwise specified, sexually attracted to adolescent males, non-exclusive type; both referred to as "hebephilia"); while New's expert contended that paraphilia not otherwise specified, sexually attracted to adolescent males is not a generally accepted diagnosis. The issue before the supreme court was whether a *Frye* hearing was required to determine the admissibility of the diagnosis of the State's expert witnesses. In response to the State's contention that *Frye* does not apply to a diagnosis because a diagnosis does not constitute a scientific principle or methodology, the supreme court reasoned that the issue before it was whether the diagnosis of the State's witnesses "is a diagnosable mental condition based upon legitimate scientific principles and methods." It concluded that "[t]his is the type of scientific evidence that the analytic framework established by *Frye* was designed to address." *New*, at ¶ 33. In determining whether the State's witnesses' diagnosis was predicated on new or novel science, the court considered various authorities, noted that the diagnosis had recently been rejected for inclusion in DSM-5, and also noted that the State recognized the recent debate over whether hebephilia is a diagnosable mental condition. Based on those considerations, the supreme court concluded that the diagnosis is sufficiently novel for purposes of *Frye*. Finally, as to the issue of general acceptance, the court concluded that this determination could not be made on the basis of judicial notice alone and that it had an inadequate basis to determine whether the diagnosis had gained general acceptance in the psychological and psychiatric communities. *New*, at ¶ 53. The court therefore remanded the case to the circuit court for a *Frye* hearing to determine if hebephilia is a generally accepted diagnosis in the relevant communities, and, if necessary, for a new trial.

Before the supreme court's decision in *In re the Detention of New*, but after the appellate court's decision in that case, in *In re the Detention of Melcher*, 2013 IL App (1st) 123085, and in *In re the Detention of Hayes*, 2014 IL App (1st) 120364, the appellate court also had addressed whether the *diagnosis* of paraphilia, not otherwise specified, nonconsent (PNOS nonconsent) was subject to the *Frye* test. As in *New*, in both of those cases and consistent with the supreme court's later decision in *New*, the appellate court held that the *Frye* test applied even to a diagnosis. In both cases, however, the court held that a *Frye* hearing was unnecessary because the diagnosis in question had already been well established.

"Shaken Baby Syndrome" Is Not a Methodology

In *People v. Cook*, 2014 IL App (1st) 113079, the defendant contended that the trial court had committed reversible error in failing to hold a *Frye* hearing on the admissibility of evidence of Shaken Baby Syndrome. The appellate court noted that the expert opinion in the case at bar was not based on a theory of "Shaken Baby Syndrome," but rather was based on medical knowledge and opinion. It further reasoned that, even if Shaken Baby Syndrome had been diagnosed, it is not a "methodology," but "is a conclusion that may be reached based on observations and medical training which is not new or novel." *Cook*, at ¶ 52. As such, no *Frye* hearing was necessary. In the later case of

People v. Schuit, 2016 IL App (1st) 150312, the appellate court reached the same conclusions.

No General Acceptance of GSS

In another *Frye*-related case, *People v. Shanklin*, 2014 IL App (1st) 120084, the defendant filed a motion to suppress his statements to police and an assistant state's attorney concerning first-degree murder, aggravated criminal sexual assault, and other offenses. In support of his motion, the defendant sought to admit testimony from experts to testify about the results of the Gudjonsson Suggestibility Scale (GSS), a test administered to determine his alleged susceptibility to interrogation techniques. Over the defendant's objections, the trial court granted the State's motion for a *Frye* hearing and, after hearing testimony from experts on both sides, barred the testimony of the defendant's experts, ruling that GSS's acceptance in the field of forensic psychology was unsettled, and it thus remained a novel scientific methodology that had not gained general acceptance. The appellate court affirmed the trial court's holding. In doing so, the court distinguished *People v. Nelson*, 235 Ill. 2d 386 (2009), on the basis that, in that case, the supreme court was not called upon to determine whether GSS had gained general acceptance in the scientific community. The *Nelson* decision turned on the lack of relevance of GSS evidence, given that the defendant in that case had not presented evidence that he was induced to make statements and that the statements he made were consistent with the facts involved in the charged offenses.

General Acceptance of Y-STR Testimony

In *People v. Zapata*, 2014 IL App (2d) 120825, the appellate court approved of the admissibility of the Y-STR analysis of a specimen of DNA found on the victim's underwear in a criminal sexual assault case. The court's approval was based on compliance with the two tests provided by the supreme court in *People v. McKown*, 226 Ill. 2d 245, 254 (2007): "[a] court may determine the general acceptance of a scientific principle or methodology in either of two ways: (1) based on the results of a *Frye* hearing; *or* (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject." (Emphasis on the word "or" added by the court). The court noted that a *Frye* hearing about Y-STR testing had occurred, albeit in another court out-of-state, and that there was sufficient general acceptance of that testing in the relevant scientific community.

Inadmissibility of Expert Opinion Testimony on Witness's Credibility

In *People v. Becker*, 239 Ill. 2d 215 (2010), the supreme court held that the trial court had properly excluded expert opinion testimony by an expert witness concerning the credibility of a child witness because of the impropriety of asking one witness to comment directly on the credibility of another (*see People v. Kokoraleis*, 132 Ill. 2d 235 (1989)), and because "the observation that this young child, like any young child, might be influenced by suggestive questioning and improper investigative techniques, is not a matter beyond the ken of the average juror." The court went on to express its belief that "it is a matter of common understanding that children are subject to suggestion, that they often answer in a way that they believe will please adults, and that they are inclined to integrate fictional notions with reality as we know it."

Inadmissibility of Expert Opinion Testimony on Whether Defendant Had Relevant Specific Intent

In *People v. Nepras*, 2020 IL App (2d) 180081, where, in the early morning hours, police found defendant inside a laundromat's office where the door had been busted open, the trial court prohibited defendant from introducing expert testimony that he was incapable of forming the specific intent to commit theft as an element for the offense of burglary. Holding that the trial court had properly denied expert opinion on defendant's state of mind, the appellate court reasoned as follows:

> "Because a defendant's state of mind at the time of the crime is a question for the trier of fact, an expert witness who was not present when the defendant entered the premises cannot opine whether the defendant acted with a specific mental state. *People v. Frazier*, 2019 IL App (1st) 172250, ¶ 33 (citing *People v. Hulitt*, 361 Ill. App. 3d 634, 639 (2005)). Thus, allowing expert testimony regarding a defendant's mental state at the time of the offense would usurp the province of the trier of fact. *Frazier*, 2019 IL App (1st) 172250, ¶ 33." *Nepras*, at ¶23.

Because Illinois does not recognize diminished capacity as a defense, the appellate court also rejected that basis for the admission of the expert's testimony. Finally, the court also rejected defendant's contention that the expert testimony should have been allowed because there was no direct evidence of his intent to commit a theft, reasoning that it was up to the jury to determine, based on the circumstantial evidence in the case, whether defendant entered the laundromat with the intent to commit a theft.

Lerma: Expert Opinion Testimony on Eyewitness Testimony

In *People v. Lerma*, 2016 IL 118496, before he died, the victim of a murder offense identified the defendant as the person who shot him, and his statement about who shot him was admitted at trial as an excited utterance. A witness, who had heard the victim identify the defendant as the shooter and who claimed to have known the defendant but whose familiarity with the defendant was contradicted by her grand jury testimony, was the only witness to provide identification testimony at the trial, in which no other incriminating evidence was provided. Before trial, the trial court had refused to admit the testimony of an expert witness on eyewitness testimony based on the expert's report that his opinion did not apply where the eyewitness knew the offender. After that expert died, the defendant sought to have the opinion of another expert admitted. That expert's report stated that a witness's prior acquaintance with a defendant did not necessarily ensure accuracy of identification. The trial court refused admission of that expert's testimony based upon the same grounds used to exclude the testimony of the original expert. On appeal, the appellate court reversed the murder conviction, holding that "the trial court's failure here to carefully scrutinize [the second expert's] anticipated testimony, as stated in his report, constituted an abuse of discretion." See *People v. Lerma*, 2014 IL App (1st) 121880, ¶ 37.

On further review, the supreme court agreed. The court noted that "this is the type of case for which expert eyewitness testimony is both relevant and appropriate." *People v. Lerma*, 2016 IL 118496, ¶ 26. This was so, the court reasoned, because "the State's case against defendant hangs 100% on the reliability of its eyewitness identifications," and because the second expert's proposed testimony was especially relevant to the issue of the reliability of eyewitness identification. *Id*. The court noted that it had been more than 25 years since its last decision on eyewitness expert testimony in *People v. Enis*, 139 Ill. 2d 264 (1990), that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined," and that the research on eyewitness identifications "is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *People v. Lerma*, 2016 IL 118496, ¶ 24.

Note that *Lerma* addressed only whether the trial court abused its discretion to exclude expert eyewitness' testimony that counsel had sought to introduce at trial. It did not concern an ineffective assistance of counsel claim. Nevertheless, in cases reviewed after *Lerma* was published, there have been decisions that alleged counsel ineffectiveness. See, for example, *People v, Hayes*, 2022 IL App (1st) 190881-B (holding the defendant demonstrated arguable prejudice resulting from counsel's failure to present expert eyewitness testimony to warrant further postconviction proceedings on his claim of ineffective assistance), and *People v. Elliott*, 2022 IL App (1st) 192294 (rejecting the defendant's claim that his trial counsel rendered ineffective assistance in failing to present expert testimony on the reliability of eyewitness identification).

Non-Application of *Lerma* on Collateral Review of Decisions before *Lerma*

People v. Brown, 2020 IL App (1st) 190828, ¶¶ 45-53, denied the invocation of *Lerma* on due process grounds in collateral review in postconviction proceedings. Brown was tried before *Lerma* was issued. In that case, the trial court denied the defendant's motion to admit eyewitness expert testimony, and the appellate court affirmed that ruling on direct appeal. Based on *res judicata* grounds, *Brown* held that the defendant could not invoke *Lerma* on collateral review. In response to the defendant's contention that *res judicata* should not apply because *Lerma* changed the relevant law, the appellate court noted that the defendant in this case was tried before *Lerma* was published, and "it was well established prior to *Lerma* that the trial court, in the exercise of its broad discretion, must 'carefully scrutinize' the relevance and probative value of the

defense's proffered eyewitness identification expert testimony," and *Lerma* did not change that standard. *Brown*, at ¶ 52. The appellate court further noted that *Lerma* did not overcome *res judicata*, for its application would be barred by *Teague v. Lane*, 489 U.S. 288, 301 (1989), because it is not a substantive rule and the defendant did not argue that it is a "watershed" procedural rule. *Id.* at ¶ 53.

Expert Opinion on False Confession Based on Personality Subject to Manipulation

People v. Burgund, 2016 IL App (5th) 130119, offers a decision about expert opinion evidence that may be limited in application due to the unique facts presented. In that case, the defendant was convicted by a jury of five counts of predatory criminal sexual assault on his two daughters, who were between the ages of 1 and 3½ and 1 and 2 at the time of the alleged conduct. The younger daughter did not testify at trial; the older daughter, then 5 years-old, did testify, but did not provide persuasive evidence. The primary evidence against the defendant included the testimony of his wife and his mother-in-law, the hearsay statements of the older daughter allegedly made to the defendant's wife and her mother and made admissible through testimony by them by virtue of section 115-10 of the Code of Criminal Procedure of 1963, and the defendant's videotaped confession to police.

At trial, the defendant testified that he had not abused his daughters. He admitted confessing to police, but testified he had done so because of the manipulations of his wife and mother-in-law, manipulations that involved religious beliefs, coercive conduct including physical assaults, and his belief that his wife had "spiritual discernment" that led to her numerous accusations concerning her knowledge of his alleged sexual lust and that ultimately resulted in his coming to believe that he had abused his daughters. He later realized he had no memory of any such conduct.

The defendant unsuccessfully sought to provide the expert testimony of a clinical psychologist, making an offer of proof when the trial court sustained the State's objections. The psychologist would have provided expert testimony in support of the defendant's claim that he had given a false confession because of psychological pressure, manipulation, and suggestions by his wife and mother-in-law. Specifically, he would have testified that the defendant's personality was such that he was subject to manipulation. He would have provided testimony not that the defendant was manipulated, but that his personality profile showed that he was a person who could be manipulated. He would have "opined that the defendant's 'psychological difficulties would make him highly suggestible and easily led, especially in matters that would have religious or sexual overtones.'" *Burgund*. at ¶ 156.

After a thorough review of the evidence presented and some erroneously not allowed by the trial court, which established corroboration of many facts testified to by the defendant, the appellate court held that the trial court had erred in not permitting the testimony of the psychologist. The court relied in part on the Seventh Circuit's decision in *United States v. Hall*, 93 F.3d 1337 (7th Cit. 1996) (holding that expert evidence, not on whether a confession was voluntary, but on whether, because of the defendant's personality disorder that made him susceptible to suggestion and pathologically eager to please, he confessed to a crime that he had not committed in order to gain approval from the law enforcement officers who interrogated him). Also, the appellate court distinguished the holding in *People v. Wood*, 341 Ill. App. 3d 599 (2003), where the defendant alleged that his confession had been coerced and unsuccessfully sought to present expert testimony on the defendant's susceptibility to police suggestion and coercion, something not beyond the ken of jurors and matters about which the defendant could testify. The appellate court reversed the defendant's conviction and remanded the case to the circuit court for a new trial.

General Acceptance of HGN Testing

In the earlier case of *People v. McKown I*, 226 Ill. 2d 245 (2007), the supreme court held that horizontal gaze nystafmus (HGN) testing had not been generally accepted as a reliable indicator of alcohol impairment; that in the case of HGN testing, general acceptance could not be determined by taking judicial notice; and that a *Frye* hearing therefore had to be held to determine general acceptance. On further review after a trial on remand, in *People v. McKown II*, 236 Ill. 2d 278 (2010), though it reversed the defendant's conviction for DUI,

the supreme court affirmed the finding of the trial court that the State had satisfied its burden of establishing that horizontal gaze nystafmus (HGN) testing "is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." The court held that the "admissibility of HGN evidence in an individual case will depend on the State's ability to lay a proper foundation and to demonstrate the qualifications of its witness, subject to the balancing of probative value with the risk of unfair prejudice."

General Acceptance of Retrograde Extrapolation

In *People v. Beck*, 2017 IL App (4th) 160654, the appellate court held that, despite the absence of a *Frye* hearing in the case at bar or in any other previous Illinois case, many former Illinois decisions had generally accepted evidence of retrograde extrapolation (defined as a method of estimating a person's blood alcohol concentration at an earlier point of time by applying information on the rates at which the human body absorbs and excretes alcohol, when the blood alcohol concentration is known at a later time). The appellate court thus held that the trial court had not erred in denying the defendant's motion to bar the retrograde extrapolation evidence.

General Acceptance of Fingerprint Testing

In *People v. Luna*, 2013 IL App (1st) 072253 (the "Brown's Chicken murder case"), the appellate court engaged in a thorough analysis regarding whether a *Frye* hearing was required concerning finger and palm print identification. In *Luna*, a palm print had been found on a napkin in a garbage bag at the scene of the murders, and there was expert testimony at trial that the print was the defendant's. The appellate court rejected the defendant's arguments that, because of recent criticisms and controversy concerning fingerprint identification and because print comparison has never been the subject of a *Frye* hearing in Illinois, a *Frye* hearing was required to determine general acceptance of the methodology used for comparison of latent and known prints. The appellate court held that the trial court had properly taken judicial notice of the general acceptance of the ACE-V methodology (for analysis, comparison, evaluation, and verification) for prints within the relevant scientific community. (See also *People v. Morris*, 2013 IL App (1st) 111251, ¶ 119 (holding that "there is no authority in Illinois, or in any other state, to support the claim that it is error for a circuit court to not hold a *Frye* hearing concerning the admissibility of latent fingerprint analysis," citing *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 31.) (For a similar discussion of fingerprint comparison, in a federal case and in the context of an alleged violation of *Daubert* principles rather than *Frye*, see *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013)).

Also in *Luna*, in the same garbage bag containing the napkin, a chicken bone containing a small amount of DNA had been found; there was expert testimony at trial that the DNA profile on the bone was identical to the defendant's DNA profile. In rejecting the defendant's contention of ineffective assistance of counsel for counsel's not requesting a *Frye* hearing because of an alleged inadequate amount of DNA on the bone, the court thoroughly discussed the DNA analysis, but ultimately did not address whether a *Frye* hearing was required because it concluded that the defendant could not satisfy the first prong of *Strickland's* ineffective-assistance-of-counsel standard (that counsel's performance fell below professional standards).

For a discussion concerning a split in the appellate court concerning the foundational requirements for admission of expert opinion on fingerprint testing, see the heading "*Split Decisions Regarding Foundational Requirements for Fingerprint Evidence, and Decisions Applying Rule 705 for Ballistics, DNA, and Shoeprint Evidence*" under the *Author's Commentary on Ill. R. Evid. 705*.

General Acceptance of Ballistics and Toolmark Evidence

For a discussion of the general acceptance of ballistics and toolmark evidence and the absence of need for a *Frye* hearing, see *People v. Rodriguez*, 2017 IL App (1st) 141379, ¶¶ 49-57 (holding that the circuit court properly denied the defendant's motion for a *Frye* hearing, despite there being no record of such a hearing, because "[t]oolmark and firearm identification evidence is not new or novel, either pursuant to the plain meaning of those words or in accordance with the analysis employed by our supreme court in [*People v.*] *McKown*[, 226 Ill. 2d 245 (2007)]. Far from being unsettled, the law in Illinois is consistent in its admission of such evidence." *Rodriguez*,

at ¶ 56, citing *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 80). Note that *Rodriguez* was vacated by the supreme court's supervisory order issued on January 18, 2018.

Expert Testimony Needed to Show Causal Connection Between Injury at Issue and Preexisting Injury or Condition

In *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000), the defendant estate's decedent (whose death was unrelated to the collision) rear-ended plaintiff's car. Plaintiff sued for damages for neck and back injuries. Over plaintiff's objections, defendant was allowed to cross-examine plaintiff and his physician about an injury to plaintiff's lower back five years before the accident, and also about plaintiff's earlier treatment for "neck problems" and carpal tunnel syndrome. The trial court granted plaintiff a directed verdict on the negligence issue but left the determination of causation and damages to the jury, which returned a verdict for defendant. In its review of the appellate court's reversal in *Voykin*, the supreme court noted that the appellate court had earlier developed a doctrine called the "same part of the body rule," which permitted the admission of evidence of a prior injury without any showing that it was causally related to the present injury as long as both the past and present injuries affected the same part of the body; but where an injury was not to the same part of the body, a defendant needed to demonstrate a causal connection between the current and the prior injury. Noting that a conflict had occurred in appellate court decisions concerning the doctrine, the supreme court pointed out that it had already rejected the doctrine in its earlier 1962 decision in *Caley v. Manicke*, 24 Ill. 2d 390 (1962), where it had rejected the argument of the defendant in that case by holding that requiring a defendant to demonstrate a causal relationship between a prior and present injury in no way shifted the ultimate burden of proof; "[i]nstead, it simply requires a defendant demonstrate that the evidence he wishes to present is relevant to the question at issue, *viz.*, whether the defendant's negligence caused the plaintiff's injury." *Voykin*, 192 Ill. 2d at 56.

In applying the holding in *Caley*, *Voykin* reasoned:

> "Without question, the human body is complex. A prior foot injury could be causally related to a current back injury, yet a prior injury to the same part of the back may not affect a current back injury. In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." *Id.* at 59.

Applying its reasoning to the case at bar, the supreme court held:

> "This evidence does not come close to demonstrating what plaintiff's 'neck problems' were, when he suffered them, or when he last suffered from symptoms. Nothing about the evidence presented by defendant has any tendency to make it less likely that defendant caused plaintiff's neck injury or that defendant caused plaintiff to suffer damages. Without expert testimony establishing both the nature of plaintiff's prior 'neck problems' as well as the relationship between those prior problems and plaintiff's current claim, an average juror could not readily appraise the effect of the prior problems upon plaintiff's current claim. Consequently, this evidence should have been excluded." *Id.* at 60.

The takeaway from *Voykin* is embodied in its conclusion that, unless the natures of the prior and current injuries are such that a lay person can readily appraise their relationship without expert assistance, "if a defendant wishes to introduce

evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence." *Id.* at 59. See, for example, the decision in *Campbell v. Autenrieb*, 2018 IL App (5th) 170148 (applying *Voykin* and summarizing appellate court decisions on the "same part of the body rule," in holding that the trial court abused its discretion in permitting defense cross-examination of plaintiff's treating physician about the possibility of plaintiff's back injury just going out for no reason (*i.e.*, idiopathic cause) or as a result of lifting, twisting, or any of those type of activities).

Parenthetically, for a supreme court decision rejecting the application of *Voykin* for justifying the refusal to admit postaccident vehicular photographs, see *Peach v. McGovern*, 2019 IL 123456, discussed, *supra*, under the heading *Peach v. McGovern: Rejecting Prior Appellate Court Decisions in Permitting Admissibility of Postaccident Vehicular Photographs* in the *Author's Commentary on Ill. R. Evid. 401*.

Cause and Origin of Fire

In *Unitrin Preferred Insurance Co. v. Flaviu George Dobra, d/b/a FGD Construction*, 2013 IL App (1st) 121364, the appellate court quoted IRE 702 and cited cases that provide the basis for the admission of expert testimony (including possessing experience and qualifications that afford an individual knowledge not common to laypersons and which will aid the trier of fact to reach its conclusions, and that such knowledge can be obtained through practical experience, scientific study, education, training, or research). Applying the rule and the principles from the cited cases, the court upheld the admission of the expert's testimony that informed the jury which of two conflicting expert witnesses' opinions on the cause and origin of a fire was correct, through a review of photographs of the scene and the expert's testing the two hypotheses developed by the conflicting fire and origin experts through the application of NFPA 921, the widely accepted method of testing in determining the cause and origin of fires by the fire investigation community. In so doing, the appellate court held that the expert's testimony did not usurp the role of the jury, which was free to disregard the expert's testimony.

Expert May Provide Opinion on Person's Mental Condition Without Interviewing the Person

In *Rigoli v. Manor Care of Oak Lawn (West) IL, LLC*, 2019 IL App (1st) 191635, the appellate court approved the admission of a doctor's affidavit that, based on medical records he reviewed, he concluded that the now-deceased occupant of a nursing home could not have understood the arbitration agreement she signed. The appellate court approved the admission of the affidavit despite the fact that the doctor had never met the woman who signed the agreement. In holding that a doctor could base his opinion on medical records and his knowledge of the side effects of the many medications a person ingested within a relatively short time before she signed the arbitration agreement and that there was no need to personally interview that person to provide an opinion about her mental condition, the court cited *People v. Smith,* 93 Ill. App. 3d 26, 34 (1981), and *People v. Newbury*, 53 Ill. 2d 228, 236 (1972), for the principle that "[a]n expert may opine on a person's mental condition even if the expert never interviewed the person." The court also cited *Barefoot v. Estelle*, 463 U.S. 880 (1983), where the U.S. Supreme Court rejected the contention that a defendant must be personally interviewed by a psychiatrist before the psychiatrist can testify about that defendant's future dangerousness, holding that the fact that experts do not examine defendants goes to the weight of their testimony, not to its admissibility.

Expert Opinion on Possession of Drugs with Intent to Deliver

In *People v. Starks*, 2019 IL App (2d) 160871, the appellate court approved of a police officer testifying as an expert "in the area of drug investigations, delivery [and] possession with intent to deliver." *Starks*, at ¶ 18. The officer did not participate in the case, which concerned the recovery of defendant's 20 bags of cocaine weighing 9.9 grams. The officer reviewed the police reports, the physical evidence, and the lab reports, and he spoke to the officers involved in the case. *Id.* In forming his opinion as to defendant's intent, he "considered the totality of the circumstances and items of evidence in the case, including information that experts would commonly use, such as weight of the drugs, the way the drugs were packaged, the lack of user paraphernalia, the presence of cash, and the presence of

weapons." *Id.* Based on those considerations, he opined that defendant was a dealer rather than a user. *Id.*

Crime-Scene Analysis

In *People v. King*, 2020 IL 123926, the supreme court agreed with the many faults found by the appellate court in connection with a former FBI profiler's expert testimony in the defendant's first degree murder jury trial. In affirming the appellate court's reversal of the defendant's conviction, the court held that the witness "never should have been allowed to testify as an expert in this case." *Id.* at ¶ 36. The court found that the witness, called to give evidence as to whether the location where the deceased was found was staged, was not qualified to give opinion evidence as to the cause and manner of the victim's death (two pathologists having given conflicting opinions on that issue), that the witness improperly gave expert opinions on subjects that jurors could have determined for themselves, and that the witness should not have been permitted to shore up one party's theory of the case when jurors could draw their own conclusions from the evidence and the State could discuss in closing argument the reasonable inferences that flowed from the evidence.

King is mandatory reading for those seeking to proffer or oppose expert testimony on crime scene analysis.

Rejection of Profile Testimony

People v. Tondini, 2019 IL App (3d) 170370, provides an example of the appellate court's rejection of "profile testimony," where a witness seeks to provide expert opinion testimony concerning general observations about a subject without being able to speak to the specific circumstances surrounding the case—one who describes common practices, habits, or characteristics that are not in any way connected to a party or his circumstances. *Id.* at ¶¶ 24, 27. In *Tondini*, in support of defendant's self-defense theory connected to his stabbing a woman with a knife, defendant proffered a witness as a "violence dynamics" expert. Acknowledging the witness's expertise in matters involving self-defense training, but without any knowledge concerning the decisive question as to whether "defendant's belief that it was necessary to use deadly force was reasonable under the circumstances" (*id.* at ¶ 28), the appellate court held that the witness "could not testify that defendant stabbed the victim in self-defense." *Id.* at ¶ 27.

Sampling of Cases Approving Exclusion of Opinion Testimony as Not Helpful

A sampling of cases that approved exclusion of expert testimony, because the proffered evidence was not beyond the understanding of ordinary people and was not difficult to understand or explain, include: *People v. Gilliam*, 172 Ill. 2d 484 (1996) (expert testimony properly excluded as to whether the defendant falsely confessed to protect his family); *People v. Carlisle*, 2015 IL App (1st) 131144 (trial court properly refused to admit expert testimony that sawed-off shotgun was not dangerous because it was old and was not deadly from distance it was fired because a gun is *per se* a deadly weapon, nor could the expert testify to what the defendant's knew of the shotgun's capabilities); *People v. Polk*, 407 Ill. App. 3d 80 (2010) (trial court properly excluded expert testimony about whether defendant's low IQ and police interrogation techniques could have resulted in a false confession); *People v. Bennett*, 376 Ill. App. 3d 554 (2007) (proper for trial court to exclude expert testimony that defendant was susceptible to police interrogations and suggestions based on his intellectual abilities); *People v. Wood*, 341 Ill. App. 3d 599 (2003) (proper to exclude expert testimony that defendant was easily coerced and susceptible to intimidation to support claim that his confession was involuntary).

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

COMMENTARY

Author's Commentary on Fed. R. Evid. 703

The plurality decision in *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012) (discussed in the *Author's Commentary on Ill. R. Evid. 703*) has led to uncertainty and numerous federal and state decisions addressing that case's application under Rule 703, with due regard for the problem due to the limitations on evidence admissibility under the Sixth Amendment Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004). One such decision is *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013).

Confrontation Clause Not Implicated by Expert's Reliance on Data of Another Expert

In *Maxwell*, a forensic scientist, who had tested the substance recovered from the defendant and had found that it contained cocaine base, had retired. Another forensic scientist from the same crime laboratory testified at trial in his place. She testified about how evidence in the crime lab is typically tested to determine whether it contains a controlled substance, that she had reviewed the data generated for the material in the case, and that she reached an independent conclusion that the substance contained cocaine base after reviewing that data. She did not read from the other scientist's report or vouch for whether he followed standard testing procedures, nor did she testify that she reached the same conclusions as he, nor was the other scientist's report introduced into evidence.

In its plain error review of whether the Sixth Amendment Confrontation Clause was violated, the Seventh Circuit held that the fact that the testifying forensic scientist relied on the other scientist's data did not deprive the defendant of his Sixth Amendment rights, especially since she did not mention what conclusions the other scientist had reached about the substance. In so holding, the court offered the following relevant analysis concerning its prior holdings in construing the *Williams* decision:

> "We already know that the government may not introduce forensic laboratory reports or affidavits reporting the results of forensic tests and use them as substantive evidence against a defendant unless the analyst who prepared or certified the report is offered as a live witness subject to cross-examination. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011); *Melendez-Diaz*, 557 U.S. [305] at 329. But, as we have explained before, 'an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who

> does not himself testify,' [*United States v.*] *Turner*, 709 F.3d [1187] at 1190, as 'the facts or data' on which the expert bases her opinion 'need not be admissible in evidence in order for the [expert's] opinion or inference to be admitted.' [*United States v.*] *Moon*, 512 F.3d [359] at 361 (citing Fed. R. Evid. 703). And this makes sense because the raw data from a lab test are not 'statements' in any way that violates the Confrontation Clause. *Id.* at 362." *Maxwell*, 724 F.3d at 726-27.

Confrontation Clause Issue Avoided

United States v. Turner, 709 F.3d 1187 (7th Cir. 2013), the case cited by *Maxwell* in the quote above, was remanded to the Seventh Circuit Court of Appeals by the United States Supreme Court for reconsideration in light of its *Williams* opinion. In that case, a supervisor of the crime-laboratory chemist who had analyzed substances that the defendant had distributed to an undercover police officer testified that, in his opinion, the substances contained cocaine base. Although the supervisor had not personally performed the lab work, he reviewed the work of the chemist who had done so, and he testified that the chemist had followed standard testing procedures, and that he reached the same conclusions she had concerning the nature of the substances. In its 2010 opinion (*U.S. v. Turner*, 591 F.3d 928), the court had found that there was no Confrontation Clause violation. In this revised decision, the court first considered the diverse views of the justices in the *Williams* opinion. It then noted that there were at least two aspects of this case that distinguished it from the *Williams* case: (1) the chemist's analysis here was for the purpose of accusing a targeted defendant to create evidence against him for use at trial, and (2) here, there had been a jury trial. The court then stated: "Recognizing that the divided nature of the *Williams* decision makes it difficult to predict how the Supreme Court would treat [the chemist's] report, and in order to give Turner the benefit of the doubt, we shall assume that the nature of the report, particularly insofar as it formally documented [the chemist's] findings for purposes of the criminal case against Turner, is sufficiently testimonial to trigger the protections of the Confrontation Clause." *Turner*, 709 F.3d at 1194. Nevertheless, concluding that "expert analysis and testimony are not invariably necessary to establish the identity of the controlled substance which the defendant is charged with distributing" (*id.*), the court concluded that the error, if any, was harmless beyond a reasonable doubt because other evidence in the case provided sufficient circumstantial evidence that the questioned substances contained cocaine base. *Id.* at 1194-97.

Application of Expert's Reliance under Rule 703

Ambrose v. Roeckeman, 749 F.3d 615 (7th Cir. 2014), illustrates an application of FRE 703 that applies to both the federal and the Illinois rule. In that case, Ambrose appealed from the denial of his petition for habeas corpus, which alleged that his involuntary commitment under the Illinois Sexually Dangerous Persons Act (SDPA) (725 ILCS 205/0.01-205/12) had deprived him of due process. His original commitment under the SDPA was premised on his alleged sexual penetration of his five-year-old daughter and her five-year-old friend. In a later hearing on his recovery petition (*see* 725 ILCS 205/9), a psychiatrist testified about two alleged prior out-of-state abuses based on statements allegedly made by victims to social workers and police. In his appeal, Ambrose contended that his counsel had been ineffective in not challenging the psychiatrist's testimony about the out-of-state abuses. The Seventh Circuit held that ineffective assistance of counsel had not been established, simply because there was no error. The rationale provided by the court, which is relevant to both FRE and IRE 703 is as follows:

> "The evidence was presented [at the hearing] not to prove the abuse allegations, but to cast light on the information considered by [the psychiatrist] in the process of reaching her expert opinion. Such evidence may properly be considered, as indicated in Federal Rule of Evidence 703 which was adopted by the Illinois courts. See *Wilson v. Clark*, 417 N.E.2d 1322, 1326-27 (Ill. 1981). Under that rule, an expert may provide opinion testimony which relies on facts and data that are not independently admissible for the truth of the matter, as long as it is the type of information that experts in the field would reasonably rely upon in forming an opinion.***In this case, the testimony as to the

allegations of out-of-state abuse was elicited in identifying the facts and data considered by [the psychiatrist] in her evaluation of Ambrose, and was not admitted as evidence of the abuse itself. Rather than establishing that the abuse occurred, it simply established that those allegations were considered by [the psychiatrist] in her evaluation." *Ambrose*, 749 F.3d at 620.

Author's Commentary on Ill. R. Evid. 703

Difference Between Federal and Illinois Rules on Disclosure of Inadmissible Data to the Jury

The first two sentences of IRE 703 are substantively identical to FRE 703 both before the latter's amendment solely for stylistic purposes effective December 1, 2011, and in its current form. However, the last sentence of both the pre-amended and current federal rule, which presents a balancing test other than the one provided by Rule 403 for the disclosure of inadmissible data and which was not present when the Illinois Supreme Court adopted the rule in *Wilson v. Clark*, 84 Ill. 2d 186 (1981), has not been adopted.

Test for Disclosure of Inadmissible Data

By requiring that inadmissible facts or data may be disclosed to the jury "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect," the third sentence of the *federal* rule totally reverses the balancing standard provided by Rule 403, thus providing a presumption of nondisclosure in a federal case. The non-adoption of the federal rule's last sentence means that the provisions of Rule 403 apply in Illinois. Therefore, in determining whether to allow or deny the disclosure to the jury of inadmissible facts or data that the expert reasonably relied upon, an Illinois court—consistent with IRE 403—must determine whether the probative value of the disclosure is substantially outweighed by the danger of unfair prejudice—a balancing test that, in contrast to the test supplied in the federal rule, places the burden of proof on the opponent of the evidence and provides a presumption in favor of disclosure to the jury.

See *People v. Lovejoy*, 235 Ill. 2d 97 (2009) (noting that "Illinois has not adopted the amended version of [Federal] Rule 703"). For more on this reasonable-reliance standard and why it does not violate the rule against hearsay, see the supreme court's discussion in *Lovejoy*, where a medical examiner properly relied on a toxicologist's determination through blood tests that six different types of drugs were in the deceased's body.

***Ward* and *Anderson*: Reliance on and Disclosure of Inadmissible Facts**

In *People v. Ward*, 61 Ill. 2d 559 (1975), the supreme court held that an expert may rely on reports that are substantively inadmissible as long as experts in the field reasonably rely on such materials. In that case, however, the court did not explicitly hold that it was proper for the expert (a psychiatrist) to reveal the contents of the reports he relied upon in arriving at his diagnosis. Later, in *People v. Anderson*, 113 Ill. 2d 1 (1986)—a case involving an insanity defense where the issue addressed was the disclosure to the jury of the contents of psychiatrists' reports in previous matters, information relating to a previous criminal offense, and information related by the defendant to the diagnosing psychiatrist expert—the supreme court held that "the logic underlying Rule 703 and this court's decisions in *Ward* and *Wilson* [*v. Clark*, 84 Ill. 2d 186 (1981)] compels the conclusion that an expert should be allowed to reveal the contents of materials upon which he reasonably relies in order to explain the basis of his opinion."

In *Anderson*, the court recognized that an "uninformed jury" might misuse disclosed inadmissible hearsay evidence relied upon by the expert, but it concluded that a limiting instruction should forestall any such misuse and that a trial court could reject such evidence by applying the standards now incorporated in Rule 403. As for the statements made by the defendant to the diagnosing psychiatrist—statements that are not subject to the hearsay exception provided for in IRE 803(4)(A), but explicitly made subject in that rule to the provisions of IRE 703—the *Anderson* court pointed out that "Rule 703 makes no distinction between treating and nontreating physicians and

that either may express an opinion founded on any information reasonably relied upon by experts in the field." Self-serving statements, the court noted, "can adequately be brought out on cross-examination of the expert."

In *Gillespie v. Edmier*, 2020 IL 125262, the supreme court affirmed the appellate court's reversal of the trial court's grant of summary judgment in favor of the defendant manufacturer of cast iron steps attached to a dump trailer. Plaintiffs, the wife of the injured party and the injured party who suffered injury from slipping and falling from the steps, alleged strict liability against the manufacturer in designing, manufacturing, and selling a defective and unreasonably dangerous product. In his deposition testimony, plaintiff's expert relied on OSHA and other protocols for forming his expert opinions. In affirming the reversal of the appellate court's grant of summary judgment, based on reliance on the expert's deposition testimony, which also included other bases for his opinions, three members of the supreme court's lead opinion agreed that, though the OSHA and other protocols testified to by the expert were not properly admissible as substantive evidence, it is proper for experts to rely on such data for the limited purpose of explaining the basis for his opinion. One justice did not participate in the decision.

The other three justices found that the lead opinion had reached the correct conclusion, but wrote in special concurrence. The reasons provided by these justices for so writing and their emphasis on the procedure to be filed by trial judges are noteworthy. The justices first pointed out that the opinion may have left "an incorrect impression that experts may always rely on regulations and standards as a basis for their opinions and must be allowed to testify to such evidence at trial to explain the basis for their opinion in every circumstance." *Gillespie*, at ¶ 24. They contended that "[a]s a result, the opinion could be misconstrued to impermissibly undermine the trial judge's role as a gatekeeper." *Id*. The concurring justices' emphasis on the trial judge's role as gatekeeper is significant because the supreme court has emphasized that "gatekeeper" is not a role for the trial court in IRE 702 jurisprudence. In making that role essential in IRE 703 jurisprudence, the concurring justices heavily relied on the earlier supreme court decisions in *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990) (where the supreme court did not use the term "gatekeeper," but did apply principles consistent with that role), and *Decker v. Libell*, 193 Ill. 2d 250, 254 (2000) ("Trial courts routinely bar evidence because it is irrelevant or unreliable, and we see no reason to apply a different rule in this context. Under this approach, the trial judge serves in a familiar role as 'gatekeeper,' barring testimony that is not sufficiently relevant or reliable to be admitted into evidence".) This emphasis on the role of the trial judge as "gatekeeper" for admissibility of evidence is certainly worthy of note where a determination of whether the trial judge should allow admissibility, under IRE 703, of otherwise inadmissible evidence reasonably relied upon by the expert in forming opinions.

See also *People v. Berrios*, 2018 IL App (2d) 150824, ¶¶ 16-20, where, in a prosecution for violating a civil-case order that the defendant not have contact with a street gang member (*see* 720 ILCS 5/25-5(a)(3)), the appellate court held that the police officer who testified as an expert on gangs properly relied, under IRE 703, on police gang information sheets. The court emphasized that, though the information relied upon was hearsay, it nonetheless was admissible to explain the basis for the expert's opinion. It also emphasized "that it is critical to maintain the distinction between using information as the basis for an expert's opinion and treating that information as fact. That otherwise inadmissible evidence may serve as the basis for an expert's opinion does not mean that the evidence is admissible for some other purpose." *Berrios*, at ¶ 20. Though the foregoing analysis retains validity, it should be noted that in *People v. Murray*, 2019 IL 123289, a majority of the supreme court overruled the ultimate holding in *Berrios* to the extent that it excused proof of each element related to establishing the status of a "street gang." (For more on *Murray*, see the Author's Commentary on IRE 705 *infra* under the heading entitled *People v. Murray: Supreme Court Disagreement on Rule 705*.)

Hypothetical Questions

Although IRE 703 does not refer to hypothetical questions as a method for establishing the bases for an expert's opinion, the adoption of the rule does not preclude their use—a use that was prevalent before the codification of evidence rules. Indeed, when jurors perceive that hypothetical facts are consistent with

the evidence presented, the use of hypothetical questions can be very persuasive. The supreme court has provided the prerequisites for the use of hypothetical questions as follows:

> "Counsel has a right to ask an expert witness a hypothetical question that assumes facts that counsel perceives to be shown by the evidence. The assumptions contained in the hypothetical question must be based on direct or circumstantial evidence, or reasonable inferences therefrom. The hypothetical question should incorporate only the elements favoring his or her theory, and should state facts that the interrogating party claims have been proved and for which there is support in the evidence. On cross-examination, the opposing party may substitute in the hypothetical those facts in evidence that conform with the opposing party's theory of the case.
>
> "It is within the sound discretion of the trial court to allow a hypothetical question, although the supporting evidence has not already been adduced, if the interrogating counsel gives assurance it will be produced and connected later. Evidence admitted upon an assurance that it will later be connected up should be excluded upon failure to establish the connection." *Leonardi v. Loyola University of Chicago*, 168 Ill. 3d 83, 96 (1995) (citations omitted).

Note that the principles contained in the final paragraph of the quote just above are consistent with IRE 104(b). Note, too, that where a proffered hypothetical question is supported by admitted evidence, the trial court abuses its discretion in denying the asking of the question. *Granberry v. Carbondale Clinic, S.C.*, 285 Ill. App. 3d 54, 60 (1996).

IRE 703's Application Despite the Confrontation Clause

In *In re Detention of Hunter*, 2013 IL App (4th) 120299, the appellate court held that, although the confrontation clause holding in *Crawford v. Washington*, 541 U.S. 36 (2004), applies to proceedings under the Sexually Dangerous Persons Act (725 ILCS 205/1 *et seq.*), "testimonial hearsay" obtained through police reports and witness statements about the respondent's prior sexual activities was properly admitted during a jury trial, not as substantive evidence, but through the testimony of psychiatrists who, consistent with IRE 703, reasonably relied upon the information in order to offer opinions about the respondent's sexual dangerousness.

Sutherland and *Williams*: Issues Related to Reasonable Reliance and the Confrontation Clause

Worthy of note concerning the second sentence of IRE 703 are two Illinois Supreme Court cases involving DNA experts, where confrontation-clause arguments were rejected.

In *People v. Sutherland*, 223 Ill. 2d 187 (2006), the expert witness was an employee of the laboratory that performed the human mtDNA analysis. She did not complete any of the actual laboratory "bench work" on the evidence. The supreme court rejected the defendant's contention that the witness's testimony regarding the mtDNA results was improper without the lab technician's testimony, holding that it was sufficient that the witness relied upon data reasonably relied upon by other experts in her field.

In *People v. Williams*, 238 Ill. 2d 125 (2010), the expert witness was a forensic biologist employed by the Illinois State Police Crime Lab. She matched the defendant's DNA profile, created at her laboratory from a blood sample taken from him, to the DNA profile created by Cellmark Diagnostic Laboratory from sperm taken from the victim's vagina. No one from Cellmark testified about the process that created the latter DNA profile, including the fact that the profile was derived from the semen identified in the vaginal swabs of the victim. Based upon the expert's testimony that Cellmark was an accredited laboratory and that its testing and analysis methods were generally accepted in the scientific community, and noting that the Cellmark report had not been admitted into evidence, the supreme court rejected the defendant's contentions of a violation of his Sixth Amendment right to confrontation, as well as his arguments concerning lack of evidentiary foundation (both of which included allegations concerning no direct evidence about the sperm DNA profile from the victim's vagina and the proper functioning and calibration of Cellmark's equipment), holding that the expert's use of the DNA profile created by Cellmark constituted use of facts or data reasonably relied upon

by experts in her field, and that there was therefore a sufficient foundational basis for her reliance on the Cellmark profile. The court noted that the expert did not merely regurgitate facts from the Cellmark profile, but relied upon it to conduct her own independent comparison of the defendant's DNA profile with that of the sperm.

After granting *certiorari*, the United States Supreme Court, in its decision in *Williams v. Illinois*, 567 U.S., 50 132 S. Ct. 2221 (June 18, 2012), affirmed the judgment of the Illinois Supreme Court, but did so in a plurality opinion in which members of the Court were sharply divided. The four-justice plurality offered as the primary basis for its decision that, under Rule 703, an expert may properly rely on statements that have not been admitted as substantive evidence, that the expert may relate those statements to the factfinder, and that, because those statements are related solely for the purpose of explaining the assumptions on which the expert's opinion rests, they are not offered for their truth and thus they fall outside the scope of the confrontation clause. The plurality offered as a second, independent basis for its decision, that even if the report from Cellmark had been admitted into evidence, there would have been no violation of the confrontation clause because the report differed from extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions that the clause was understood to reach, and because the report was not primarily concerned with accusing a targeted individual. The plurality opinion emphasized the fact that this was a bench trial and that there was no issue concerning a confused factfinder, for the trial judge was presumed to have knowledge concerning hearsay issues, chain of custody, and the provisions of Rule 703.

Justice Breyer, one of those who joined in the plurality opinion, would have preferred to have had reargument to clarify the extent of post-*Crawford* opinions (*i.e.*, *Melendez-Diaz* and *Bullcoming* (see the discussion of them under the *Author's Commentary on Ill. R. Evid. 803(8) infra*)), but in the absence of reargument, he adhered to his dissenting view in those cases that the reports addressed in them were not "testimonial" and thus not barred by the confrontation clause.

Though describing the plurality's analysis as flawed, Justice Thomas joined the plurality as the fifth vote. He concurred with the plurality solely because he concluded that Cellmark's report lacked the requisite "formality and solemnity" to be considered "testimonial" for confrontation clause purposes. He considered the confrontation clause to reach such statements as those in depositions, affidavits, and prior testimony or statements resulting from "formalized dialogue," such as custodial interrogation, all of which bear indicia of solemnity.

The four-justice dissent focused on the fact that the expert's testimony informed the factfinder (the trial court) that the testing of the victim's vaginal swabs had produced a male DNA profile implicating the defendant. This, the dissent contended, was contrary to the provisions of Rule 703, and was done to prove the truth of the matter asserted and thus violated the confrontation clause. Interestingly, the dissent provided a simple solution for what it deemed to be the error that occurred in the *Williams* case:

> "Had [the expert] done otherwise, this case would be different. There was nothing wrong with [the expert's] testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of [the expert's] expertise. Similarly, [the expert] could have added that *if* the Cellmark report resulted from scientifically sound testing of [the victim's] vaginal swab, *then* it would link Williams to the assault. What [the expert] could not do was what she did: indicate that the Cellmark report *was* produced in this way by saying that [the victim's] vaginal swab contained DNA matching Williams's." *Williams*, 132 S. Ct. at 2270 (emphasis in original).

In future cases, because of the diverse views expressed in *Williams*, prosecutors are likely to present some of the chain of evidence not produced in that case, or at least follow the recommendation of the dissent to make clear the Rule 703 nature of the proffered evidence. As to the chain of evidence issue, however, the majority's footnote in the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), has special significance:

> "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, 'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live." *Melendez-Diaz*, Note 1 (internal citations omitted)

As a sequel to the *Williams* decision, note that in *People v. Williams*, 2015 IL App (1st) 131359, the appellate court affirmed the circuit court's dismissal of Sandy Williams' post-conviction petition, rejecting his contention that his attorney was ineffective in not providing three documents that would have persuaded Justice Thomas to conclude that admission of the DNA testimony violated his right to confrontation.

After the Illinois Supreme Court's decision in *Williams* but before the United States Supreme Court's affirmance of that decision, the appellate court had upheld the expert's testimony in a similar factual scenario in *People v. Johnson*, 406 Ill. App. 3d 805 (2010). In *People v. Negron*, 2012 IL App (1st) 101194, a decision that post-dates the United States Supreme Court *Williams* holding, the appellate court did likewise, and so did the appellate court in *People v. Nelson*, 2013 IL App (1st) 102619, ¶¶ 46-70.

Additional confrontation-clause-related decisions are discussed in the *Author's Commentary on the Non-Adoption of Fed. R. Evid. 807*. Discussed there, *inter alia*, is application of *Crawford's* jurisprudence concerning the confrontation clause. Many of the discussed cases are relevant to the "reasonable reliance" application of the second sentence of IRE 703. They include: the Illinois Supreme Court decisions in *People v. Barner*, 2015 IL 116949, and *People v. Leach*, 2012 IL 111534 (more thoroughly discussed in the *Author's Commentary on Ill. R. Evid. 803(8)*, and more directly related to the business records exceptions to the hearsay rule of IRE 803(6) and (8), rather than to IRE 703), and the United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); and *Bullcoming v. New Mexico*, 564 U.S.647 131 S. Ct. 2705 (2011).

Rule 704. Opinion on an Ultimate Issue

(a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMMENTARY

Author's Commentary on Ill. R. Evid. 704

IRE 704 is identical to FRE 704(a) before the latter's amendment solely for stylistic purposes effective December 1, 2011. FRE 704(b), which is substantively identical in both its pre-amended and current forms, however, was not adopted because it is inconsistent with Illinois law.

See *Freeding-Skokie Roll-Off Serv., Inc. v. Hamilton*, 108 Ill. 2d 217 (1985) (adopting FRE 704 related to lay opinion evidence); *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542 (1995) (citing prior Illinois cases allowing expert opinion evidence on ultimate issues, and approving accident reconstruction evidence even when an eyewitness was present); *People v. Richardson*, 2013 IL App (2d) 120119, ¶¶ 18-19 (citing IRE 704 in rejecting defendant's argument seeking to exclude lay opinion evidence on the basis that it went to an ultimate issue in the case).

In *People v. Willett*, 2015 IL App (4th) 130702, ¶98, without citing IRE 704, but citing instead *People v. Owens*, 372 Ill. App. 3d 616, 620 (2007) and the supreme court decision cited in the quote below, both of which predate the codification of the Illinois Rules of Evidence, the appellate court stated:

> "As this court noted in *People v. Owens*, 372 Ill. App. 3d 616, 620, 874 N.E.2d 116, 119 (2007), Illinois courts have rejected the so-called 'ultimate fact' doctrine, which held that a witness may not express his opinion as to the ultimate issue in a case. Instead, 'it is now well settled that a witness, whether expert or lay, may provide an opinion on the ultimate issue in a case. [Citation.] This is so because the trier of fact is not required to accept the witness' conclusion and, therefore, such testimony cannot be said to usurp the province of the jury.' *People v. Terrell*, 185 Ill. 2d 467, 496-97, 708 N.E.2d 309, 324 (1998)."

The principles provided by the earlier decisions in the quote above—both of which predate Illinois' codified evidence rule—are now contained within IRE 704.

Rejection of FRE 704(b)

FRE 704(b), which was added in the aftermath of John Hinckley's attempt to assassinate President Reagan, has not been adopted. In Illinois, a witness, properly qualified as an expert, may give an opinion that will assist the trier of fact regarding the mental state of the defendant at the time of the alleged crime. *See, e.g., People v. Ward*, 61 Ill. 2d 559 (1975) (citing the then-newly-adopted FRE 703 and the related advisory commentary, and holding that an expert may give opinion on sanity based upon personal observations and information relied upon by experts in the field); *People v. Hope*, 137 Ill. 2d 430, 489-90 (1990) (noting physician's testimony about defendant's intoxication in relation to whether he acted intentionally in shooting a police officer); *People v. Sojack*, 273 Ill. App. 3d 579, 584-585 (1995) (addressing State and defense expert psychiatrist and psychologist testimony as to sanity of defendant).

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMENTARY

Author's Commentary on Ill. R. Evid. 705

IRE 705 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. In *Wilson v. Clark*, 84 Ill. 2d 186 (1981), the decision that adopted pre-amended FRE 703, the supreme court also adopted FRE 705.

Burden on Opposing Party to Develop Facts

Pursuant to the rule's provisions and the holding in *Wilson v. Clark*, 84 Ill. 2d at 194, the burden of eliciting facts underlying the expert opinion is placed on the opposing party. For that reason, in *People v. Wright*, 2012 IL App (1st) 073106, ¶¶ 117-130, the appellate court held that, because the cross-examiner has the burden of developing the facts underlying an expert's opinion, the trial court abused its discretion in curtailing the cross-examination of the expert witness regarding the significance of an Arizona study related to a nine-loci DNA match.

In *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833, an appeal from a trial on just compensation after the City of Chicago exercised its power of eminent domain to take the defendant's property, one of the bases for the reversal and remand of a favorable judgment for Chicago was the trial court's error in disallowing defendant from probing the sufficiency of an expert's assumptions and the soundness of his opinions. The relevant principles articulated by the appellate court were these:

> "Facts, data, and opinions which form the basis of the expert's opinion but which are not disclosed on direct may be developed on cross-examination. The cross-examiner may also elicit, emphasize, or otherwise call attention to facts or opinions avoided or minimized on direct examination. (*id*. at ¶101 (citations omitted))***The weaknesses and strengths of assumptions underlying an expert's opinion constitute an area rightly explored and challenged on cross-examination. See *People v. Pasch*, 152 Ill. 2d 133, 179 (1992) (holding cross-examiner may probe expert's qualifications, experience, sincerity, weaknesses in basis, sufficiency of assumptions, soundness of opinion, and material reviewed but not relied on). [Defendant] was entitled to impeach [the expert] on cross-examination with his own opinion. This would undermine the reliability of [the expert's] valuation opinion." *Id*. at ¶104.

That the burden is on the party-opponent, however, should not serve as an automatic incentive for the proffering party's withholding the facts supporting the expert's opinion. In most instances, the underlying facts result in credibility for the expert and weight for the expert's opinion. Validity for the expert's opinion is rooted in the underlying facts, especially when they provide logical reasons for the opinion.

People v. Murray: Supreme Court Disagreement on Rule 705

In P*eople v. Murray*, 2019 IL 123289, a jury convicted the defendant of first-degree murder and unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1)(a)).

The defendant did not appeal the murder conviction, so the propriety of the firearm conviction was the only issue reviewed by the Illinois Supreme Court.

A four-member majority of the court reversed the firearm conviction. It held that a detective's testimony, as an expert witness on street gangs, failed to provide the jury all the elements listed in section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act ("the Act"; 740 ILCS 147/10), thus failing to define the Latin Kings—the defendant's alleged gang—as a street gang. The elements required by the Act include evidence that establishes the alleged street gang was involved in "a course or pattern of criminal activity" involving two or more gang-related felony offenses during specified time periods. Based on the absence of such evidence, the majority held that the State had failed to establish the street gang status of the Latin Kings, and it thus failed to establish that the defendant was a street gang member.

The four justices in the majority agreed that, because the expert witness had not provided evidence that satisfied the Act's statutory definitions of "street gang," the State failed to offer sufficient evidence to make its *prima facie* case. But two of the four justices in the majority provided an opinion in special concurrence refusing to join with the other two justices in their additional holding that IRE 705 (which is substantively identical to its federal counterpart) "unambiguously requires" experts to explain the reason underlying their opinions. The two specially concurring justices contended that the majority's reliance on that aspect of its opinion created tension with the court's long-standing statements in *Wilson v. Clark*, 84 Ill. 2d 186 (1981) and its progeny and, contending that the portion of the opinion that relied on it was unnecessary, they rejected even the notion that Rule 705 applied, pointing out that "we need not consider how, or even if, Rule 705 and *Wilson* apply." *Murray*. at ¶ 60.

In a lengthy dissent, three members of the court contended that the expert witness's testimony was sufficient to prove that the Latin Kings was a street gang and that the majority's interpretation of the Act "will require the introduction of prejudicial evidence to convict a defendant based on crimes he personally may well have not committed or been involved in." *Murray*. at ¶ 71. Relevant to the interpretation of Rule 705, the dissent contended that the majority's holding regarding the rule (an interpretation which, it must be stressed, had the concurrence of only two justices) contravenes controlling law, focusing on *Wilson* and other supreme court precedent, as well as Rule 705 itself and its interplay with IRE 703.

There are two takeaways from *Murray*, one based on a rule of evidence and the other relevant to prosecutions involving the offense of unlawful possession of a firearm by a street gang member:

- Only two justices called for a different interpretation of Rule 705 than that provided by *Wilson v. Clark* and its progeny—an interpretation that has established the principles that an expert witness need not provide the underlying facts or data for an opinion and that the burden of attacking the opinion is placed on the party-opponent. The *Wilson* interpretation and that of its progeny has therefore not been altered.
- Based on the holding of four of the seven justices, in future cases the State must accommodate the requirements of section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act for the presentation of *prima facie* evidence to prove a street gang's identity.

For a post-*Murray* decision, where the State failed to establish that the defendant was a member of a street gang because it presented no evidence that the Spanish Gangster Disciples was a street gang engaged in a course or pattern of criminal activity, see *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 68-71, *pet. for leave to appeal allowed*, No.128805 (filed Nov. 30, 2022) (reversing without remand defendant's conviction for unlawful possession of a firearm by a street gang member, but remanding for retrial other offenses).

Cross-Examination on Expert's Own Reports and Reports of Other Experts

In *People v. Pasch*, 152 Ill. 2d 133 (1992), the supreme court held that, in addition to the propriety of examining an expert on reports that the expert relied upon (*see People v. Silagy*, 101 Ill. 2d 147, 171-72 (1984)), it is proper to question experts (in this

case, psychiatrists testifying about the sanity of the defendant) concerning other experts' reports and conclusions not relied upon by the experts in forming their opinions, as long as the other experts' reports are not substantively admitted.

In *Karn v. Aspen Commercial Painting, Inc.*, 2019 IL App (1st) 173194, a personal injury lawsuit, the appellate court held that, where an expert's opinion is based in part on false information (in this case, reliance on a surveillance video depicting activities of a person whom the expert incorrectly assumed to be the plaintiff), the opposing party is entitled to question the expert about the information upon which his opinion was based, and the trial court's refusal to allow such cross-examination constituted reversible error.

Though not related to cross-examination of experts about other expert opinions related to the same case, two Seventh Circuit decisions are noteworthy concerning cross-examination about faulty expert opinions in a separate case. In both *United States v. Rivas*, 831 F.3d 931 (7th Cir. 2016) and *United States v. Bonds*, 922 F.3d 343(7th Cir. 2019), defendants sought to challenge the accuracy of fingerprint identification by introducing evidence about the FBI's 2004 error in identifying Brandon Mayfield as a person whose fingerprints suggested involvement in a terrorist bombing in Spain, resulting in his incarceration for more than two weeks before the FBI acknowledged its mistake. Both decisions held that the district court properly denied admission of the evidence; in *Bonds* the court rejected the defendant's effort to distinguish *Rivas* based on the fact that the fingerprint examiner worked in the same division that mistakenly identified Mayfield. Both decisions emphasized the defendant's ability to challenge the accuracy of the procedures used without reference to the *Mayfield* case.

Split Decisions Regarding Foundational Requirements for Fingerprint Evidence, and Decisions Applying Rule 705 for Ballistics, DNA, and Shoeprint Evidence

As described below, there is a split in the holdings of the appellate court regarding the admissibility, as opposed to the weight, of expert fingerprint evidence. As backdrop, note that in *People v. Campbell*, 146 Ill. 3d 363 (1992), in pointing out that in one case a fingerprint expert found five points of similarity and in another four, the supreme court noted that no Illinois case has expressly set out the minimum number of points of similarity that are required to constitute a match of a latent print to an exemplar.

In *People v. Safford*, 392 Ill. App. 3d 212 (2009), the appellate court held that there was an insufficient foundation for admissibility of a **fingerprint** expert's opinion, where the expert listed no points of comparison in his report; did not record how or why he reached his conclusion that the latent print matched the known print; and, though he testified that based on his examination the latent print was defendant's, he gave no testimony as to how he arrived at his conclusion that the latent print could belong only to the defendant. In reversing the defendant's conviction, the appellate court applied the *de novo* standard of review, and held that the evidence provided an insufficient foundation for the admissibility of the fingerprint expert's opinion, for the defendant had been deprived of the ability to effectively cross-examine the expert, and an adequate foundational basis for admissibility was essential for the jury to assess the credibility and weight of the expert's testimony. Pointing out that, in *People v. Ford*, 239 Ill. App. 3d 314 (1992), admission of the fingerprint expert's testimony was approved even though that expert also did not testify to finding any particular number and features of like characteristics, the dissenting judge in *Safford* contended that the expert's testimony had been properly admitted because it was related to the weight of the expert's opinion, not its admissibility.

Later, in *People v. Negron*, 2012 IL App (1st) 101194, another panel of the First District referred to *Safford* as "an outlier case," noting that "no reported case since then has held that there must be a minimum number of points of **fingerprint** comparison or disclosure of a specific number of points of similarity found by the expert." *Negron*, at ¶ 44. The *Negron* opinion cited the dissent in *Safford*, with one judge writing a one-paragraph special concurrence underscoring his "respectful disagreement with the majority holding in *People v. Safford*" and his agreement with the dissent in that case. The *Negron* court concluded its analysis by pointing out that, under Rule 705, "the number of points of comparison is part of the facts underlying the expert opinion and the burden was on the defense to elicit such facts." The court noted that the defendant

had "performed a vigorous cross-examination" of the expert and that "the jury determined the weight of credibility was with the State's expert." *Negron*, at ¶ 45.

In *People v. Cline*, 2020 Ill App (1st) 172631, *pet. for leave to appeal allowed*, No. 126383, (filed on Nov. 18, 2020) a decision with *Safford* implications, the appellate court reversed without remand a bench trial residential burglary conviction that was based on the fingerprint expert's determination that the **fingerprint** found in the burglarized premises on a case for a missing headphone, the determination of which was based on "analysis," "comparison," and "evaluation"—three prongs of the accepted standard analytical procedure of ACE-V for matching prints—because the expert did not provide evidence of "verification" by another expert, which is the fourth prong of ACE-V procedure. Rejecting the State's argument that the testimony was merely foundational and not part of the substantive evidence, in a supplemental opinion on denial of rehearing, the court held that the proper performance of testing protocol is a necessary substantive element of the expert's testimony and the absence of such testimony results in a missing substantive element. The decision does not address IRE 705 nor the generally accepted principle that the burden of rebutting expert testimony is on the opposing party. As noted above, the supreme court granted leave to appeal in *Cline*, so it will have the final say on the admissibility of the fingerprint evidence.

Note, too, that in *People v. Cross*, 2021 IL App (1st), where an expert on latent fingerprint examination described the ACE-V methodology but, as in *Cline*, did not testify that he performed the verification by an independent examiner required under that methodology, the defendant, who had not objected at trial to the admissibility of the examiner's testimony, contended that, because verification was not satisfied, the examiner's testimony was improperly admitted. Reasoning that " issues regarding an expert's application of techniques go to the *weight* of the evidence, rather than its admissibility" (*Cross*, at ¶ 21), the examiner's testimony was not improperly admitted.

Most recently, *People v. Dixon*, 2022 IL App (1st) 200162, in discussing the testimony of a witness concerning **bloodstain pattern analysis**, was added to the list of cases that rejected the holding in *Safford*.

People v. Simmons, 2016 IL App (1st) 131300, ¶¶ 106-131, which dealt with **ballistics** comparison, also challenged *Safford*. Citing numerous Illinois Supreme Court decisions, the appellate court pointed out that *Safford*'s holding that the *de novo* standard of review applies to the determination of whether there was a sufficient foundation for an expert's testimony was based on inappropriate authority. It further pointed out that, based on numerous supreme court decisions, the proper standard of review is abuse of discretion. Finally, it concluded that *Safford*'s analysis was flawed, and that the expert's testimony about ballistics comparison in this case, like the fingerprint comparison in *Safford*—testimony that, in this case, reflected the expert's inability to specify which individual characteristics of the compared bullets matched—went to the weight of the testimony and not to its admissibility.

People v. Robinson, 2018 IL App (1st) 153319, ¶¶ 17-19 also addressed the field of **ballistics** identification. It agreed with the line of cases that applied abuse of discretion as the standard of review, rejecting *Safford's* holding that the standard was *de novo*. Pointing out that *Safford* "has been heavily criticized, and characterized as an 'outlier,'" and that it could "find no published case following *Safford's* reasoning," the appellate court held "[i]t is the defendant's right and burden to elicit the facts underlying an expert's opinion in cross-examination."

People v. Bradford, 2019 IL App (4th) 170148, is another decision that addresses the propriety of expert opinion on **ballistics**. Citing *Robinson* and *Simmons*, it follows the line of decisions that disagrees with the holding in *Safford*. The appellate court held that the defendant could not satisfy the two *Strickland* prongs in contending that his counsel rendered ineffective assistance by not objecting to what he claimed was unreliable firearm expert's testimony due to an inadequate foundation for her testimony.

People v. Wilson, 2017 IL App (1st) 143183, is another appellate court decision that declined to follow *Safford*. The issue in *Wilson* was whether the State's **DNA** evidence lacked an adequate foundation because the Illinois State Police forensic scientist did not explain how she came to the conclusion that the DNA profile on a hat matched the defendant's DNA profile. Citing both FRE 705 and IRE 705 and the supreme

court's statement in *Wilson v. Clark*, 84 Ill. 2d 186, 194 (1981), that "under Rule 705 the burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert witness," the court held that, because "the basis of [the forensic expert's] opinion was a matter for cross-examination, [her] failure to disclose it on direct examination did not undermine the foundation of her testimony." *Wilson*, at ¶ 43.

In *People v. Simpson*, 2015 IL App (1st) 130303, though not expressly rejecting *Safford*, the appellate court cited IRE 705 in holding that the burden was on the defendant to elicit the number of points of comparison that existed between the defendant's **shoe and a footwear impression** found at the scene of the crime. Reasoning that "Rule 705 permits an expert to give an opinion without divulging the basis for it and shifts the burden to the opposing party to elicit and to explore the underlying facts or data on cross-examination," the appellate court held that "[a]ny issues regarding the details [the expert] provided to support her opinion that Simpson's shoeprint matched the shoeprint found at the crime scene went to weight, not admissibility." *Simpson*, at ¶¶ 37, 38. The court therefore affirmed the trial court's admission of the expert's shoeprint-comparison evidence.

Note that the Seventh Circuit Court of Appeals decision in *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013), offers an interesting discussion concerning opinion evidence related to fingerprint comparison and DNA analysis, and concerning admissibility versus weight of evidence.

Destroyed Notes Imported into Expert's Report

In *In re the Commitment of Steven Tungent*, 2018 IL App (1st) 162555, an appeal from the trial court's revocation of the conditional release of the respondent who had been adjudicated a sexually violent person, the appellate court held that the trial court did not abuse its discretion in allowing testimony by a psychologist, a Department of Human Services supervisor, who failed to maintain her notes from interviews she conducted with the respondent and with a licensed clinical social worker who was respondent's conditional release supervisor. The psychologist testified that she destroyed the notes from her interviews once she drafted her report, and that the information from her notes was included in her report. Pointing out that the respondent had the opportunity to cross-examine the psychologist and citing IRE 705's provisions and the fact that the rule places the burden on the adverse party during cross-examination to elicit facts underlying the expert opinion, the appellate court held that the trial court had not abused its discretion in allowing the psychologist to testify. *Tungent*, at ¶ 46.

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

[FRE 706 NOT ADOPTED.]

Author's Commentary on Non-Adoption of Fed. R. Evid. 706

Illinois has not adopted a counterpart to FRE 706. In regard to FRE 706(a), however, note that Illinois statutes and rules give the court power to appoint experts in certain situations. See, for example, Illinois Supreme Court Rule 215(d) (appointment of impartial medical examiner); 725 ILCS 5/115-6 (defense of insanity); 725 ILCS 205/4 (sexually dangerous persons); 405 ILCS 5/3-804 (commitment of mentally ill persons); 750 ILCS 45/11 (blood test in paternity actions).

See also section 604.10(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604.10(b), added by Public Act 99-90, effective January 1, 2016), which allows the court to seek the advice of professional personnel regarding issues of child custody. And *see Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229 (addressing the same Act's section 604(b), which was repealed by Public Act 99-90, effective January 1, 2016, and replaced by section 604.10, which has similar provisions, and holding, in conformity with the Seventh Circuit and other Illinois Appellate Court decisions, that an expert appointed by the court possesses absolute immunity).

Though FRE 706(c) has not been adopted, note that in Illinois, where the court has discretion to appoint an expert, the inherent power of the court allows for appropriate compensation to be paid.

Though FRE 706(d) has not been adopted, note that in Illinois a jury should not be advised of the court-appointed status of an expert witness. *Morrison v. Pickett*, 103 Ill. App. 3d 643, 645 (1981) (holding that although references to the fact that a physician examined a plaintiff pursuant to court order are highly inappropriate, such references do not necessarily constitute reversible error, especially where the party failed to object).

Though FRE 706(e) has not been adopted, note that Illinois gives parties discretion to choose their own experts. *See McAlister v. Schick*, 147 Ill. 2d 84, 99 (1992) (in affirming the constitutionality of the affidavit requirement of section 2-622 of the Code of Civil Procedure, holding that "[j]ust as he selects his own expert witness at a trial, the plaintiff can interview any number of medical professionals before finding one who agrees with him that his case has merit").

FEDERAL RULES OF EVIDENCE

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

ILLINOIS RULES OF EVIDENCE

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if

(1) Prior Statement by Witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony at the trial or hearing, and—

(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and

(a) the statement is proved to have been written or signed by the declarant, or

(b) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or

(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording; or

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

(B) one of identification of a person made after perceiving the person.

(2) Statement by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy, or (F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

COMMENTARY

Author's Overview of the Hearsay Rules in Article VIII

Article VIII of the Evidence Rules begins with Rule 801, providing definitions related to hearsay in subdivisions (a), (b), and (c) and statements that are not hearsay in subdivision (d). A later-numbered rule, Rule 802, presents the hearsay rule and informs us that hearsay—defined in Rule 801(c) as an out-of-court statement offered for the truth of the matter asserted—is inadmissible, except as provided by "these rules" (*i.e.*, other evidence rules, thus previewing the rules that follow while taking into account a rule such as Rule 104(a)), supreme court rules, and statutes. Rules 801(d)(1) and (2), in turn, exclude from the hearsay rule certain out-of-court statements made by witnesses and party-opponents (either directly or through authorization or adoption) that otherwise might fit the definition of hearsay. It does this by declaring that statements that satisfy the rule are not hearsay at all (and thus are not even exceptions to the hearsay rule, but may properly be characterized as exclusions from the hearsay rule) and are therefore substantively admissible.

Rule 803 provides a host of exceptions to the hearsay rule, in instances where it makes no difference whether the out-of-court declarant is or is not available; and Rule 804 provides five exceptions to the hearsay rule, exceptions that apply only where the out-of-court declarant is unavailable as a witness. All of the statements subject to the exceptions provided by Rules 803 and 804, like the statements excluded from the hearsay rule in Rule 801(d), are admissible substantively, *i.e.*, they may be relied upon by the trier of fact in determining the outcome of the litigation.

Rule 805 provides that hearsay within hearsay is excluded from the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule, and Rule 806 describes how the credibility of a declarant may be attacked or supported whether or not the declarant is called as a witness.

Illinois has not adopted a "residual exception" to the hearsay rule, such as that provided in FRE 807 but, as the author's commentary to the non-adoption of that federal rule indicates,

Illinois has numerous exceptions to the hearsay rule provided by statutes, all of which may be considered residual exceptions. The Confrontation Clause in the sixth amendment to the U.S. Constitution allays concerns about the unreliability of out-of-court, incriminating statements against an accused in a criminal case. (See the *Author's Commentary on Non-Adoption of Fed. R. Evid. 807*).

Though the hearsay rule provides an evidentiary rule and not a constitutional mandate, a similar concern about reliability applies to the admission of a declarant's out-of-court statements to prove the truth of the matter asserted in both civil and criminal cases: the concern that the trier of fact (with primary focus on juries) might not properly evaluate statements made outside its presence, and thus might give undue weight to such evidence. The rationale underlying the rule against hearsay is that out-of-court statements are not subject to cross-examination, frequently not under oath, and are not subject to the trier's review of the demeanor of the out-of-court declarant. To allay those concerns, both the exclusions to the hearsay rule (in Rule 801(d)) and the exceptions to the rule (in Rules 803 and 804) allow for the substantive admission of out-of-court statements that are deemed to possess sufficient indicia of reliability.

Author's Commentary on Ill. R. Evid. 801(a)

IRE 801(a) is identical to the wording of the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The 2011 amendment to the federal rule resulted—without substantive change—in combining a "person's oral assertion, written assertion, or nonverbal conduct" in a single rule without subdivisions. In contrast, IRE 801(a) has two subdivisions. IRE 801(a)(1), which defines a "statement" that is "an oral or written assertion," is what the hearsay rule typically addresses. IRE 801(a)(2), which offers a separate definition of a statement as "nonverbal conduct of a person, if it is intended by the person as an assertion," is less common.

People v. Neal, 2020 IL App (4th) 170869, a lengthy opinion authored by Justice Robert Steigmann, provides significant insight into the rule's second subdivision. The opinion concerns the propriety of the admissibility of a phone bill and an unopened envelope containing the defendant's name and the same address where the two documents and narcotics were located and (along with other evidence) were attributed to the defendant. The defendant contended that the documents were improperly admitted as hearsay because, he argued, they constituted nonverbal conduct used to prove "the truth of the matter asserted"—that the defendant lived at the address listed on the documents and that they were therefore intended as an assertion under IRE 801(a)(2). In rejecting that argument and approving the admission of the documents, the appellate court cited numerous and varied favorable authorities and even discussed opposing authorities. The court concluded, in what it termed this matter of first impression in Illinois, that "implied assertions of fact contained within mail and other documents are not hearsay." *Id.* at ¶ 3; ¶¶ 145-48. The court stressed that such documents (such as the phone bill and an envelope from an insurance company in this case) did not constitute a hearsay assertion that the defendant lived at the relevant address in violation of IRE 801(a)(2), but were merely properly admitted circumstantial evidence of the defendant's relationship to the relevant location.

***People v. Collins*: Hearsay Issue Related to Audio on Police Officer's Body-Worn Camera Dismissed Due to Faulty PLA**

In *People v. Collins*, 2020 IL App (1st) 181746, *appeal allowed on November 24, 2021*, the defendant fled from police and was apprehended after a foot chase. After the defendant was apprehended, the officer who had chased and ultimately arrested the defendant made statements on his police radio about where the defendant had dropped a black pistol, later recovered, during the chase. Those statements were captured as audio on the officer's body-worn camera video. The issue on appeal focused on whether the statements recorded on the officer's body camera were improperly admitted in evidence as hearsay during the jury trial for unlawful possession of a weapon by a felon and for being an armed habitual criminal.

A majority of a panel of the appellate court held that the statements were inadmissible hearsay and rejected the State's contention that the Law Enforcement Officer Body-Worn Camera Act, 50 ILCS 706/10-1 *et seq.*, rendered the statements "admissible irrespective of its compliance with hearsay rules."

Collins, at ¶ 21. In doing so, the majority provided a lengthy analysis for its rejection of section 10-30 of the Act, which reads, "The [body-worn camera] recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding." 50 ILCS 706/10-30. The majority also rejected the State's harmless error contention, thus reversing the defendant's convictions. It remanded the matter to the circuit court for retrial.

The dissenting justice asserted that the trial court had properly admitted the recorded statements and that the majority erred in finding the Law Enforcement Officer Body-Worn Camera Act inapplicable, contending that there is no conflict with the Illinois Rules of Evidence and that the Act's "explicit purpose," fortified by section 10-30, asserting that "[o]n its face, the Act unambiguously allows officer body camera recordings, including both audio and visual footage, to be admitted in a judicial proceeding without any express limitation" *Collins*, at ¶ 59.

On further review in *People v. Collins*, 2022 IL 127584, the supreme court pointed out that the State had abandoned the position it took in obtaining its petition for leave to appeal in reliance of the Law Enforcement Officer Body-Worn Camera Act. Instead, the State argued that the statements were not hearsay or were admissible pursuant to course-of-investigation or excited-utterances exceptions. The supreme court pointed out that the appellate court had noted that the State had abandoned the argument that the hearsay statements were admissible as excited utterances, by asserting on appeal only that the statements in the video were not hearsay. But neither exception raised by the State was raised in the State's PLA to the supreme court. Holding that "the State has failed to argue the threshold question presented to this court through its PLA and upon which we granted leave to appeal" (*Collins*, 2022 IL 127582, at ¶ 21), the supreme court dismissed the appeal and remanded the case to the circuit court for a new trial. Unfortunately, the issue concerning the Law Enforcement Officer Body-Worn Camera Act, which drew the supreme court's attention, was not addressed. For a supreme court ruling, that issue will need to await another case in controversy.

Author's Commentary on Ill. R. Evid. 801(c)

IRE 801(c) is identical to the wording of the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The definition it provides is consistent with prior Illinois law. *See People v. Carpenter*, 28 Ill. 2d 116 (1963) (offering substantially the same definition of hearsay); *People v. Olinger*, 176 Ill. 2d 326, 357 (1997) ("Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule").

Witness as Out-of-Court Declarant

Note that, except for the Rule 801(d)(1) analysis discussed below, the fact that the witness is both the out-of-court declarant and the witness is not relevant in hearsay analysis. In *People v. Lawler*, 142 Ill. 2d 548 (1991), well before Illinois adopted codified evidence rules, the supreme court reasoned as follows about the non-admissibility of such evidence:

> "The State argues that a statement from a witness as to his own prior out-of-court statement cannot violate the hearsay rule, because the witness will testify at trial with the safeguards of an oath and cross-examination, reducing the risk of perjured testimony. Adoption of the State's rationale would essentially obliterate a good portion of the hearsay rule. As has been noted, '[t]he presence or absence in court of the declarant of the out-of-court statement is *** irrelevant to a determination as to whether the out-of-court statement is hearsay.' M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 801.1, at 564-65 (5th ed. 1990). See *People v. Spicer* (1979), 79 Ill. 2d 173, 179, 402 N.E.2d 169 (where this court held that prior inconsistent hearsay statements of an in-court witness cannot be used as substantive evidence)."

In *People v. Lambert*, 288 Ill. App. 3d 450 (1997), also well before Illinois' adoption of codified evidence rules, the appellate court provided this explanation for the non-admission of out-of-court statements even when the declarant is the witness:

> "Illinois follows the common-law rule that, where admission is allowed, a prior consistent statement is permitted solely for rehabilitative purposes and not as substantive evidence. The rationale for this common-law rule is that corroboration by repetition preys on the human failing of placing belief in that which is most often repeated. Credibility should not depend upon the number of times a witness has repeated the same story, as opposed to the inherent trustworthiness of the story. Where the common law applies and a prior consistent statement is admitted into evidence, an instruction from the court instructing the jury of its limited rehabilitative purpose is proper." *Lambert*, 288 Ill. App. 3d at 457-58 (citations and internal quotation marks omitted).

The quoted statement from *Lambert* is consistent with Illinois' common-law holdings on the non-admission, as substantive evidence (*i.e.*, for the truth), of prior consistent statements, which explains why FRE 801(d)(1)(B) was not codified in the Illinois evidence rules. Consistent with the quoted statement, in Illinois, prior consistent statements, even those admitted "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," are admitted for rehabilitative purposes only, and not admitted substantively as non-hearsay or as an exception to the hearsay rule. *See* IRE 613(c), which provides the relevant Illinois principles.

Different Analysis under Rule 801(d)(1)

Note, however, that the foregoing hearsay analysis differs under **FRE** 801(d)(1)(A) and under **IRE** 801(d)(1)(A) and (B) when the out-of-court declarant is also the witness. That is so because, under the first part of Rule 801(d)(1), an out-of-court statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the other requirements of the rule are satisfied. In those instances, the fact that the out-of-court declarant and the in-court witness is the same person is relevant to the substantive admissibility of the out-of-court-statement.

Note also that, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), in a criminal case, certain "testimonial statements" made out of court are not violative of the Confrontation Clause and are allowed admissibility by statutes and rules, where the out-of-court declarant is present in court and subject to cross-examination.

Statements Offered for Non-Hearsay Purpose

When an out-of-court statement is offered for a proper purpose—other than "to prove the truth of the matter asserted"—it is not hearsay. *See, e.g., People v. Prather*, 2012 IL App (2d) 111104 (where defendant was charged with the offense of committing an aggravated battery on a victim whom he knew was pregnant, evidence from the victim that she showed defendant a home pregnancy test that indicated she was pregnant was not inadmissible as hearsay because it was not offered to establish that the victim was pregnant, but to prove that defendant had notice or knowledge of the substantial probability that the victim was pregnant when he committed the offense); *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963) (using Wigmore's example of witness A testifying that "B told me that event X occurred." If A's testimony is offered for the relevant purpose of establishing that B said this, it is admissible; if offered to prove that event X occurred, it is inadmissible); *People v. Banks*, 237 Ill. 2d 154 (2010) (approving admission of a series of flash messages over police radios, holding that "admission of an out-of-court statement that is not offered to prove the truth of the matter asserted but rather to explain the investigatory procedure followed in a case is proper," and that confrontation clause was not violated because that clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). See also *Khungar v. Access Community Health Network*, 985 F.3d 565 (7th Cir. 2021) (in this Title VII action, holding that the complaints against the plaintiff were not hearsay because they were not offered to show that the plaintiff in fact engaged in the conduct complained of, but to show the state of mind of plaintiff's supervising physician when he made his recommendation regarding plaintiff's termination (*Khungar*, at 575)).

In *People v. Moss*, 205 Ill. 2d 139 (2001), where the defendant was convicted of murdering his ex-girlfriend and her

daughter, and in *People v. Lovejoy*, 235 Ill. 2d 97 (2009), where the defendant was convicted of murdering his stepdaughter, evidence was admitted that the daughter of the ex-girlfriend in *Moss* and the stepdaughter in *Lovejoy* had informed numerous persons about the defendant's sexual assaults against each of them. In each case, the supreme court held that the evidence of the statements about the sexual assaults was not introduced to prove the fact that each victim had been sexually assaulted by each defendant, but to establish the defendant's motive for killing that victim: that each victim had said that each defendant had assaulted her. The truth of each victim's out-of-court statements was irrelevant; what was relevant was that each victim's statements provided a motive for each defendant's offense. In each case, the supreme court held that the victim's out-of-court statements were properly admitted—not to prove the truth of the statements, but to provide a motive for each defendant's killing each victim.

An example of a case in which an out-of-court statement should have been admitted in evidence to explain the effect on the listener is *McIntyre v. Balgani*, 2019 IL App (3d) 140543, ¶¶ 91-96 (although ultimately concluding that its exclusion as hearsay was harmless, holding that a statement by one physician to another physician about a patient's care was not offered to prove the truth of any factual matter asserted by the declarant about his treatment recommendations being correct or medically sound, but rather to show why doctors subsequently acted as they did). See also *People v. Saulsberry*, 2021 IL App (2d) 181027 (holding that evidence of a gang member's order to a trial witness, who was then a fellow gang member, to shake the defendant's hand, while informing the witness (the fellow gang member) that defendant was "the one who took care of it,"—referring to the shooting of a rival gang member, leading to the handshake as a show of respect to defendant—was admissible for its effect on the witness, and was not hearsay (see *id.* at ¶¶ 74-88); and *People v. Griffin*, 2022 Ill App (1st) 190499, ¶¶ 39-43 (holding that the complaining witness's testimony that, in responding to a police officer's question whether she knew where the gun was, she responded, "Yes, I did," was not hearsay because her statement was not offered for the truth of the matter asserted in her statement, but rather to explain the subsequent conduct of the police in finding the gun; and similarly holding that when the complaining witness told the police officer that, there was a gun in the apartment and where the gun was, provided "a permissible recounting of the steps of [the officer's] investigation leading to his discovery of the gun in the bedroom and the ultimate arrest of the defendant." *Id.* at ¶ 43.

Investigatory Procedures

Though sometimes incorrectly referred to as an exception to the hearsay rule, the "investigatory procedures" or the "course of investigation" doctrine, allows the admission of evidence of the investigation performed by law enforcement officers, which includes interviews and conversations with witnesses, even where an inference is created that officers received and acted on the information related—as long as the contents of such interviews or conversations are not disclosed.

For a discussion of "the course of investigation" doctrine, see *People v. Risper*, 2015 IL App (1st) 130993, ¶¶ 39-42 (discussing cases in explaining how testimony recounting steps taken in a police investigation does not violate either the hearsay rule or a defendant's sixth amendment right to confront witnesses against him, as long as the substance of statements made by nontestifying witnesses to an officer in the course of investigation is not disclosed to the jury). See also *People v. Ochoa*, 2017 IL App (1st) 140204 (citing cases and emphasizing "distinction between an officer testifying to the fact that he spoke to a witness without disclosing the contents of that conversation and an officer testifying to the contents of the conversation," citing *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993)).

See also *People v. Jones*, 153 Ill. 2d 155 (1992) (holding that a police officer may testify to investigatory procedures, including the existence of conversations, as long as the substance of conversations does not go to the very essence of the dispute); *People v. Simms*, 143 Ill. 2d 154, 174 (1991) (holding that a police officer "may testify about his conversations with others, such as victims or witnesses, when such testimony is not offered to prove the truth of the matter asserted by the other, but is used to show the investigative steps taken by the officer. Testimony describing the progress of the investigation

is admissible even if it suggests that a nontestifying witness implicated the defendant."); *People v. Johnson*, 116 Ill. 2d 13 (1987) (though an officer's testimony recounting steps taken in the course of an investigation may be admissible without violating a defendant's constitutional rights, detective's testimony that after his arrest codefendant implicated defendant and said defendant was the gunman constituted hearsay); *People v. Davison*, 2019 IL App (1st) 161094 (detective's testimony that after talking to others he began looking for three persons, including defendant, was not hearsay because there was no testimony about the source of the information, and defendant's right under the confrontation clause of the sixth amendment was not violated); *People v. Sardin*, 2019 IL App (1st) 170544 (evidence that detective talked to the mother of an eyewitness and then returned to the police station and generated a photo array that included defendant did not violate the rule against hearsay or the confrontation clause, for there was no evidence about what the mother had said); *People v. Short*, 2020 IL App (1st) 162168, ¶¶ 68-73 (detective's testimony that he investigated defendant after talking to codefendant may have implied that codefendant implicated defendant, but it was proper because there was no testimony about the content of any statement by the codefendant).

See also *People v. Griffin*, 2022 IL App (1st) 190499, ¶¶ 39-40 (holding that victim-witness's statement to police about the location of the shotgun that defendant had pointed at her was not an inadmissible prior consistent statement, but rather predicate testimony that explained the subsequent conduct of police officers). See also *People v. Harris*, 2022 IL App (1st) 192509 (where a detective's testimony about statements to him by a mother and her son about a sweatshirt on the son's bed not belonging to the son—where the evidence showed the defendant had fled to their home after a shooting and that DNA evidence on the inside collar of the sweatshirt implicated the defendant as the person who wore the sweatshirt that was similar to that worn by the shooter—exceeded the limits of the course of investigation doctrine, particularly since the mother had not testified during the trial, but holding that the improperly admitted statements were harmless beyond a reasonable doubt because a forensic DNA analyst's testimony about the DNA evidence on the sweatshirt firmly established the connection between the defendant and the sweatshirt). *Id.* at ¶¶ 61-79.

Decisions in the Seventh Circuit Court of Appeals are somewhat similar to those in Illinois, but with a twist. Consistent with Illinois decisions, in *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004), the court rejected the course of investigation rationale for admitting evidence when the evidence was not relevant except for its truth. In contrast, in its recent decision in *United States v. Law*, 990 F.3d 1058 (7th Cir. 2021), the court approved the admission in evidence of "copious" statements made to two Department of Homeland Security agents by two women alleged to be victims of sex trafficking. Citing a number of previous Seventh Circuit opinions which held that "statements offered to 'establish the course of the investigation,' rather than to prove the truth of the matter asserted, are nonhearsay and therefore admissible" (*Law*, at 1061), the court reasoned that

> "this complex investigation required explanation and context. It involved several businesses, multiple witnesses, and spanned two continents. This case differs from *Silva* where the government sought to admit evidence describing the "course of investigation" that consisted solely of statements spoken by a non-testifying informant." *Id.* at 1063. The court further reasoned that "unlike the testimony in *Silva*, the contested statements by the investigators here were corroborated by the testimony of [the two women]. So even if the government offered the testimony for its truth, it would have been cumulative of other uncontested evidence. Although the course of investigation evidence in this case was ample, its admission was not a subterfuge for the government to place impermissible hearsay before the jury, and the probative value of the evidence in explaining the complex investigation outweighed any unfair prejudice to Law." *Id.*

The court also pointed out that the district court "repeatedly and correctly instructed the jury that the portions of the agents' testimony on these subjects could be considered only for the

limited purpose of explaining the investigation and not for their truth." *Id.*

Statements Offered for Context

It often occurs that defendants in criminal cases object, on the basis of hearsay, to statements made by police officers while interrogating defendants. Four decisions of the appellate court, where the court addressed the admissibility of statements made by police officers while questioning defendants, are illustrative and demonstrate a somewhat different approach to the issue. Seventh Circuit decisions also provide insight.

In *People v. Theis*, 2011 IL App (2d) 091080, ¶ 33, the Second District held that "an out-of-court statement that is necessary to show its effect on the listener's mind or explain the listener's subsequent actions is not hearsay." It then went on to note that, without the detective's statements, "defendant's answers would have been nonsensical."

In *People v. Hardimon*, 2017 IL App (3d) 120772, the Third District held that "[g]enerally, statements made by an investigating officer during an interview with the suspected defendant are admissible if they are necessary to demonstrate the effect of the statement on the defendant or to explain the defendant's response." *Hardimon*, at ¶ 36. The *Hardimon* court went on to note, however, that, in this case, the final two-thirds of the interview contained statements of the detectives that were denied by the defendant and "served only to impermissibly bolster the State's case and inflame the passions of the jury." *Id.* at ¶ 37. The court thus held that the statements made by the detectives in the final two-thirds of the interview with the defendant should not have been admitted.

In *People v. Davilla*, 2022 IL App (1st) 190882, ¶¶ 47- 77, citing and relying on *Hardimon*, the appellate court reversed the defendant's murder and attempted murder convictions based on detectives' statements to the defendant during a videotaped interrogation that was played for the jury. Holding that the detectives' statements were more prejudicial than probative, the appellate court reasoned that the statements: vouched for the credibility of the victim of the attempted murder offense; asserted personal opinions, thus asserting official imprimatur on the victim's testimony; were the equivalent of prohibited prior consistent statements at a trial; bolstered the victim's trial testimony; and were likely to carry more weight because of their repetitive quality and the detectives' status as authority figures. The court also reasoned that some of the detectives' statements misled the jury into believing there were additional witnesses against defendant who were either unwilling or unavailable to testify. The court also concluded that the detectives' statements diminished the relevant and more probative portions of defendant's statements in the video.

Finally, in *People v. Whitfield*, 2018 IL App (4th) 150948, ¶ 47, the Fourth District held that "[h]earsay is not involved where a challenged statement 'is admissible not for its truth, but for its effect on the listener.' *People v. Britz*, 112 Ill. 2d 314, 320, 493 N.E.2d 575, 578 (1986). In other words, '[a]n out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is not hearsay and is admissible.'" *Whitfield*, at ¶ 47. Citing both *Theis* and *Hardimon*, the *Whitfield* court went on to note that its decision is "mostly consistent" with those decisions, but it differed with the holdings in those cases insofar as they allowed admissibility of the questioning officer's statements only "when they are 'necessary' to show the effect of the statement on the defendant or to explain the defendant's subsequent actions." *Whitfield*, at ¶ 48. The court's disagreement with the other holdings was based on their requirement of "a higher degree of probativeness regarding an officer's statements or questions through their use of the word 'necessary.'" *Id.* The *Whitfield* court explained:

> "We find that questions and statements by police officers during a defendant's interrogation may still possess probativeness where they are simply 'helpful,' although perhaps not essential or 'necessary,' to a jury's understanding of the defendant's responses or silence." *Id.*

Seventh Circuit decisions are in agreement with the general holdings of Illinois decisions: When out-of-court statements are offered to provide context for other admissible statements, they are not hearsay because they are not admitted for their truth. *See e.g.*, *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012) (citing other cases and holding that recorded statements of a confidential informant admitted into evidence were not

hearsay because they provided context for defendant's responsive statements in sale of crack cocaine prosecution, and thus did not violate the confrontation clause under the analysis in *Crawford*); *United States v. Norton*, 893 F.3d 464 (7th Cir. 2018) (informant's recorded statements provided context for the statements and actions of other participants in the conversations); *United States v. Fernandez*, 914 F.3d 1105 (7th Cir. 2019) (although ultimately deemed to be harmless, holding that trial court's restriction of cross-examination of police officer about his side of the interrogation of a key witness against defendant was error for it affected the ability of defendant to establish the full content and context of the witness's changing stories); *United States v. Jackson*, 940 F.3d 347 (7th Cir. 2019) (citing *Foster* and *United States v. Gaytan*, 649 F.3d 573 (7th Cir, 2011) in holding that the recorded statements of a non-testifying confidential source provided context for defendant's statements and did not trigger a confrontation clause violation). See also *United States v. Lewisbey*, 843 F.3d 653 (7th Cir. 2016) (holding text messages received by defendant were not hearsay for they provided context for his own messages), and *United States v. Smith*, 816 F.3d 379 (7th Cir. 2016) (by using examples of conversations between hypothetical informant and defendant, eschewing "context" and holding that statements were neither hearsay or testimonial statements).

But note the Seventh Circuit's rejection of "context" in *United States v. Pulliam*, 973 F.3d 775 (7th Cir. 2020) (though affirming defendant's conviction of possession of a firearm by a felon based on harmless error, holding that it was error for the district court to admit the testimony of police officers that they went to the location from which the defendant fled and disposed of a handgun, based on a dispatcher's report about suspected drug sales at that location, because the reason why the officers went to that location was not disputed at trial and had no probative value concerning the charge of possessing a gun).

The takeaway from the above-cited cases: Statements made by police during interrogation of a defendant are proper to show the effect on the defendant and to provide context for the defendant's response. But statements that unduly vouch for the credibility of a prosecution witness or assert the officer's personal opinions about a witness's credibility should not be permitted and may constitute reversible error.

Questions and Commands Are Not Hearsay

Citing its own precedent and that of other federal circuits, the Seventh Circuit Court of Appeals pointed out that a *question* is neither a "statement" nor an "assertion" under Rule 801(c). *U.S. v. Love*, 706 F.3d 832 (7th Cir. 2013) (quoting the 1972 advisory committee's note to FRE 801(a) that "nothing is an assertion unless intended to be one," in holding that a question is not hearsay).

In contrast, *United States v. Pulliam* (cited in the last paragraph of the heading just above) provides an example of a situation where a question by a defendant while being interviewed by police constituted a statement and thus was properly excluded as inadmissible hearsay. In that case, involving defendant's possession of a handgun that police observed him throw away while he fled from them, defendant denied possession of the gun and asked "What gun?" In holding that the district court properly excluded that statement, the 7th Circuit reasoned that "'what gun,' in context, reads as a substantive assertion meant to deny knowledge rather than a question meant to elicit a response." *Pulliam*, at 783-84.

Likewise, in *Baines v. Walgreen Co.*, 863 F.3d 656 (7th Cir. 2017), the Seventh Circuit held that commands are not hearsay, for "statements assert propositions that may be true or false. They are distinct from other forms of communications, such as questions or commands. [A] command is not hearsay because it is not an assertion of fact." *Baines*, 706 F.3d at 662, citing *United States v. White*, 639 F.3d 331, 337 (7th Cir. 2011).

Effect of Not Objecting to Hearsay

"It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect." *Jackson v. Board of Review of Dept. of Labor*, 105 Ill. 2d 501, 508-09 (1985) (citing other supreme court cases for the principle). For recent cases demonstrating forfeiture for not objecting to hearsay, see *In re C.J., a Minor*, 2020 IL App (2d) 190824, ¶50, and *In re Marriage of Francesco Potenza and Vanessa Wereko*, 2020 IL App (1st) 192454, ¶¶ 64-67, where the *pro se* respondent left the courtroom

during a hearing, despite the trial court's admonition that issues would be resolved without her input if she left.

Author's Commentary on Ill. R. Evid. 801(d)(1)

FRE 801(d)(1)(B) Not Adopted

FRE 801(d)(1)(B) was not adopted. That is so because Illinois does not allow prior consistent statements to be admitted substantively (*i.e.*, for the truth of the statement), but only for rebuttal or rehabilitative purposes, consistent with the common law rule. See IRE 613(c), which is Illinois' counterpart to FRE 801(d)(1)(B), and the commentaries addressing the rule's non-adoption *infra*.

IRE 801(d)(1)(A)—Based on an Illinois Statute—Applies Only in Criminal Cases

In federal courts, **FRE** 801(d)(1)(A) applies both to civil and criminal cases. In Illinois, **IRE** 801(d)(1)(A)(1) is substantively identical to **FRE** 801(d)(1)(A), except that the Illinois rule does not apply to civil cases. The Illinois rule applies only to *criminal* cases. Thus, in Illinois *civil* cases, prior inconsistent statements under oath have impeachment value, but they are not substantively admissible as "not hearsay."

Both **IRE** 801(d)(1)(A)(1) and **IRE** 801(d)(1)(A)(2) merely codify section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1), which is provided in the appendix to this guide at **Appendix I**. Because that statute predates the adoption of the Illinois Rules of Evidence, the codified rules do not represent any change in Illinois law. Nevertheless, in criminal cases, **IRE** 801(d)(1)(A)(2) significantly expands the scope of **FRE** 801(d)(1)(A).

Significance of the 801(d)(1)(A) Rules

The 801(d)(1)(A) rules—both the federal and Illinois versions—abrogate prior common law principles. That is so because, under the common law, evidence of prior inconsistent statements was admissible only for impeachment purposes (*i.e.*, only to cast doubt on the credibility of the witness's testimony). They were not admissible substantively (*i.e.*, to prove the truth of the matter asserted). The 1975 introduction of the federal evidence rules altered that. FRE 801(d)(1)(A) provided not only impeachment value to prior inconsistent statements made under oath but also gave them substantive weight. The 1984 addition of section 115-10.1 to the Code of Criminal Procedure did likewise in Illinois criminal cases, but it also provided even more instances in which prior inconsistent statements are admissible substantively in Illinois criminal cases (as is illustrated in codified IRE 801(d)(1)(A)(2)).

The problem of turncoat witnesses was a primary basis for the introduction of FRE 801(d)(1)(A); it was an even greater incentive for the introduction of section 115-10.1 in Illinois.

IRE 801(d)(1)(A)(1): Prior Inconsistent Statements under Oath

In criminal cases (but not in civil cases), IRE 801(d)(1)(A)**(1)**, like FRE 801(d)(1)(A), allows substantive admissibility (*i.e.*, admissible to prove the truth of the matter asserted) for a witness's prior inconsistent statements made under oath. Under the rule, such statements are admissible as "not hearsay," and the trier of fact is thus free to place weight on what the witness testifies to in court *or* on the inconsistent statement the witness previously gave under oath.

Example of an Application of Both IRE 801(d)(1)(A)(1) and FRE 801(d)(1)(A) where a Prior Inconsistent Statement is Given under Oath

The recent Seventh Circuit decision in *United States v. Shaffers*, 22 F.4th 655 (7th Cir. 2022), illustrates an application not only of FRE 801(d)(1)(a) but also of its identical counterpart (in criminal cases) in IRE 801(d)(1)(a)(1). In that case, a prosecution for possession of a weapon by a convicted felon, a witness, who had been a passenger in defendant's car where a gun attributed to defendant was recovered by police, testified under oath before a federal grand jury that she had not known there was a gun in the car, that she had seen the police remove the gun from under the driver's seat, and that the gun was not hers. At trial, the witness disclaimed any memory of the events in question or of testifying before the grand jury. Over a defense objection, the district court permitted her grand jury testimony to be used as substantive evidence under FRE 801(d)(1)(A) (which, in a criminal case, is identical to IRE 801(d)(1)(A)(1)), and she read a transcript of that testimony to the jury. Defendant's counsel then cross-examined her. He inquired into her lack of memory and asked if it was because she had been

drinking on the night of her arrest. Counsel also questioned whether she was claiming not to remember anything because she feared prosecution. And he asked her to confirm that the government was paying for her airline ticket and hotel during the trial, which she did.

On appeal from his conviction, in response to defendant's contention that the district court's decision allowing the grand jury testimony as substantive evidence violated the Confrontation Clause, the circuit court held that admission of the witness's grand jury testimony did not violate the Confrontation Clause, because defendant had an opportunity to cross-examine the witness and expose weaknesses in her answers to the jury. In support of its holding, the Seventh Circuit cited numerous United States Supreme Court and Seventh Circuit decisions justifying the admission of prior testimony given under oath at a trial or hearing, where the witness testifies inconsistent withe that prior testimony or, as here, claims memory loss and is subject to cross-examination.

IRE 801(d)(1)(A)(2): Broader Admissibility of Prior Inconsistent Statements

In *criminal* cases, moreover, IRE 801(d)(1)(A)**(2)**, unlike both FRE 801(d)(1)(A) and IRE 801(d)(1)(A)(1), but in conformity with section 115-10.1 (available at **Appendix I**), also gives substantive weight, as "not hearsay," to a prior inconsistent statement—without an oath requirement—of a witness where that prior inconsistent statement narrates, describes, or explains events or conditions about which the witness had *personal knowledge*, when:

> (a) the prior statement is proved to have been written or signed by the witness, or
>
> (b) the witness acknowledges at the relevant proceeding or another proceeding or deposition having made the prior statement, or
>
> (c) the witness's prior statement is proved to have been accurately electronically recorded.

IRE 801(d)(1)(A)(2) has no federal counterpart. As is the case with IRE 801(d)(1)(A)(1), when the requirements of IRE 801(d)(1)(A)(2) are satisfied, the out-of-court statements are admissible substantively as not hearsay, and the trier of fact may give weight either to the witness's testimony in court or to the prior inconsistent statement.

Meaning of "Event or Condition of Which Declarant Had Personal Knowledge"

In *People v. Simpson*, 2015 IL 116512, although the supreme court did not specifically refer to IRE 801(d)(1)(A)(2), by construing the statute upon which the rule is based, the court provided the definitive statement about the meaning of "an event or condition of which the declarant had personal knowledge." The appeal in *Simpson* was from the appellate court's reversal of the defendant's jury-trial conviction for first-degree murder. At trial, after a witness testified to a loss of memory both as to what the defendant had told the witness and as to what the witness had told the police, the State played for the jury a videotape of the witness informing police of the incriminating information the defendant had shared with the witness about the defendant's role in killing the victim. Because defense counsel had failed to object to the State's playing the videotape, on appeal the defendant claimed ineffective assistance of counsel.

The supreme court began its analysis by determining whether the playing of the videotape for the jury, under the circumstances in this case, was error. The court first acknowledged that the statute it was construing—section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1—available at **Appendix I**), the statute upon which IRE 801(d)(1)(A)(2) is based—"appears to be susceptible to two reasonable interpretations and therefore ambiguous." *Simpson*, at ¶ 31.

But the court rejected the State's interpretation that the "event" in question was the defendant's verbal admission to the witness, reasoning that the statute has a settled meaning because the appellate court had interpreted it numerous times and had unfailingly "concluded that the prior inconsistent statement is not admissible unless the witness actually perceived the events that are the subject of the statement or admission." *Id.* at ¶ 32. The court therefore held that the witness's "out-of-court videotaped statement was not given the imprimatur of admissibility by section 115-10.1." In sum, the supreme court held that "in order for a prior inconsistent statement to be admissible under section 115-10.1 of the Code [and by exten-

sion, under IRE 801(d)(1)(A)(2)] the witness must have actually perceived the events that are the subject of the statement, not merely the statement of those events made by the defendant." *Id.* at ¶ 41. In affirming the appellate court's reversal of the defendant's conviction, the court also held that both prongs of the *Strickland* standard for determining ineffective assistance of counsel had been satisfied.

Distinction between Prior Inconsistent Statements under Oath and Those Not under Oath

Given the supreme court's decision in *Simpson*, the meaning of the previously ambiguous phrase, "an event or condition of which the declarant had personal knowledge," is clear. To be admissible substantively under IRE 801(d)(1)(A)(2), a prior inconsistent statement of the witness that was not made under oath must narrate, describe or explain events or conditions about which the witness had "personal knowledge," not a statement narrating what was told to the witness about an event by another—even if the defendant provided the information to the witness.

Cases that illustrate situations where that threshold requirement was not met include *People v. Morgason*, 311 Ill. App. 3d 1005 (2000) (though all other requirements of the statute upon which the rule is based were met, the witness's recorded statement did not narrate events within her personal knowledge, but what was told to her by the defendant, and was therefore improperly admitted); *People v. McCarter*, 385 Ill. App. 3d 919 (2008) (in a handwritten statement and in a videotaped statement, some of what the witness stated was told to her and thus not admissible substantively under the statute (and, by extension, the codified rule), and some of what she stated was personally seen by her and thus was substantively admissible); *People v. Lofton*, 2015 IL App (2d) 130135 (holding that it was error to admit witness's prior inconsistent written statement that contained overheard statements of defendant about the offense, and another witness's prior inconsistent oral statements that contained defendant's statements about the offense as well as statements of others discussing defendant's statements).

On the other hand, appellate court decisions consistently hold that previous inconsistent-under-oath statements of a witness that are based not on the witness's personal knowledge but on what the defendant told the witness are substantively admissible. For examples of such cases that allowed substantive admissibility of prior inconsistent grand jury testimony—where the prior inconsistent statements made under oath were based on what the witness was told by the defendant rather than on what the witness personally perceived—see *People v. Wesley*, 2019 IL App (1st) 170442 (holding that 725 ILCS 5/115.10.1(c)(1) (upon which IRE 801(d)(1)(A)(1) is based) does not require personal knowledge of the offense, so the admission of the witnesses' grand jury testimony about the defendant's telling them that he killed the victim, which was inconsistent with their trial testimony, was proper); *People v. Cook*, 2018 IL App (1st) 142134, ¶ 49 ("there is no personal knowledge requirement for grand jury testimony under section 115-10.1(c)(1)"); *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 37 (same quote as in *Cook*); *People v. Wilson*, 2012 IL App (1st) 101038 (witness's entire prior inconsistent statement made under oath to the grand jury was substantively admissible although it was based in part on what the defendant told the witness; however, portions of audiotape and handwritten statements of the witness that narrated what the defendant told the witness were inadmissible, while portions that narrated what the witness personally perceived were admissible); *People v. Harvey*, 366 Ill. App. 3d 910, 921-24 (2006) (same rulings concerning witnesses' grand jury testimony and their written statements).

But note that prior-inconsistent-under-oath testimony is subject to the double hearsay rule. For an example of a case that holds it was error to admit evidence of a witness's prior-inconsistent-under-oath testimony about statements told to her by another about what the defendant had said concerning the offense, see *People v. Lofton*, 2015 IL App (2d) 130135, ¶¶ 31-32 (holding that prior grand jury testimony, which was inconsistent with the witness's trial testimony, but that related statements told to the witness about what defendant had told that third person, was not admissible under IRE 801(d)(1)(A)(1) or (2), as violative of the rule barring double hearsay or the rule against hearsay within hearsay).

IRE 801(d)(1)(A)(2)(a) Issues

In *People v. Melecio*, 2017 IL App (1st) 141434, because a witness had claimed a loss of memory concerning both the

offense and having provided a written statement about it, the defendant contended that the State failed to prove that the pretrial statement had been "written or signed" by the declarant/witness as required by section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1(c)(2)(A), see **Appendix I**), which is substantially identical to IRE 801(d)(1)(A)(2)(a). *Melecio*, at ¶ 88. Pointing out that the statute (and, by implication, the rule) allows the State to prove the witness's signing the statement by means other than the witness's own acknowledgment, the appellate court rejected the defendant's contention and held that the State had "more than met its burden of proof on this point." *Id.* at ¶ 89. The court also rejected the defendant's contention that, because of the witness's claimed lack of memory about the events surrounding the offense, the State failed to satisfy the personal knowledge requirement of the statute (and the rule). The court reasoned that the statement adequately demonstrated the witness's personal knowledge of the events described therein. *Id.* at ¶ 90.

Next, pointing out that "consistency is measured against a witness's trial testimony, not against other admitted statements" (*id.* at ¶ 92), the appellate court also rejected the defendant's contention that the witness's grand jury testimony should not have been admitted based on the fact that the admission of prior consistent statements is not allowed and the grand jury testimony was consistent with her pretrial statement. Finally, reasoning that he had adequate opportunity to cross-examine the witness, the court rejected the defendant's argument concerning the loss of his right to confront the witness who claimed memory loss.

Appellate Court Advice for Admission of "Acknowledged" Inconsistent Statements under IRE 801(d)(1)(A)(2)(b)

The need for a written statement under IRE 801(d)(1)(A)(2)**(a)** or for a recording under IRE 801(d)(1)(A)(2)**(c)** results in obvious application of those two rules. Where those rules are invoked, the impeaching party will have either a written or a recorded statement that differs from the witness's trial testimony and that may be used to impeach the witness and to admit the impeaching statement substantively. The same is true for a witness who, under IRE 801(d)(1)(A)(2)**(b)**, has previously "at a trial, hearing, or other proceeding, or in a deposition" acknowledged having made an inconsistent statement. In that situation, the impeaching party will have a transcript of the witness's acknowledgment of the prior inconsistent statement. But what about the situation where a witness, who has not previously acknowledged having made an inconsistent statement (whether at trial or pretrial), is sought to be impeached by the party calling the witness and the impeaching party wishes to have the prior inconsistent statement admitted substantively under IRE 801(d)(1)(A)(2)(b)?

In *People v. Brothers*, 2015 IL App (4th) 130644, the appellate court, through Justice Robert Steigmann, who has written extensively about the statutes that give rise to these 801(d)(1)(A) rules, provides the answer. The appellate court does so without referencing the codified rule, referring instead to the statute (725 ILCS 5/115-10.1(c)(2)(B)), which was applied at trial and upon which IRE 801(d)(1)(A)(2)(b) is based.

In *Brothers*, the appellate court recommends that, where it is known that a witness will testify contrary to prior statements, an "acknowledgment hearing" be held outside the presence of the jury before the witness takes the stand. At that hearing, the witness may be questioned about her present testimony and be confronted with her prior statements, and then she may be asked whether she made the prior statements. If the witness acknowledges having made the prior statements, questioning proceeds in the presence of the jury, where similar questioning may occur. If the witness then refuses to acknowledge having made the prior statement before the jury, the questioner will be able to use the record of the witness's acknowledgment from the hearing just concluded. The court further recommends that, where testimony commences before the jury and it is unknown whether the witness will testify contrary to prior statements, an "acknowledgment hearing" be held outside the presence of the jury as soon as the witness deviates from her prior statement. That hearing should be conducted in the same manner as the hearing held before the witness's testimony, with the same effect. *Brothers*, at ¶¶ 67-80. The appellate court emphasizes that, at the "acknowledgment hearing," the witness should be questioned about each inconsistent statement that the party seeks to have acknowledged. *Brothers*, at ¶ 74. And it points out that "the acknowledged statement is still not admissible

until the witness testifies *inconsistently* with it in the presence of the jury once the trial resumes." *Brothers*, at ¶ 77 (emphasis in original).

Later, in *People v. Guerrero*, 2021 IL App (2d) 190364, the appellate court relied heavily on *Brothers* in reversing and remanding the defendant's jury conviction for aggravated battery. The court's reversal was based on the State's substantive admission of statements made to a detective about what a witness had told him about the offense, where the witness denied making the statements and testified that he had not seen the offense and that he had no recollection about it. Noting that 725 ILCS 5/115-10.1(c)(2)(B) (which, again, is the basis of IRE 801(d)(1)(A)(2)(b)), allows the substantive admission of a prior inconsistent statement where the witness acknowledges having made the prior statement, the court concluded that, because the witness had not acknowledged having made the statements to the detective, the substantive admission of his statements was improper. As an aside, the alleged victim of the offense had given police a video recording concerning the offense, so his similar "turncoat" evidence during trial was unaffected by section 115-10.1(c)(2)(B), and was properly admitted under section 115-10.1 (c)(2)(C) of the Code of Criminal Procedure of 1963, which is the basis for IRE 801(d)(1)(A)(2)(c).

Note that the discussion above concerns the *substantive* admission of a prior inconsistent statement under IRE 801(d)(1)(A)(2)(**b**). But prior inconsistent statements—even those that are not written or recorded or acknowledged by a witness—may be used solely for impeachment purposes, with due regard for the specific prohibition in IRE 607 that "the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage." Note, however, that this IRE 607 restriction does not apply where the credibility of the witness is attacked by the party opposing the party who called the witness. And it does not apply where the witness is impeached by the party who called the witness and the prior inconsistent statement is substantively admissible under a rule such as IRE 801(d)(1)(A) and its subdivisions.

Distinguishing Mere Impeachment and Admission of Evidence for Its Substantive Weight

People v. Lewis, 2017 IL App (4th) 150124, provides guidance on the distinction between impeaching a witness called by an opposing party and seeking the substantive admission of a prior inconsistent statement of a witness called by the proffering party (usually the State, in calling a witness who is frequently referred to as a "turncoat witness"). Without referring to IRE 801(d)(1)(A), the appellate court pointed out in *Lewis* that section 115-10-1 of the Code of Criminal Procedure, upon which the codified Illinois rule is based, plays no role where mere impeachment is involved (without the application of IRE 607 principles), and where there is no attempt to have the inconsistent statement admitted substantively. Like *Brothers*, this decision is also noteworthy for Justice Steigmann's observations concerning foundational errors in questioning the witness to be impeached, observations about errors in the testimony of the police officer witness who provided the impeaching evidence, and advice on how to do it correctly.

Effect of IRE 801(d)(1) Rules: Impeachment and Substantive Weight

When their provisions are satisfied in criminal cases, the effect of IRE 801(d)(1)(A)(1) and (2) is to provide, not only impeachment through prior inconsistent statements, but also substantive weight for such statements—in contrast to the earlier (pre-statute) holding in *People v. Collins*, 49 Ill. 2d 179, 194-95 (1971), where the supreme court refused to adopt an early *draft* of what was then FRE 801(d)(1) to extend substantive effect to prior inconsistent statements (as well as those not under oath), while continuing to permit their use only for impeachment purposes—consistent with their treatment under common law.

In plain terms, application of each rule means that the trier of fact is permitted to go beyond solely believing or disbelieving the witness's testimony at the relevant proceeding (which is the consequence of evidence that has only impeachment value), because the trier of fact may give substantive weight even to the witness's prior inconsistent statement. It thus permits a prosecutor, in some cases where such evidence has been admitted, to avoid a directed verdict; and, in all cases where

such evidence has been admitted, to argue that evidence substantively (rather than solely for impeachment purposes) in encouraging the trier of fact to base its decision upon the prior inconsistent statement.

IRE 607's Limitation on Impeaching Party's Own Witness

When prior inconsistent statements are not admitted as substantive evidence, they still have impeachment value (*i.e.*, for the purpose of attacking the credibility of the witness). But when an Illinois party impeaches its own witness (in either a civil or a criminal case), that party must be aware of and abide by the provisions of IRE 607, which prohibits use of a prior inconsistent statement to impeach one's own witness, except where there is "a showing of affirmative damage"—unless the prior inconsistent statement is substantively admissible.

That limitation does not apply under the federal rule, but in Illinois a party's mere disappointment in the testimony of the witness is an insufficient basis for allowing impeachment. In Illinois, the failure of one's own witness to support a party's case is an inadequate basis for impeaching that witness; the witness's testimony must give positive aid to the opposing party's case (again, unless the prior inconsistent statement is substantively admissible). For a discussion of these principles, see *People v. McCarter*, 385 Ill. App. 3d 919 (2008), as well as the *Author's Commentary on Ill. R. Evid. 607*.

Determining that Statements Are "Inconsistent"

Cases relevant to whether prior statements of witnesses are "inconsistent" include: *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989) ("determination of whether a witness' prior testimony is inconsistent with his present testimony is left to the sound discretion of the trial court"); *People v. Sykes*, 2012 IL App (4th) 100769 (trial court has discretion in determining whether a witness has acknowledged making a prior inconsistent statement, and is not affected by witness's attempts to disavow them); *People v. Dominguez*, 382 Ill. App. 3d 757, 770 (2008) (admissibility of prior inconsistent statement is not affected by witness's efforts to explain it; resolution of inconsistencies is for the trier of fact).

In *People v. Vannote*, 2012 IL App (4th) 100798, a split decision, the appellate court construed and applied section 115-10.1 of the Code of Criminal Procedure of 1963 (see **Appendix I**), the statutory basis for IRE 801(d)(1)(A). In that case, the victim of the defendant's alleged offense of aggravated criminal sexual abuse was 9 years old at the time of the offense, and 11 years of age at the time of trial. He testified that he remembered none of the events of the day in question and did not remember a police interview or what he said during it. The trial court admitted into evidence both the police-videotaped interview of the victim, which was played for the jury, and its transcript. On appeal, the appellate court affirmed the conviction, holding that the recorded interview was properly admitted under section 115-10.1. The court relied on cases that held that prior statements do not need to directly contradict testimony given at trial to be considered inconsistent, and that the term "inconsistent" includes evasive answers, silence, or changes in position. The court concluded that the victim's previous statement, recorded the day after the incident, was inconsistent with his trial testimony and sufficient to constitute a prior inconsistent recorded statement. The court also held that there was no confrontation clause violation because the victim was personally present during trial and was subject to cross-examination.

The appellate court decision in *People v. Kennebrew*, 2014 IL App (2d) 121169, provides a thorough analysis concerning the admissibility of prior out-of-court "testimonial" statements under section 115-10.1 of the Code of Criminal Procedure (available at **Appendix I**), when a witness testifies to a lack of memory concerning relevant facts. At issue in *Kennebrew* was the propriety of the admission of out-of-court statements of the then-nine-year-old victim of sexual offenses: statements made to her stepmother and her cousin, and a videotaped statement made to a woman at a children's center. Because the nine-year-old testified that she could not recall statements that she had made about offense-related incidents that had occurred when she was seven years of age, the focus in the case was on whether the out-of-court-statements were inconsistent with the victim's testimony (to satisfy subdivision (a) of the statute), whether the victim was subject to cross-examination concerning the statements (to satisfy subdivision (b) of the statute), and whether admission of the statements violated the confrontation

clause pursuant to the requirements of *Crawford v. Washington*, 541 U.S. 36 (2004).

Relying upon Illinois precedent and decisions of the United States Supreme Court, the appellate court held that "[a] witness's inability at trial to remember or recall events does not automatically render the witness unavailable under the confrontation clause," (*Kennebrew*, at ¶ 35), and that "[d]efendant's decision not to cross-examine [the nine-year-old] did not mean that he did not have the *opportunity* to cross-examine her, which is what the confrontation clause guarantees." (*id.* at ¶ 40 (*emphasis in original*), *see also* ¶ 41). *Kennebrew* is mandatory reading for anyone addressing issues related to the admission of out-of-court statements of a forgetful or uncooperative witness, not only because of its thorough analysis of the issues, but because of its distinguishing the decision in *People v. Learn*, 396 Ill. App. 3d 891 (2009), a decision that the specially concurring justice in *Kennebrew* contended was wrongly decided and should be rejected.

People v. Graves, 2021 IL App (5th) 200104, ¶¶ 33-46, offers a comprehensive discussion concerning *Learn*, which involved the admission of out-of-court statements made to her father and two police officers by a minor who was present to testify, but offered no evidence concerning the defendant's sex offense. *Learn*, with one justice dissenting, reversed the defendant's conviction based on its holding that the testimony of the father and the police officers was improperly admitted. *Graves*, a prosecution for sex offenses on a minor, also had testimony by witnesses who testified about the victim's statements concerning the offense and also resulted in the victim's testimony, but with no evidence from her concerning the offense. Concluding that *Learn* was an outlier and providing a compilation of the numerous appellate court decisions that have ruled contrary to that case, the court ruled that the Confrontation Clause is satisfied by the mere presence of the minor victim as a witness.

In *In re Brandon P.*, 2014 IL 116653, the supreme court held that a three-year-old child was unavailable as a witness in a juvenile court proceeding alleging a sexual offense by the 14-year-old respondent. In that case, the supreme court held that the three-year-old was unavailable to testify because of her youth and her fear, noting that she "could barely answer the trial court's preliminary questions, and then completely froze when the State attempted to begin its direct examination of her." *Brandon P.*, at ¶ 47. The court thus held that the child's out-of-court statements should not have been admitted, though it held that the admission of those statements was harmless beyond a reasonable doubt. It should be noted, however, that *Brandon P.* is a case involving the use of out-of-court statements under section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10; see **Appendix U**), and not under section 115-10.1 (available at **Appendix I**), and thus is not relevant to the hearsay exclusion provided by IRE 801(d)(1). Nevertheless, the case establishes that a witness may be deemed to be unavailable in similar situations in an IRE 801(d)(1) setting, and thus not "subject to cross-examination concerning the statement," as required by both section 115-10.1 and IRE 801(d)(1).

2014 Amendment of FRE 801(d)(1)(B) and Its Non-Adoption in Illinois

Note that **FRE** 801(d)(1)(B), was amended, effective December 1, 2014. That federal rule now has two subdivisions:

> (1) FRE 801(d)(1)(B)**(i)** is identical to what was formerly FRE 801(d)(1)(B), as amended only for stylistic purposes effective December 1, 2011. That subdivision, as before, makes a prior *consistent* statement of a witness *substantively* admissible as not hearsay when offered (in the words of the December 1, 2011 amended, and now current, federal rule) "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper motive in so testifying."
>
> (2) FRE 801(d)(1)(B)**(ii)** is the subdivision that was added effective December 1, 2014. It broadens FRE 801(d)(1)(B) by allowing substantive admissibility as not hearsay of prior consistent statements offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground" (*i.e.*, other than on the basis of recent fabrication or recent improper influence or motive).

What was FRE 801(d)(1)(B) and now is FRE 801(d)(1)(B)(i) has not been adopted in Illinois. That is so because, as stated *supra* in the *Author's Commentary on Ill. R. Evid 801(d)*, under

the heading *FRE 801(d)(1)(b) Not Adopted*, consistent with the common law, Illinois allows such statements to be admitted, but only for rebuttal or rehabilitative purposes, not substantively (*i.e.*, not as "not hearsay" or as a hearsay exception). *See People v. Harris*, 123 Ill. 2d 113 (1988) (to rebut a charge of recent fabrication, consistent statement made prior to the time when the witness had a motive to fabricate is admissible); *People v. Walker*, 211 Ill. 2d 317, 344 (2004) (prior consistent statement is not admissible substantively, but only for the limited purpose of rebutting inferences that the witness is motivated to testify falsely or that the testimony is of recent fabrication); *People v. Johnson*, 2012 IL App (1st) 091730, ¶¶ 57-67 (holding that, because there was no allegation of recent fabrication or recent motive to lie, introduction of prior consistent statements was improper); *People v. Denson*, 2013 IL App (2d) 110652, ¶¶25-29, *reversed on other grounds* in *People v. Denson*, 2014 IL 116231 (defendant's cross-examination concerning witness's testimony about offender's height in deposition taken six years after the murder was more accurate than her trial testimony at trial on that subject and allowed State to properly elicit from witness her statement to police immediately after the offense about offender's height, "to address the improper insinuations raised by the defendant").

Adoption of IRE 613(c) and Inaction Regarding FRE 801(d)(1)(B)(ii)

Note that **IRE 613(c)**, effective on January 1, 2015, was adopted by the supreme court in order to codify the principles that are summarized above and that apply in Illinois—as they are related to **FRE** 801(d)(1)(B) before its amendment (*i.e.*, as related to what is now FRE 801(d)(1)(B)(i)). IRE 613(c)'s specific provisions and its placement as a subdivision of IRE 613, which addresses prior statements of witnesses, demonstrate that prior consistent statements—even those admitted to rebut an allegation of recent fabrication or improper influence or motive—are not substantively admissible as either a hearsay exclusion or an exception to the hearsay rule.

Illinois has not adopted nor have Illinois cases addressed recently added FRE 801(d)(1)(B)(ii). Based on decisions of the supreme and appellate courts that address what is now FRE 801(d)(1)(B)(i), as well as Illinois' refusal to codify that rule as a hearsay exception, it is unlikely that Illinois will adopt that federal rule, for it grants a much broader range of substantive admissibility to prior consistent statements.

In sum, regarding prior consistent statements, the common-law rule continues to apply in Illinois: a prior consistent statement is admissible for rebuttal or rehabilitative purposes if it was made before the existence of an alleged motive to testify falsely or prior to an alleged fabrication; but such a statement is not substantively admissible and thus does not qualify as "not hearsay" (as the federal rule provides) or as an exception to the hearsay rule. Again, the adoption of IRE 613(c) makes those principles clear.

Proper Use of Prior Inconsistent Statements Not Admitted Substantively; Limiting Instructions

It should be emphasized that "the mere introduction of contradictory evidence, without more, does not constitute an implied charge of fabrication or motive to lie." *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 17, quoting *People v. McWhite*, 399 Ill. App. 3d 637, 643 (2010). In *Randolph*, most of the impeachment of a police officer consisted of impeachment by omission, which the appellate court held did not justify the admission of evidence concerning the officer's report. Citing *People v. Lambert*, 288 Ill. App. 3d 450, 461 (1997), the appellate court stated that "[e]ven in cases where prior consistent statements are properly admitted, such evidence must be accompanied by a limiting instruction informing the jury that the evidence should not be considered for its truth, but only to rebut a charge of recent fabrication." *Randolph*, at ¶ 20. The court also pointed out that "it is improper for the State to refer to the prior consistent statements as substantive evidence in closing arguments." *Id.*

IRE 801(d)(1)(B): Prior Identification Evidence

IRE 801(d)(1)(B), which addresses substantive admissibility of evidence of prior identification, though bearing a different number designation from the federal rule, is identical to FRE 801(d)(1)(C) before the latter's amendment solely for stylistic purposes effective December 1, 2011. The Illinois rule does not represent a change in Illinois law because section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12), which is provided in the appendix to this guide at **Appendix**

J, predates the rule and also gives substantive weight to such identification evidence. The Illinois rule, which applies only in criminal cases, is substantively identical to the statute.

In the pre-codification case of *People v. Holveck*, 141 Ill. 2d 84 (1990), in interpreting section 115-12 of the Code of Criminal Procedure, the supreme court held that an out-of-court statement of identification is admissible substantively where the declarant testifies at trial and is subject to cross-examination, even if the declarant fails to identify the defendant at trial. The court noted that in its earlier decision in *People v. Rogers*, 81 Ill.2d 571 (1980), it had held that, in order to be admissible, a prior identification had to corroborate an in-court identification of the defendant, but that case predated the statute's enactment. See also *People v. Bowen*, 298 Ill. App. 3d 829 (1998) (where the out-of-court declarant, who had previously identified defendant, testified at trial that defendant was not the offender, holding that "section 115-12 on its face permits the substantive admission of prior identification statements without regard to whether the witness makes an in-court identification").

Also, in the pre-codification case of *People v. Lewis*, 223 Ill. 2d 393 (2006), again in interpreting section 115-12 (which, it must be stressed, is substantively identical to IRE 801(d)(1)(B)), the supreme court held that the statute requires only that the declarant/witness testify and be subject to cross-examination on the identification statement. The court held that the witness, who on direct examination identified the defendant in-court but offered no direct testimony about her out-of-court identification of him and was not cross-examined on that subject by the defendant, was available for and subject to cross-examination. The court further held that the statute does not require that the declarant "testify to the out-of-court statement before a third party may offer testimony on that matter." Thus, despite the failure of the declarant/witness to give testimony about the out-of-court identification of the defendant, it was proper for a detective to provide testimony concerning her out-of-court identification. Consistent with its holding, the *Lewis* court overruled the contrary holdings in *People v. Bradley*, 336 Ill. App. 3d 62 (2002), and *People v. Stackhouse*, 354 Ill. App. 3d (2004), both of which required a declarant to testify on his or her out-of-court identification before another witness may testify about that identification.

In the post-codification case of *People v. Whitfield*, 2014 IL App (1st) 123135, the appellate court applied *Lewis* in holding that the out-of-court declarant's testimony that he never identified the defendant as the offender did not prevent police officers from testifying that the declarant had made an identification. *Whitfield* also held that testimony by a police officer that three people pointed to the defendant before his arrest did not constitute hearsay, and the testimony was properly admitted for the purpose of showing the conduct of police and the steps in their investigation.

It should be noted that in *People v. Tisdel*, 201 Ill. 2d 210 (2002), the supreme court held that evidence of an out-of-court *non-identification* of a person is substantively admissible, thus reversing the court's previous, contrary decision in *People v. Hayes*, 139 Ill. 2d 89 (1990).

Also, note that in *People v. Temple*, 2014 IL App (1st) 111653, a drive-by shooting case in which one person was murdered and another was shot multiple times, the appellate court rejected the defendant's hearsay objections in approving the admission of pre-arrest statements of eye witnesses and police officers recounting the name of the offender, physical and clothing descriptions of the offender, and descriptions of the car involved in the offense and its route of travel. In doing so, the appellate court cited the supreme court decisions in *People v. Shum*, 117 Ill. 2d 317, 342 (1987) and *People v. Tisdel*, 201 Ill. 2d 210, 217 (2002), and the appellate court decision in *People v. Newbill*, 374 Ill. App. 3d 847 (2007), to justify its holding that both section 115-12 and IRE 801(d)(1)(B) allow, not only evidence of identification, but also testimony concerning the type of descriptive information provided by the witnesses to the offense and police officers in this case.

In *People v. Griffin*, 2022 IL App (1st) 190499, ¶¶ 33-38, defendant contended on appeal that defense counsel was ineffective for not objecting to testimony that the witness-victim had told a police officer that defendant had pointed a gun at her and where the gun was located. He also contended that the trial court had erred in overruling objections to testimony by the police officer that the victim had told him there was a gun

in the apartment and that a gun shown in a video was the gun defendant pointed at her. Noting that the general rule is that a witness may not testify to an out-of-court statement made by that witness or a third party who corroborates the statement or gives testimony about the statement at trial, the appellate court held that the rule does not apply to statements of identification, Citing *People v. Tisdel*, 201 Ill. 2d 210, 219 (2002), the court pointed our that the supreme court defines "statements of identification" broadly to encompass "the entire identification process." *Griffin*, at ¶ 37. Quoting *People v. Anderson,* 2018 IL App (1st) 150931, ¶ 39, which stated, "when admitting a prior identification as substantive evidence under section 115-12, the testimony may include a description of the offense 'only to the extent necessary to make the identification understandable to the jury,' but it may not go beyond that to provide 'detailed accounts of the actual crime.' " *Griffin*, at ¶ 37. To make the identification understandable to the trier of fact, the court held, it was proper to connect the identification of defendant to what she had witnessed defendant do.

People v. Thompson, 2016 IL App (1st) 133648, demonstrates the distinction between a witness's testimony concerning his prior statement of identification, and a witness's testifying about a non-testifying witness's statement that another person told him of the identity of the offender. In *Thompson*, the appellate court approved, as not hearsay under section 115-12 and IRE 801(d)(1)(B), the testimony of a witness to a shooting in which he had identified the names of the offenders to his father. But the court held that the testimony of a police detective that the father, who had not testified at trial, told him that his son had named the defendants as the shooters was inadmissible hearsay, which in this case the court determined constituted harmless error.

In *People v. Zimmerman*, 2018 IL App (4th) 170695, an interlocutory appeal by the State of trial court rulings, the appellate court held that the trial court had properly limited the introduction of identification testimony under both IRE 801(d)(1)(B) and section 115-12. In that case, the trial court ruled that a witness's testimony that she saw the defendant—the former husband of the victim—in the parking lot of the murdered victim's office, shortly after the murder was committed in the victim's office, was admissible. In the hearing on the motion to suppress statements, the witness testified she recognized the defendant as the person she had seen many months after her parking-lot observation, when she saw his photo in a newspaper. The witness had informed her husband of both her original observation and her later recognition of the defendant. She later told another couple of her observations. In addition to allowing the witness to make an in-court identification of the defendant, the trial court ruled that her husband could testify about the witness's identification of the defendant based on the newspaper photo, but the other couple could not testify regarding the witness's later conversation. Rejecting the State's arguments on appeal that the statements made to the other couple were wrongfully excluded because they went to the credibility of the witness's identification and because there is no limit on the number of identification witnesses who may testify, the appellate court held that the testimony of the other couple was properly barred because it was repetitive and cumulative.

Summary of Differences Between Federal and Illinois Versions of Rule 801(d)(1)

The following is provided for the purpose of emphasizing, in summary form, what is stated above concerning the differences between the federal and Illinois versions of Rule 801(d)(1):

(1) although **FRE** 801(d)(1)(A) applies both to civil and criminal cases, **IRE** 801(d)(1)(A) and its subdivisions apply only to criminal cases and not to civil cases;

(2) although **FRE** 801(d)(1)(B)(i) gives substantive weight to a prior consistent statement when used to rebut an allegation of recent fabrication or recent improper influence or motive, Illinois does not have a rule that gives substantive weight to such statements (*i.e.*, that makes them "not hearsay" or subject to an exception to the hearsay rule), but allows such statements only for the purpose of rehabilitating a witness (see **IRE 613(c)**, which makes that manifestly clear); also, Illinois has no counterpart to **FRE** 801(d)(1)(B)(ii);

(3) although **FRE** 801(d)(1)(C) gives substantive weight to identification testimony in both civil

and criminal cases, **IRE** 801(d)(1)(B) provides substantive weight to such testimony only in criminal cases.

For the Committee's views on these rules, see section (5) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

Author's Commentary on Ill. R. Evid. 801(d)(2)

IRE 801(d)(2) is identical to FRE 801(d)(2) before its amendment solely for stylistic purposes effective December 1, 2011, except for (1) the addition of (F) to codify Illinois law, and (2) the omission of the last sentence of both the pre-amended and the current federal rule, because it is inconsistent with Illinois law, which requires the admission of the subdivision (C), (D), (E), and (F) statements to be based on the relationships specified independently of the contents of the statement.

Note that the rule had been labeled "Admission by Party-Opponent." Effective October 15, 2015, however, the Illinois Supreme Court altered the title to read "Statement by Party-Opponent." That title more accurately describes the rule that provides substantive admissibility to party-opponent "statements," which are not necessarily "admissions" to anything, and may not have been against interest when they were made. Note, too, that the title given to revised FRE 801(d)(2), effective December 1, 2011, also refers to "Statements." As opposed to the federal rule's "Opposing Party's Statement," Illinois retains the designation of "Party-Opponent," which has gained common usage.

Effective October 1, 2019, the current title of IRE 801(d)(2) resulted in the supreme court's amendment of Supreme Court Rule 212(a)(2), which addresses the various uses of discovery depositions. That subsection, related to the substantive admission of a deposition of a party-opponent, now refers to "a former statement, pursuant to Illinois Rule of Evidence 801(d)(2)," thus deleting the rule's prior reference to "an admission" and making specific reference to this evidence rule and all its subdivisions.

"Not Hearsay" Nature of Rule 801(d)(2) Statement

As is the case under IRE 801(d)(1), an out-of-court statement that satisfies IRE 801(d)(2) requirements is admitted substantively as "not hearsay" or as a hearsay exclusion, not as an exception to the hearsay rule. Formerly, such statements were admissible substantively as exceptions to the hearsay rule. *See In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998).

As a matter of fact, in *People v. Denson*, 2013 IL App (2d) 110652, *reversed on other grounds* in *People v. Denson*, 2014 IL 116231, noting that the defendant cited to cases that contain holdings that "define coconspirator statements as an exception to the traditional definition of hearsay," the appellate court pointed out that such holdings have "been radically modified by the Illinois Rules of Evidence." The court explained: "Rather than continue to refer to such statements as an exception to the hearsay rule, and thus substantively admissible, the Rules have defined such statements as not hearsay." *People v. Denson*, 2013 IL App (2d) 1106562, ¶ 5, *reversed on other grounds* in *People v. Denson*, 2014 IL 116231.

Co-conspirator's Statements under Rule 801(d)(2)(E)

Some of the issues addressed in *Denson* concerned whether certain statements made by co-conspirators to non-conspirators were substantively admissible under the common law and under IRE 801(d)(2)(E). The appellate court found that some of the statements qualified as statements in furtherance of the conspiracy and thus were substantively admissible, while others were mere narrative and thus were not substantively admissible because they were not made in furtherance of the conspiracy. In *People v. Denson*, 2014 IL 11623, although disagreeing with the appellate court's forfeiture analysis, the supreme court held that "the appellate court's analysis of these statements is not only correct but also factually and legally complete." *People v. Denson*, 2014 IL 11623, ¶ 28. The supreme court therefore affirmed both the appellate court's reasoning and conclusions on these issues.

In *People v. Caraga*, 2018 IL App (1st) 170123, the appellate court rejected the defendant's contention that co-conspirator statements made outside of his presence or without his knowledge should not have been admitted against him. Pointing out that a person's involvement in a conspiracy "may be inferred from all the surrounding facts and circumstances, including his own acts and declarations" (*id.* at ¶ 41), the court held that, where a person is determined to be a co-conspirator, his

absence from the discussion of other co-conspirators in furtherance of the conspiracy does not affect admissibility.

In *People v. Jaimes*, 2019 IL App (1st) 142736, ¶¶ 59-72, the appellate court held that statements made by members of the defendant's gang, which related to the defendant's killing of a rival gang member, were made as part of a conspiracy to kill a rival gang member and in furtherance of the conspiracy, even though the statements were made after the killing. The appellate court reasoned that the statements about the defendant's involvement in the killing was part of a broader conspiracy stemming from the ongoing feud between the rival gangs in which members of the defendant's gang desired to continue harming members of the victim's gang. Because the conspiracy was still ongoing, statements by [three members of the gang] were intended to keep fellow gang members informed of the continuance of the conspiracy and, thus, in furtherance of the conspiracy." *Jaimes*, at ¶ 62.

Relevant Decisions on Statements by Party-Opponent

In a criminal case, the victim of an offense is not a "party." See *People v. Deskin*, 60 Ill. App. 3d 476 (1978) ("In a criminal case, the party opponent to the defendant is the People of the State of Illinois. The victim, though also a complainant, is merely another witness.").

In *People v. Aguilar*, 265 Ill. App. 3d 105 (1994), a decision issued before the codification of Illinois' evidence rulers and before the amendment of "admission" to "statement," the trial court suppressed statements made by the defendant on the grounds that the statements were not "admissions" but were exculpatory. In reversing the trial court's ruling on the State's interlocutory appeal, the appellate court ruled as follows:

> "The hearsay rule is not a basis for objection when the defendant's own statements are offered against the defendant; in such a case the defendant's statements are termed "admissions." Any statement by an accused person, unless excluded by the privilege against self-incrimination or other exclusionary rules, may be used against him as an admission. Illinois courts have relied on Federal Rule of Evidence 801(d)(2) in finding that a defendant's admissions are not excludable as hearsay." *Aguilar*, 265 Ill. App. 3d at 110 (citations omitted).

In *People v. Schlott*, 2015 IL App (3d) 130725, the trial court suppressed a portion of the defendant's 911 call on the basis that what the defendant said during that call violated the holding in *Crawford v. Washington,* 541 U.S. 36 (2004), relating to "testimonial" statements. On the State's interlocutory appeal, the appellate court pointed out that *Crawford*'s focus on testimonial and nontestimonial hearsay "was at all times concerned with *hearsay*." *Schlott*, at ¶ 33 (emphasis in original). Holding that the defendant's statements were not hearsay, the court held that "[a]dmissible nonhearsay does not implicate the confrontation clause." *Id*. Quoting the language of IRE 801(d)(2)(A), the court held that "[t]he statements made by defendant and recorded on the 911 tape are admissions, and are plainly considered nonhearsay under Illinois law." *Schlott*, at ¶ 35.

In *In re Matter of Chance H.*, 2019 IL App (1st) 180053, after an adjudicatory hearing, the trial court determined that a number of children were neglected children due to an injurious environment. On appeal, the mother of the children contended that the trial court erred in its admission of and reliance on the allegedly hearsay testimony of two caseworkers who testified to what the mother had self-reported to them regarding her mental health. Noting that statements of a party-opponent "constitute substantive evidence subject to consideration by the trier of fact," the appellate court held "that the statements testified to by the caseworkers were properly admitted as statements by a party-opponent pursuant to Ill. R. Evid. 801(d)(2)(A) and were not inadmissible hearsay." *Chance H.*, at ¶¶ 49-50.

In *Perez v. St. Alexius Medical Center*, 2020 IL App (1st) 181887, a wrongful death and survival action based on medical malpractice, the appellate court held that the trial court had improperly barred the plaintiff from questioning the defendant based on the defendant's expert witness's disclosure in his interrogatory pursuant to Ill. S. Ct. Rule 213(f)(3), a disclosure that was signed by the defendant's attorney and which was inconsistent with the defendant's defense. In addition to the appellate court's reliance on Rule 213(f)(3) and other supreme court rules, the court relied on IRE 801(d)(2)(A), pointing out that the rule "does not distinguish between 'the party, the par-

ty's current employee, or the party's retained expert.'" *Perez*, at ¶ 68. The dissenting justice did not object to the majority's general principles on this issue; rather, she dissented based on the plaintiff's failure to make an offer of proof, as well as the fact that the jury had heard the content of the Rule 213(f)(3) disclosure at various times during the trial.

In *People v. Sanders*, 2021 IL App (5th) 180339, a prosecution for first degree murder, the State was allowed to impeach the defendant through cross-examination, in his initial trial, during his testimony by questioning him about admissions of guilt he made while being interrogated by police. This form of impeachment was proper under United States Supreme Court decisions, despite the trial court's prior ruling that police had obtained the incriminating statements from the defendant in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial in which this occurred ended in a hung jury. During the subsequent retrial, in which the defendant did not testify, the trial court allowed the State to admit the transcript of the defendant's testimony in the former trial based on the non-hearsay "statement by party-opponent" rule provided by IRE 801(d)(2). The defendant was convicted. In the appeal that followed, the appellate court rejected the State's contention that the testimony of the defendant was justified by this evidence rule, holding that the trial court erred in allowing the State to introduce at trial, as substantive evidence, the transcript of the defendant's prior trial impeachment testimony, which had been excluded as substantive evidence under *Miranda*. The conviction was reversed and the case was remanded for retrial.

Tacit or Implied Admission

A tacit or implied admission by silence by a defendant in a criminal case is an example of an 801(d)(2)(B) statement. The elements of such an admission are: (1) the defendant heard the incriminating statement, (2) the defendant had an opportunity to reply and remained silent, and (3) the incriminating statement was such that the natural reaction of an innocent person would be to deny it. *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003), citing *People v. Goswami*, 237 Ill. App. 3d 532, 536 (1992), which in turn cited *People v. McCain*, 29 Ill. 2d 132, 135 (1963). For an appellate court decision addressing the elements of admission by silence in the context of a will contest case, see *DeMarzo v. Harris*, 2015 IL App (1st) 141766, ¶¶ 24-26 (absent evidence that defendant-attorney heard statement by testatrix that he had drafted her will, which left a good portion of her estate to him, there was no admission by silence based upon his failure to respond).

In *People v. Allen*, 2022 IL App (1st) 190158, in a recorded phone conversation from jail, defendant did not respond to his mother's question, "You innocent, right?" The issue before the appellate court was whether the trial court had properly admitted the recording of defendant's non-response as a tacit admission under IRE 801(d)(2)(B). Holding that the admission of the recording of defendant's silence was error, the appellate court reasoned as follows:

> "Under the tacit admission rule, a defendant's silence is only admissible if made in response to an incriminating statement that would cause an innocent person to *deny* it. In effect, the admission of the recorded phone conversation here between defendant and his mother and his grandmother flips the tacit admission rule on its head and allows for an inference of guilt from defendant's failure to immediately respond *affirmatively* to his mother's nonincriminatory question, 'You innocent, right?'" (Emphasis by the court) *Allen*, at ¶ 74.

In *People v, Seritella*, 2022 IL App (1st) 200072, ¶¶ 101-116, the appellate court distinguished *Allen* in several ways, in holding that the defendant's pause in denying the deceased mother's telephonic accusation that he had killed her son and wanted to know why constituted a tacit admission. Reasoning that defendant had relied only on IRE 403 in his briefs and tactfully did not argue the tacit admission issue, the majority held that defendant had forfeited the issue on appeal. One justice dissented on the forfeiture issue but agreed with the court's affirmance of defendant's conviction for first degree murder.

IRE 801(d)(2)(D): Scope of Employment Approach

Adoption of IRE 801(d)(2)(D) resolves the split in the Illinois Appellate Court about which approach should apply to make an agent's statement admissible against the principal: the traditional agency approach (which includes the requirement that the agent be given authority to speak) or the scope of

employment approach (which is consistent with the federal rule and does not require specific authority to speak). See *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060 (2001), for a discussion concerning the split and its preference for the federal rule. The adoption of the rule, which includes subdivision (D) without the requirement of authority to speak, makes it clear that authorization is unnecessary. *See also* section (6) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101.

COMMENTARY

Author's Commentary on Ill. R. Evid. 802

IRE 802 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for language specific to Illinois. This rule provides the specific authority for the inadmissibility of hearsay—except when a hearsay exception or exclusion applies.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

[**IRE 803(1) is Reserved** – Illinois has not adopted FRE 803(1) Present Sense Impression exception to the hearsay rule]

COMMENTARY

Author's Commentary on Non-Adoption of Fed. R. Evid. 803(1)

The present sense impression exception to the hearsay rule, which FRE 803(1) provides, has not been adopted in Illinois. For that reason, there is no IRE 803(1); that rule designation has been reserved.

In *Estate of Parks v. O'Young*, 289 Ill. App. 3d 976 (1997), the appellate court noted that it was unaware of any Illinois case that applied the present sense impression exception; *see also People v. Stack*, 311 Ill. App. 3d 162 (1999) (citing *O'Young*). See *also People v. Leonard*, 83 Ill. 2d 411 (1980) (noting that the State urged the correctness of the admission of the controverted statement by the deceased as a present sense impression but, without specifically rejecting the State's claim, holding that "absent some evidence of the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, the testimony relating the out-of-court statement should be excluded," and ultimately finding that the statement was properly admitted as a spontaneous declaration); *People v. Smith*, 127 Ill. App. 3d 626 (1984) (though not using the phrase "present sense impression," holding that "[t]here is no exception to the hearsay rule which allows admission of 'a declaration of a witness to the event as to what he saw happen,'" but admitting part of a since-deceased person's statement as a spontaneous declaration).

For those seeking added justification for Illinois' non-adoption of the present sense impression exception to the hearsay rule, see Judge Richard Posner's concurrence in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2014).

Despite the above-described authority justifying the non-adoption of this hearsay exception, note that in *People v. Alsup*, 373 Ill. App. 3d 745 (2007), the appellate court relied on the present sense impression exception, as well as the business records and the excited utterance exceptions, to approve admission of ISPERN radio communications during a police chase of a stolen vehicle that resulted in a homicide. In *People v. Abram*, 2016 IL App (1st) 132785, the trial court admitted a tape of officers pursuing a car from which objects, later determined to be cocaine, were thrown, Noting the absence of a present sense impression exception in Illinois' codified rules, and considering and rejecting the holding in *Alsup*, the appellate court concluded that the tape's admission could not be justified by the present sense impression exception to the hearsay rule. But the court went on to consider the applicability of the excited utterance exception, and held that the tape was admissible under that exception. The court further reasoned that, even if that exception did not apply, there was no resulting prejudice "as no information was provided in the recording that was not also established through the live testimony" of the officers. *Abram*, at ¶ 76.

In addition to the excited utterance exception, for an alternative (non-substantive) method for introducing such evidence, see the Illinois Supreme Court decision in *People v.*

Banks, 237 Ill. 2d 154 (2010) (approving admission of a series of flash messages over police radios, holding that "admission of an out-of-court statement that is not offered to prove the truth of the matter asserted but rather to explain the investigatory procedure followed in a case is proper").

See also *People v. Lacey*, 93 Ill. App. 2d 430 (1968), a decision not related to the present sense exception to the hearsay rule, where, in upholding the admission of a sheriff's radio logs, the appellate court stated, "As an exception to the hearsay rule, it has been repeatedly held that records kept by a public officer, dealing with his official activities and either required by statute or reasonably necessary for the performance of the duties of the office, are admissible to prove the matters recorded."

FEDERAL RULES OF EVIDENCE

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

ILLINOIS RULES OF EVIDENCE

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(2)

IRE 803(2) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. This exception to the hearsay rule, labeled as the "excited utterance" exception, generally has been referred to in Illinois cases as the "spontaneous declaration" exception.

Rule's Common-Law Roots

For case interpretation, see *People v. Sutton*, 233 Ill. 2d 89, 107 (2009) ("there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence"). See also *People v. Williams*, 193 Ill. 2d 306, 352 (2000); *People v. Damen*, 28 Ill. 2d 464 (1963); and *People v. Burton*, 399 Ill. App. 3d 809 (2010).

In *People v. Stiff*, 391 Ill. App. 3d 494 (2009), in approving the admission of statements made by the victim who had run a significant distance after being set afire, the appellate court cited other decisions holding that time since and distance from an incident are not dispositive in determining whether "it is reasonable to believe that the declarant acted without thought, or whether there existed the possibility that the declarant has deliberated and made a false statement."

See also *People v. Connolly*, 406 Ill. App. 3d 1022 (2011), where, in reviewing a conviction for domestic battery, the appellate court held that (1) the out-of-court incriminating statements of the defendant's wife qualified as excited utterances and sufficiently justified the conviction, despite the wife's contrary testimony at trial, and (2) the wife's excited utterance was not a "testimonial statement" and thus did not violate the confrontation clause as interpreted by *Crawford v. Washington*, 541 U.S. 36 (2004).

Sampling of Rule's Post-Codification Application

For a case applying the rule's hearsay exception, see *People v. Herring*, 2018 IL App (1st) 152067, ¶¶ 68-69 (holding that tape of a 911 call by the mother of a homicide victim, after seeing her son's body on the ground, was sufficiently startling to justify admission under the hearsay exception).

In *People v. Perkins*, 2018 IL App (1st) 133981, the appellate court determined that two of three statements made by the victim concerning the defendant's shooting her in the face

qualified as excited-utterance exceptions to the hearsay rule. Nevertheless, the court held that admission of the statements violated the defendant's sixth amendment right to confrontation. The court reasoned that the victim had been taken from the scene of the shooting and she had been in the hospital for about one and a half hour before making the first statement, and that the defendant had already been taken into custody when she made the statement. The court therefore concluded that "the primary purpose in questioning [the victim] was not to determine if there was an ongoing emergency, since they already had defendant in custody for the shooting, but to establish or prove past events to identify or convict the perpetrator." *Perkins*, at ¶ 78. The court therefore held that the statements of the victim, who died nine days later, were testimonial and therefore violated the defendant's sixth amendment rights. *Id.* at ¶¶ 75-78. The appellate court, however, ultimately allowed admissibility of all three statements of the victim under the forfeiture-by-wrongdoing exception to the hearsay rule. *Id.* at ¶¶ 81-88.

In *People v. Gabriel Feliciano*, 2020 IL App (1st) 171142, in a jury trial for first degree murder, home invasion, and robbery, the trial court admitted numerous statements of the 94-year-old victim that "Gabriel did this to me" or that "Gabriel" had beaten him up. The victim was found on his bedroom floor trapped under a tall dresser on top of him, brutally beaten, with injuries that indicated they had occurred one or two days before. He died in the hospital 41 days after his removal from his home. On appeal, defendant argued that the victim's statements "were inadmissible because the startling occurrence of being found had passed by the time [the victim] made the statements." *Id.* at ¶ 85. He also contended that the statements were inadmissible "statements to [a police officer] and the medical personnel in particular were inadmissible because they were testimonial statements, as they were made in response to an interrogation intended to collect information for a future prosecution." *Id.*

In first responding to defendant's confrontation-clause argument concerning the admissibility of the victim's statements to a police officer and to medical personnel, the appellate court discussed the victim's numerous statements, noting that the victim was facing an ongoing emergency, that his statements were necessary to resolve the present emergency, that his statements were made frantically, and that he "was not strictly referring to past events, as his statement that he was beaten by someone was necessary to describe his present condition, which further provided context necessary to receive assistance." *Id.* at ¶ 93. The court noted that defendant had not been apprehended when the statements were made, and cited *People v. Sutton*, 233 Ill.2d 89, 115-16 (1989), in concluding that the victim's "statements were not made to provide information for a future prosecution and therefore were not testimonial and do not implicate the confrontation clause." *Feliciano*, at ¶ 98.

In response to defendant's contention that the spontaneous declaration exception to the hearsay rule was inapplicable because there was too much time between the startling events that caused the victim's injuries and his one-to-two-day statements to police and medical personnel, the appellate court relied on *People v. Gacho,* 122 Ill. 2d 221, where there was a 6½ hour delay in naming the offender by the victim of a shooting who was found in the trunk of a car with the dead body of another shooting victim. The appellate court equated the victim's statement in this case to that of the victim in *Gacho*, reasoning that "during this extremely painful and traumatic period of time, the victim likely could not have fabricated a story regarding who put him in that situation." *Feliciano*, at ¶ 107. Finally, in response to defendant's contention that statements of the victim were made in response to questions, the appellate court cited the holding in *People v. Williams*, 193 Ill. 2d 306, 352 (2000), that "the fact that a statement was made in response to a question does not necessarily destroy spontaneity." *Feliciano*, at ¶ 101.

For an example of a decision where the hearsay exception did not apply, see *People v. Denis*, 2018 IL App (1st) 151892, ¶¶ 71-75 (holding that statements by the victim of sexual assaults when she was seven-years old, made to her mother during an argument more than 10 years after the offenses, were improperly admitted because the excitement of the occurrences no longer predominated and thus did not meet the requirements of the excited utterance exception).

For an example of a decision of the Seventh Circuit where the hearsay exception did apply, see *United States v. Graham*

___ F.4th ___, No. 19-2373 (7th Cir. August 29, 2022) (holding that the admission at trial of police body cameras that captured videos of a woman in a hotel parking lot shouting that she had been a victim of prostitution and that the defendant was holding a 19-year old girl as a prostitute did not violate the confrontation clause, because the declarant, who did not testify at trial, did not make testimonial statements, but rather provided spontaneous declarations to responding police officers, which indicated that the primary purpose of the police encounter was to respond to an ongoing emergency).

Effect of Questioning on Spontaneity

In *People v. Williams*, 193 Ill. 2d 306, 353 (2000), the supreme court stated: "Although a statement made in response to persistent interrogation might not be admitted under the spontaneous declaration exception (see, *e.g., People v. Sommerville*, 193 Ill.App.3d 161, 174-75 (1990)), the fact that a statement was made in response to a question does not necessarily destroy spontaneity (see, *e.g., People v. Smith*, 152 Ill.2d 229, 260 (1992))." In *Smith*, the supreme court stated: "The proper question is whether the statement was made while the excitement of the event predominated." *Smith*, 152 Ill.2d at 260.

In *People v. Morales*, 2021 IL App (2d) 190408, applying the excited utterance exception, the appellate court upheld the admission of 33 seconds of a domestic violence victim's call to a 911 operator, over the defendant's objection based on the direct result of questioning by the 911 operator. Citing other decisions where the exception applied despite questioning (including *Williams* and *Smith*), the appellate court held that the victim remained under the influence of the startling event when she made the call, and the operator's questioning did not destroy spontaneity.

Requirement that Declarant Have Personal Knowledge of the Matter

Note that "there is a caveat to the spontaneous declaration exception of the hearsay rule that the declarant must have had an opportunity to observe personally the matter of which he speaks." *People v. Hill*, 60 Ill. App. 2d 239, 248 (1965). For a recent application of that principle, see *People v. Garner*, 2016 IL App (1st) 141583, ¶¶ 47-52 (finding error in admission as excited utterances statements of mother that implicated her daughter in killing her granddaughter ("she killed my baby," "I can't believe she would do this," and "I can't believe she did this"), where mother had not personally witnessed the acts that constituted the murder offense, but holding that the admission of the evidence was harmless error).

Consequence of "Availability of Declarant Immaterial"

As it relates to this rule and all the other 803 rules, note the significance of the immateriality of the availability of the out-of-court declarant. That immateriality means that if the out-of-court declarant is on the witness stand, he or she may testify to the out-of-court statement. It also means that whether or not the out-of-court declarant testifies, a person who heard the statement may testify about the declarant's Rule 803 statement.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or

(B) a statement of declarant's then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(3)

The combination of IRE 803(3) and subdivision (A) is identical to FRE 803(3) before the latter's amendment solely for stylistic purposes effective December 1, 2011. IRE 803(3)(B) (concerning the non-admissibility of one declarant's state of mind, emotion, sensation, or physical condition to prove another declarant's state of mind, emotion, sensation, or physical condition) is added to the Illinois rule merely to clarify what is implicit in the federal rule and explicit in Illinois. For the substantive changes that this rule represents in Illinois law, see the first sentence in bold under the final heading of this commentary, entitled "Substantive Changes in Illinois Law," and the discussion that follows.

Shepard v. United States: Exclusion of Statements of Memory or Belief as Related to IRE 803(3)(A)

The exclusion from the hearsay exception of "a statement of memory or belief to prove the fact remembered or believed" in IRE 803(3)(A) is best illustrated by *Shepard v. United States*, 290 U.S. 96 (1933). In that case, the defendant Dr. Shepard, a major in the medical corps of the army, was convicted of murdering his wife by poisoning her with bichloride of mercury contained in a bottle of whiskey from which she had drunk. Evidence was presented at trial that, while she was ill in bed two days after collapsing, the victim asked her nurse to retrieve a whiskey bottle from the defendant's closet. When the bottle was produced, she told the nurse that it was the liquor she had drunk before collapsing; she asked if there was enough left to test for the presence of poison; she said the smell and taste were strange; and then she said, "Dr. Shepard has poisoned me." She died approximately three weeks later. After concluding that the victim's statements were not admissible under the dying declaration exception to the hearsay rule, the issue for Justice Cardozo, writing for a unanimous Supreme Court, was whether the statements were properly admitted under the state-of-mind exception. The answer was "no," explained in these terms, relevant to the IRE 803(3)(A) exclusion:

> "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that,

to the rule against hearsay if the distinction were ignored.

"The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker." *Shepard*, 290 U.S. at 106.

Relevant Cases on IRE 803(3)(B)

For cases relevant to IRE 803(3)(B), see *e.g.*, *People v. Lawler*, 142 Ill. 2d 548, 559 (1991) (evidence of complainant's statement during a telephone conversation with her father—that defendant had a gun and that she could not get away—was improperly admitted where State did not use the statement solely as evidence of complainant's state of mind regarding whether she consented to intercourse, and State's closing argument showed that statement was used as substantive evidence of its contents); *People v. Cloutier*, 178 Ill. 2d 141 (1997) (statements of declarants that defendant displayed victim's body to them in effort to force them to submit to his wishes were inadmissible on issue of whether defendant's sexual conduct with victim was achieved by use of force—defendant was not the declarant and the declarants' statements had no bearing on defendants' state of mind when he killed victim). As the supreme court pointed out in *Cloutier*,

> "Under [the state of mind] exception, an out-of-court statement of a declarant is admissible when that statement tends to show the declarant's state of mind at the time of utterance. [Citation to *Lawler*.] In order to be admissible, the *declarant's* state of mind must be relevant to a material issue in the case." *Cloutier*, 178 Ill. 2d at 155 (emphasis added).

For an appellate court case applying IRE 803(3)(B) in holding that a statement was not admissible under this state-of-mind exception to the hearsay rule, see *People v. Denson*, 2013 IL App (2d) 110652, *judgment reversed on other grounds* in *People v. Denson*, 2014 IL 116231, (holding that the statement was improperly admitted as shown by the General Commentary of the Committee (see the last sentence of the Commentary on IRE 803 on page 6 of this guide):

> "Consistent with prior Illinois law, Rule 803(3)(B) provides that the hearsay exception for admissibility of a statement of intent as tending to prove the doing of the act intended applies only to the statements of intent by a declarant to prove her future conduct, *not the future conduct of another person*.") *People v. Denson*, 2013 IL App (2d) 110652, ¶ 23 (emphasis added by the court).

For a pre-codification case that cites some of the no longer applicable common-law principles, see *People v. Munoz*, 398 Ill. App. 3d 455 (2010) (in defendant's trial for murder, deceased victim's statements that defendant "was jealous of her" and "wanted to know where she was and what she was doing all the time" were not admissible). Though relying on pre-codification common-law principles, *Munoz* and cases it cites (such as *Lawler* and *Cloutier*) are relevant to IRE 803(3)(B) for distinguishing statements showing the state of mind of the declarant (which are admissible) as opposed to the state of mind of another person (which are not admissible).

Statements Admissible to Prove Motive

People v. Hill, 2014 IL App (2d) 120506, an appellate court decision following a murder conviction, discusses the rule, other cases that construe it, the distinction between subdivisions (A) and (B), and the standard of review for the admissibility of this state-of-mind exception to the hearsay rule. In *Hill*, the appellate court approved admission of Post-It notes and another note, all written by the deceased, in which she discussed the defendant's statements and her intent to end her relationship with him. In rejecting the defendant's contentions that the notes were improperly admitted to establish the truth of what the victim had written and to improperly establish the defendant's state of mind as a motive for murdering the victim, the appellate court reasoned as follows:

> "[T]he notes found in the townhouse were relevant to demonstrate decedent's state of mind, and the additional circumstantial evidence presented at trial was sufficient to establish a basis from which a reasonable jury could infer that defendant read

the notes, making the disputed evidence relevant to suggest defendant's motive. Thus, the contents of the handwritten notes were not hearsay, as they were not offered for the truth of the matter asserted, but were admitted for the effect that they had on defendant." *Hill*, at ¶ 58.

Statements Admissible to Show Decedent's State of Mind

In *Dohrmann v. Swaney*, 2014 IL App (1st) 131524, the appellate court did not refer to IRE 803(3), but instead applied common-law principles for events that occurred before the adoption of the codified evidence rules. Nevertheless, under either analysis, the result would not have differed. In that case, the plaintiff and Mrs. Rogers agreed in writing for Mrs. Rogers to transfer approximately $5.5 million in cash and property upon Mrs. Rogers' death, in exchange for the plaintiff's agreement to have his two young sons incorporate the Rogers name into their names to help the Rogers name continue after Mrs. Rogers' death. The addition of "Rogers" to the sons' middle names was effected. On appeal from the circuit court's finding that the contract was not enforceable and its grant of summary judgment in favor of the estate of Mrs. Rogers, the plaintiff contended that it was error for the circuit court to consider Mrs. Rogers' statements to third parties regarding her suspicions that he "was after" her property. In affirming the grant of summary judgment and in reasoning that the statements were not admitted to prove the truth of what she believed, the appellate court held that the statements were admissible as relevant to Mrs. Rogers' state of mind to show her reluctance to enter the agreement with the plaintiff.

Substantive Changes in Illinois Law

Note that, though the Illinois rule is substantively identical to its federal counterpart, the placement of it as an 803 rule (where the availability of the declarant as a witness is immaterial) represents a substantive change in Illinois law. That is so because Illinois decisions had required the unavailability of the out-of-court declarant in order to trigger the rule's application, which would have required its placement as an 804 rule. Note, too, that this codification alters the requirement in previous cases that there be a reasonable probability that the statement was truthful. See the thorough discussion of this issue in section (b) under the "Recommendations" discussion in the Committee's general commentary on the bottom of page 5 through page 6 of this guide.

An example of a pre-codification decision that required the unavailability of the declarant to testify and a reasonable probability that the proffered statements are truthful is *People v. Caffey*, 205 Ill. 2d 52 (2001). Again, the requirements of the declarant's unavailability and a reasonable likelihood of the statement's truthfulness no longer are relevant to the application of this rule.

Thus, in the post-codification decision of *People v. Herring*, 2018 IL App (1st) 152067, ¶ 64, the appellate court erred in failing to apply IRE 803(3) and in wrongly citing *Caffey* in approving the admission of the murder victim's statement, before he was killed, that his car had been broken into and he was going to await the arrival of police. The court's error was in approving the "state of mind" exception to the hearsay rule based on its reasoning that the deceased declarant was unavailable to testify and there was a reasonable probability that the hearsay statement was truthful. Without applying those unnecessary requirements, however, application of IRE 803(3) would have led to the identical result.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(4) Statements for Purposes of Medical Diagnosis or Treatment.

(A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to Rule 703, not including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial, or

(B) in a prosecution for violation of sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, or 11-1.60 of the Criminal Code of 1961 (720 ILCS 5/11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60), or for a violation of the Article 12 statutes in the Criminal Code of 1961 that previously defined the same offenses, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(4)

803(4)(A)

Insofar as it applies to statements made for *treatment* purposes, **IRE 803(4)(A)** is identical to FRE 803(4), before the latter's amendment solely for stylistic purposes effective December 1, 2011. There is a substantive difference, however, in that the federal rule does not distinguish between statements made for medical treatment and for medical diagnosis for treatment purposes on the one hand, and statements made for medical diagnosis solely for trial purposes. Consistent with Illinois common law, the Illinois rule does not allow, as an exception to the hearsay rule, statements made for medical diagnosis solely to prepare for litigation or to obtain testimony for trial.

Note, however, that the Illinois rule allows, subject to IRE 703, the non-substantive admission of statements made to a health care provider, who is "consulted solely for the purpose of preparing for litigation or obtaining testimony for trial." In other words, statements made to a health care provider, consulted solely to prepare for trial or to obtain testimony for trial, are admissible at trial (subject to IRE 403) for the non-substantive purpose of disclosing facts the expert reasonably relied upon in reaching her opinion. For more on this subject, see *People*

v. Anderson, 113 Ill. 2d 1 (1986), discussed in the *Author's Commentary on Ill. R. Evid. 703*.

Common-Law Basis for IRE 803(4)(A)

In *People v. Gant*, 58 Ill. 2d 178 (1974), before the adoption of the Federal Rules of Evidence, the supreme court held that statements made by a patient to a doctor for treatment purposes concerning the cause or the external source of the condition to be treated are substantively admissible.

Offenses within the Statutes Listed in IRE 803(4)(B)

Though the current version of the federal rule is substantively identical to the pre-amended rule, the pre-amended version of the federal rule did not have a subdivision (B). The pre-amended version of the federal rule simply had no subdivisions, combining what is now subdivisions (A) and (B) into a single FRE 803(4). Illinois' subdivision (B), in **IRE 803(4)(B)**, however, differs from the federal pre-amended version and, specifically, what is now FRE 803(4)(B) and which has no federal counterpart.

The Illinois rule is a near-verbatim reproduction of section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13; provided at **Appendix K**). Both section 115-13 and IRE 803(4)(B) provide for the admission, as an exception to the hearsay rule, of statements made to medical personnel *by a victim of the sex offenses provided in the section numbers that are listed in IRE 803(4)(B)*, concerning the source of the victim's symptoms for medical diagnosis or treatment—without regard for the distinction between "diagnosis" and "treatment" that is present in IRE 803(4)(A). The result is broader substantive admissibility of a victim's statements related to the sex offenses described in the statutes provided in subdivision (B).

Another distinction to be noted within the Illinois rule itself is that IRE 803(4)(A) is not limited to statements made directly to health care providers (thus allowing admissibility even for statements made to laypersons—if they are for the purpose of treatment); while IRE 803(4)(B) is limited to statements made to "medical personnel." Of course, in many instances the hearsay exceptions provided by IRE 803(2) (excited utterance) or IRE 803(3) (then existing mental, emotional, or physical condition) may be used to gain admission, depending on relevant factual circumstances.

Note that the original version of IRE 803(4)(B) was amended by the supreme court, effective April 26, 2012. The rule amendment was necessary because, in Public Act 96-1551, effective July 1, 2011, the General Assembly amended section 115-13 by adding section numbers (while retaining section numbers that had been repealed), and it also altered the section numbers of numerous statutes relating to sex offenses in the Criminal Code of 1961 (now, the Criminal Code of 2012). As relevant here, Public Act 96-1551 moved sex offenses from Article 12 (which addresses "Bodily Harm" offenses) to Article 11 (which addresses "Sex Offenses"), thus renumbering the statutes listed in the original version of IRE 803(4)(B).

Specifically, the statute that addresses the offense of **criminal sexual assault**, formerly section 12-13, is now section 11-1.20 (720 ILCS 5/11-1.20); the statute that addresses **aggravated criminal sexual assault**, formerly section 12-14, is now section 11-1.30 (720 ILCS 5/11-1.30); the statute that addresses the offense of **predatory criminal sexual assault of a child**, formerly section 12-14.1, is now section 11-1.40 (720 ILCS 5/11-1.40); the statute that addresses the offense of **criminal sexual abuse**, formerly section 12-15, is now section 11-1.50 (720 ILCS 5/11-1.50); and the statute that addresses the offense of **aggravated criminal sexual abuse**, formerly section 12-16, is now section 11-1.60 (720 ILCS 5/11-1.60). Both the pre-amended and amended section 115-13 are provided in the appendix to this guide at **Appendix K**.

Decisions Applying the Statute Underlying IRE 803(4)(B)

In *People v. Falaster*, 173 Ill. 2d 220 (1996), the supreme court held that section 115-13 of the Code of Criminal Procedure, which is the basis for IRE 803(4)(B) and a codification of the common-law rule that admits statements concerning medical treatment and which—the court noted—does not distinguish between examining physicians and treating physicians, permitted admissibility of a victim's statement to medical personnel about sexual history, including the identification of the offender who was the victim's father. In response to the defendant's contention that the statute "did not authorize the nurse to testify to the victim's identification of the offender because the identification was irrelevant to the victim's diagnosis and treatment" (*Falaster*, 173 Ill. 2d at 229), the supreme court held

that "at least in the family setting, a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment in cases involving allegations of sexual abuse." *Id.* at 230.

In *People v. McNeal*, 405 Ill. App. 3d 647 (2010), the appellate court held that a nurse's testimony about a triage nurse's note concerning the sexual assault of the victim was not hearsay because it was relevant to the nurse's actions in treating the victim. But even if it were hearsay, the court held, it was admissible under section 115-13 of the Code of Criminal Procedure as an exception to the hearsay rule, adding that the fact that the information on the note was taken by a nurse other than the nurse who testified at trial was not a bar to the admission of the evidence. Moreover, the court held, the evidence was not "testimonial hearsay" and therefore did not violate the confrontation clause, pursuant to the holding in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *People v. Freeman*, 404 Ill. App. 3d 978 (2010), the appellate court recognized the conflict between section 115-3, which allows admissibility, and the rape shield statute (725 ILCS 5/115-7(a)—provided at **Appendix E**, and discussed in the *Author's Commentary on Ill. R. Evid. 412*), which denies admissibility. The court held that the statement of the victim that she had not had previous sexual intercourse, made to a doctor by the 12-year-old victim of a sex offense, was admissible because it was relevant to the issue of whether, based on the physical examination of the victim by the doctor, a sexual assault had occurred.

In *People v. Spicer*, 379 Ill. App. 3d 441 (2008), the appellate court upheld, as an exception to the hearsay rule, the admission of the victim's statement to a doctor that she had been "tied and raped," over the defendant's contention that she had not sought treatment, but only evidence collection. The court held that the statement by the elderly victim, who was unable to be present for trial because of a medical condition, was admissible as an exception to the hearsay rule, based on *Falaster*'s holding that section 115-13 does not distinguish between treatment and diagnosis. The court held, however, that there had been a violation on the separate issue of the Sixth Amendment Confrontation Clause, but that the error was harmless because of the strong corroborating nature of the defendant's confession.

In *People v. Drake*, 2017 IL App (1st) 142882 (*partially affirmed and partially reversed* in *People v. Drake*, 2019 IL 123734), while in a bathtub, a six-year-old boy suffered second- and third-degree burns on his buttocks, genital region, and on both feet up to his ankles. After more than a week in the hospital, he told a nurse that the defendant, his step-father, had poured a cup of hot water on him. The primary issue for the appellate court was the propriety of the admission into evidence, in this bench trial, of the boy's statements to the nurse—primarily the boy's identification of the defendant as the person responsible for his injuries. Finding that the boy's statement was not made to assist in his medical diagnosis or treatment, in that it occurred more than a week after the treatment for his injuries had commenced, the appellate court held that "the common-law exception to the hearsay rule did not apply to the identification portion of [the boy's] statement." *Id.* at ¶ 25. The appellate court therefore held that the trial court had abused its discretion in admitting the statements. It therefore reversed the defendant's conviction for aggravated battery, holding in addition, with one justice dissenting, that double jeopardy barred a retrial. On further review in *People v. Drake*, 2019 IL 123734, the supreme court noted that the State did "not dispute the appellate court's holding that admission of [the boy's] out-of-court statement was reversible error." *Drake*, 2019 IL 123734, ¶ 18. But on the issue of double jeopardy, finding that even the improperly admitted evidence as well as other circumstantial evidence should be considered in determining the application of double jeopardy, the supreme court reversed the appellate court's holding that double jeopardy barred a retrial. The case was therefore remanded to the circuit court for retrial.

As a follow-up to *Falaster* and *Drake*, the Seventh Circuit case of *Lovelace v. McKenna*, 894 F.3d 845 (7th Cir. 2018), has relevance. In *Lovelace*, plaintiff sought to corroborate his claim that the defendants, Illinois Department of Corrections correctional officers, had beaten him, causing the injuries that were the subject of his federal lawsuit. He sought to do this through the proffer of evidence that, a couple of months after the alleged beating, he told a psychologist from whom he sought

treatment that the defendants had beaten him. In her report, the psychologist had noted that plaintiff told her that "the C/Os kicked my ass." The district court allowed evidence of plaintiff's statements to a nurse and a physician's assistant, immediately after the alleged incident, that he had been in a fight, had suffered injuries, and required pain medication; however, those statements contained nothing about the defendants' beating plaintiff. (Plaintiff had been in a fight with a fellow inmate on the same day as the alleged beating by the defendants.) The district court also allowed the notes of the psychologist to be admitted, but it redacted plaintiff's statement about the "ass-kicking" and barred the psychologist from testifying about it on the basis that it constituted inadmissible hearsay. On appeal from a verdict for the defendants, the Seventh Circuit found no abuse of discretion in this ruling, rejecting plaintiff's argument that the statement related to damages. Moreover, it rejected plaintiff's contention that FRE 803(4)(A) which, similar to the Illinois rule, allows admissibility if the statement "is made for—and is reasonably pertinent to—medical diagnosis or treatment." The court held that the district court had not abused its discretion in finding that the statement did not fall within the exception because it was not made for diagnosis or treatment, and the district court was permitted to rely on the psychologist's assessment of what statements were made for medical treatment.

Another relevant Seventh Circuit decision is *United States v. Norwood*, 782 F.3d 1932 (7th Cir. 2020). In that case, a jury convicted defendant of attempted transportation of a minor, a 15-year-old girl, across state lines with the intent that the minor engage in prostitution. The minor did not testify at trial. Instead, a sexual assault nurse examiner testified to what the minor had told her about sexual encounters with numerous men, without disclosing defendant's name. The nurse's notes, with the defendant's name extracted, also were admitted. In response to defendant's contention that his right of confrontation was denied by this procedure, the Seventh Circuit reasoned that the sexual assault examination served both medical and investigatory purposes but, given the redaction of defendant's name, it concluded that the statements of the minor were for the primary purpose of medical attention, and it held that defendant's right to confrontation was not violated. *Norwood*, at 1042-1052.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(5)

IRE 803(5) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011—except for the non-adoption of the last sentence (which is substantively identical to the last sentence in the current federal rule). That sentence was not adopted because Illinois allows a recorded recollection to be received into evidence at the request of *either* the proponent or the opponent of the evidence. See *People v. Olson*, 59 Ill. App. 3d 643 (1978) for a discussion of authorities and a general recitation of the principles.

It should be noted that, though the rule is listed under the 803 rules—where the availability of the declarant is deemed to be immaterial—because the rule applies only where a *witness* has insufficient recollection and provides a sufficient foundation for admission, the presence of the witness who authored or adopted the report is essential. Arguably, the 803 designation has relevance to the extent that it may apply to the availability or unavailability of the author or authors of a report adopted by the witness.

This designation as a hearsay exception allows the admission of the memorandum or record of the "recorded recollection" into evidence under both the federal and Illinois rules. But the last sentence of the federal rule allows the record only to be "read into evidence," at the behest of the proponent, while allowing only the adverse party to offer it in evidence as an exhibit. As pointed out above, the Illinois rule allows the memorandum or record to be offered into evidence by either party.

This hearsay exception admits what is contained in the memorandum or record, thus allowing the trier of fact to determine what weight to give that document. Admission of evidence based on "refreshed memory," on the other hand, does not create a hearsay exception. In that situation, a witness's testimony based on refreshed memory is admitted under normal rules of relevancy, and a refreshing document is not admitted into evidence.

In *Kociscak v. Kelly*, 2011 IL App (1st) 102811, the appellate court cited previous cases discussing this hearsay exception, noting that, although some cases "described the elements of past recollection recorded using different terminology," the cases are consistent despite that difference. *Kociscak*, at ¶¶ 26-27.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the opposing party shows that the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(6)

The regular practice of business and a "calling of every kind" in relying on documents to function appropriately and thus being trustworthy, combined with the expediency of bypassing the usually unnecessary task of calling witnesses to satisfy chain of evidence requirements, provide the rationale for this exception to the hearsay rule.

IRE 803(6)—commonly referred to as the "business records exception" to the hearsay rule—is identical to the pre-amended federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the minor deletion of the reference to "FRE 902(12)" (which is also present in subdivision (D) of the current federal rule), because Illinois incorporated that rule into IRE 902(11) and it therefore was not separately adopted in the Illinois rules. A prior difference from the federal rule, one which excluded medical records in criminal cases from this hearsay exception, was deleted by the supreme court in *People v. Deroo*, 2022 IL 126120, effective March 24, 2022. That decision is discussed in the commentary immediately below.

People v. Deroo: Elimination of the of Medical Records Exclusion from Illinois' Business Records Exception to the Hearsay Rule in Criminal Cases

In *People v. Deroo,* 2022 IL 126120, a jury convicted defendant of aggravated driving under the influence and aggravated driving while his license was revoked. At trial, the results of a chemical blood test, which established defendant's blood alcohol content at twice the legal limit, were admitted in evidence based on section 11-501.4(a) of the Illinois Vehicle Code (625 ILCS 5/11-501.4(a)).

On appeal to the appellate court, the only issue was defendant's contention that section 11-501.4(a) of the Vehicle Code directly conflicted with IRE 803(6), which at that time expressly excluded medical records in criminal cases from the business records exception to the hearsay rule. Defendant contended

that the evidence rule controlled over the statute, and thus the results of the chemical blood test should have been deemed inadmissible hearsay. With one dissenting justice agreeing with defendant's contention, a majority of the appellate court panel affirmed the judgment, concluding that there was no conflict between the statute and the rule because, based on the committee commentaries that accompany the Illinois evidence rules, the rules were not intended to abrogate or supersede any statutory rule of evidence that existed at the time the rules were adopted. On further appeal, the supreme court affirmed the judgment, but for different reasons.

First, examining the language of both the statute and the rule, the supreme court acknowledged that they were indeed in direct conflict. It thus determined that the interests of maintaining a sound and uniform body of law compelled it to resolve the conflict.

To do so, the court presented a thorough historical analysis of two early lines of authority related to the issue of whether medical records fell within the business record exception to the hearsay rule. The first line of authority held that medical diagnoses and opinions required expert interpretation, thus requiring expert witness testimony and the opportunity for cross-examination. The second line held that medical opinions and diagnoses were analytically indistinguishable from other recorded facts, and thus their presence within a medical report should not be a reason for excluding them as hearsay. *Deroo*, 2022 IL 126120, ¶31. For an understanding of the decision in *Deroo*, the court's historical analysis follows.

In 1922, the supreme court adopted the first line of authority in *Wright v. Upson*, 303 Ill. 120, 144 (1922) (holding that those who entered opinions or diagnoses in the record were required to testify that the entries were correct). That became the common-law rule in Illinois for many years thereafter. In the 1960s, the common-law rule was codified in two places: in section 115-5 of the Code of Criminal Procedure of 1963 (which in subsection (c)(1) then and now excludes hospital or medical records from the business record exception) and, in 1967, in Ill. S. Ct. R. 236 (which codified the business records exception but, consistent with the statute, excluded evidence of medical records in both civil and criminal cases). (Note that the *current* versions of section 115-5 and Rule 236 are available at **Appendix L** of this guide.)

In 1975, however, the situation began to change when the Federal Rules of Evidence, which were adopted that year, included medical records in both civil and criminal cases in FRE 803(6), and expressly used the terms "opinion" and "diagnosis" in describing the contents of records that may fall under the hearsay exception. Then in 1988, the legislature enacted section 11-501.4 of the Vehicle Code, the statute at issue in this case, thus allowing the admission of chemical blood tests under the business records exception—an enactment consistent with the proposition that medical records fall within the business records exception.

In 1991, the supreme court amended Rule 236 to include medical records in the business records exception in civil cases, but not in criminal cases. Later, when the court adopted the Illinois Rules of Evidence in 2010, IRE 803(6) applied to both criminal and civil cases. However, though the Illinois rule includes records of "opinions" or "diagnoses" that fall under the business record exception, it excluded medical records from the exception in criminal cases. *Deroo*, at ¶¶32-39.

Applying that history, the court determined that amendment of the rule was now necessary and it offered numerous rationales for the amendment. It first noted that when it adopted IRE 803(6), the only reason medical records were excluded from the business records exception in criminal cases was the existence of section 115-5(c)(1) of the Code of Criminal Procedure and the desire not to supersede or invalidate any existing statutory rules of evidence. But, the court noted, section 115-5(c)(1) was itself a codification of a common-law rule that excluded medical opinions and diagnoses from the business records exception.

The court reasoned that when it adopted IRE 803(6), thus determining that opinions and diagnoses were properly within the business records exception, the rationale for excluding medical records from the hearsay exception was eliminated. That was so because the rule was internally contradictory in excluding medical records from the hearsay exception in criminal cases based on a concern regarding the admissibility of medical opinions and diagnoses, while nevertheless expressly

recognizing that opinions and diagnoses are admissible under the rule. Reasoning that the trustworthiness of a recorded document does not change depending on whether the document is used in a civil or a criminal matter, the court stated that it could discern no basis for excluding medical records from the business records exception in criminal cases but not in civil cases. *Id.* at ¶¶ 40-42.

Recognizing that amendment of the rule by striking the exclusion from IRE 803(6) creates a current conflict with section 115-5(c)(1) of the Code of Criminal Procedure, the court held the amendment is nevertheless appropriate because the statute was a codification of a common-law rule first adopted by the court, but the rationale behind that rule no longer exists, having been abandoned by the court with the adoption of IRE 803(6) and the recognition that medical opinions and diagnoses fall within the business records exception. The court also pointed out that the legislature itself has retreated from the medical records exclusion for criminal cases in section 115-5(c)(1) by adopting the chemical blood test exception in section 11-501.4(a) of the Vehicle Code. Moreover, citing IRE 101, the court pointed out that it has an obligation to maintain the Illinois Rules of Evidence in a coherent way, regardless of the actions of the legislature. *Id.* at ¶ 44. It therefore deleted, effective March 24, 2022, the phrase "Except for medical records in criminal cases," which had presented the initial words for the exception of criminal cases in IRE 803(6).

Finally, the court held that the amended rule does not raise any *post facto* concerns because the amendment does not alter the amount of evidence to convict a defendant, but merely allows for the admission of medical records evidence that was previously excluded under the business records exception, addressing only what type of evidence can be admitted. *Id.* at ¶¶ 46-47.

The takeaways from *Deroo*: Though worded differently from FRE 803(6), the Illinois rule is now identical in substance to its federal counterpart. In future cases and in cases pending and even on appeal, the now-amended Illinois rule applies. Thus, reliance on a statute such as 11-501.4(a) of the Vehicle Code is unnecessary. Also earlier appellate court decisions, such as *People v, Hutchison*, 2013 IL App (1st) 102332, *People v. Turner*, 2018 IL App (1st) 170204, and *People v. Wuckert*, 2015 IL App (2d) 150058, all of which upheld the Vehicle Code's statute over the rule, are deemed to be correct, but not for the reasons they relied upon.

Although only indirectly related to the rules of evidence, it should be noted that in *People v. Schantz*, 2022 IL App (5th) 200045, the appellate court provided a comprehensive discussion of the confusion in Illinois holdings concerning the propriety of drawing blood pursuant to a search warrant or on the basis of probable cause, where the defendant does not give consent for the blood withdrawal.

"Business" Defined

Note that the expression "business records exception" is potentially misleading. The rule incorporates more than records kept in the course of a regularly conducted business activity. That is made clear by the definition of "business" in the final sentence of the rule (and in subdivision (B) of the current federal rule). There, the term "business" is defined to include a broad category of regularly conducted activities, "whether or not conducted for profit."

The Certification Option and the Rule's Underlying Statute and Supreme Court Rule

The adoption of the certification option of IRE 902(11) in IRE 803(6) constitutes a substantive change from Illinois common law by providing an alternative to the prior requirement for the testimony of the custodian of the records or a person with knowledge of them to provide the foundational basis for the introduction of the evidence. The certification should provide the same information that would be provided by the foundational witness. Except for the provision allowing for certification, the rule is consistent with the provisions of section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5) (except for the *Deroo* amendment discussed *supra*), as well as of Supreme Court Rule 236, which applies in civil cases. Section 115-5 and Supreme Court Rule 236 are provided in the Appendix to this guide at **Appendix L**.

See also the Committee's general commentary related to this rule and to IRE 803(8) in the paragraph entitled "Structural Change" starting on page 6 of this guide.

Amendments to Rule 803(6) to Clarify that the Burden of Proof for "Lack of Trustworthiness" Is on the Party-Opponent

FRE 803(6)(E) was added to FRE 803(6) effective December 1, 2011, when amendments were made solely for stylistic purposes. That rule was amended again effective December 1, 2014, merely to clarify that the burden of showing "that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness" is on the party opposing the admission of the record rather than on the proponent of the evidence. Though the Illinois rule does not have a subdivision (E), effective September 28, 2018, the Illinois Supreme Court amended IRE 803(6) to remove any ambiguity as to who has the burden by making it clear that the burden of proving lack of trustworthiness is on the opponent of the evidence. This is logical because, as in the federal rule, the foundation for admission will have been met through the proponent's satisfying the rule's other requirements, and because proving "lack of trustworthiness" is in the opponent's interest, not a result sought by the proponent of the evidence. It should be noted that in its amendment of the rule, the supreme court moved the phrase "Except for medical records in criminal cases" to the beginning of the rule but, consistent with the holding in *Deroo*, that phrase was deleted by the supreme court.

People v. Leach: Autopsy Reports

For a significant case involving this business record exception to the hearsay rule and whether, in a criminal case, an autopsy report is inadmissible as "testimonial hearsay" under the theory that the right to confrontation under the Sixth Amendment may be violated, see *People v. Leach*, 2012 IL 111534. In *Leach*, the supreme court held that either this rule or IRE 803(8) provided a proper foundation for the introduction of autopsy reports as provided by section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1; provided at **Appendix M**). As relevant to this rule, the supreme court held that an autopsy report is not a "medical record" for the simple reason that a deceased person is not a patient and the medical examiner is not the deceased person's doctor. *Leach*, 2012 IL 111534 at ¶ 71. That finding was necessary based on the exclusion of medical records in IRE 803(6) before the supreme court amended the rule based on its holding in *People v, Deroo*, 2022 IL 126120, which now allows medical records to be admitted in evidence as business records. For more on the statute and a thorough discussion of the *Leach* opinion, see the *Author's Commentary on Ill. R. Evid. 803(8)*.

Relevant Statutes

A statute relevant to this exception to the hearsay rule is section 8-401 of the Code of Civil Procedure (735 ILCS 5/8-401), which addresses the admissibility of account books and records.

Another relevant statute, providing a business record exception for civil cases involving abused, neglected, or dependent minors, is in section 2-18(4)(a) of the Juvenile Court Act of 1987 (705 ILCS 405/2-18(4)(a)). For decisions involving application of the statute and discussing other cases, see *In re J.L., M.L., and A.L.*, 2016 IL App (1st) 152479; and *In re Nylami M.*, 2016 IL App (1st) 152262 (pointing ou that the statute is "a variation of the common law business records exception" in cases involving a minor in an abuse, neglect or dependency proceeding). But for a decision holding that the hearsay exception was improperly invoked and applied based on the State's failure to comply with the certification requirement of the statute, resulting in the reversal and remand of the circuit court's finding that respondents were unfit parents, see *In Re M.H.*, 2020 IL App (3d) 190731.

Selected Post-Codification Decisions Addressing the Business Records Exception

For an example of a case affirming the admission of an insurance carrier's claim file related to a workers' compensation claim under this exception to the hearsay rule, see *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560. In that case, the appellate court considered the admission of the claim file as a business record, rejecting objections based on (1) hearsay within hearsay; (2) attorney-client privilege; (3) preparation in anticipation of litigation; and (4) work-product protection. *Holland*, at ¶¶ 177-206.

In *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, the appellate court addressed the

foundational requirements for business records, providing citations to other cases and noting that the adoption of the rule made no substantive changes to the requirements of Supreme Court Rule 236. Pointing out, as other cases have, that a computer-generated business record is admissible under this exception to the hearsay rule, the court provided the requirements for the admission of such evidence and addressed other issues related to admissibility.

In *People v. Harris*, 2014 IL App (2d) 120990, ¶¶ 20-22, the appellate court held that there had not been a proper foundation for admission of a logbook showing that a Breathalyzer machine used to conduct a breath test on the defendant had been certified as accurate. The court held that, "A review of [the testimony of the police officer who administered the Breathalyzer] makes clear that, although he testified that the record was kept in the regular course of business for the Belvidere police department, he never testified that 'it was the regular course of such business to make such memorandum or record *at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter*.'" *Harris*, at ¶ 22. (Emphasis by the court). The appellate court held that, although the logbook was "documented and signed" by another officer, the officer who administered the test and testified presented no testimony that the other officer documented and signed the logbook "at the time of such [certification] or within a reasonable time thereafter," and that "[w]ithout this testimony, the State failed to lay the necessary foundation." *Id.*

In *People v. Eagletail,* 2014 IL App (1st) 130252, a DUI case, the appellate court cited IRE 803(6) in holding that there was a sufficient foundation for admission of a computer-generated copy of the printout from the breath machine to satisfy the business records exception to the hearsay rule.

In *People v. Ramos*, 2018 IL App (1st) 151888, a police detective testified to receiving information from T-Mobile derived from the mobile phone of the defendant's co-defendant. That information confirmed that the co-defendant, who was identified, along with the defendant, as one of the two robbers of the victim, had traveled the same route on the same date and time as the victim before and to the point of the robbery, by following coordinates of "pings" off of cell towers. But no business records from T-Mobile were introduced at trial. The information concerning the pings came solely from the testimony of the detective. Finding that the testimony of the detective was hearsay that was not subject to any hearsay exception, and pointing out that the same information could properly have been introduced through T-Mobile's business records (which are subject to an exception to the hearsay rule), the appellate court found sufficient error to reverse the defendant's conviction and remand the case for a new trial.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(7)

This rule is premised on the rationale that the failure of a record to mention a matter logically expected to be mentioned satisfies evidence of its nonexistence.

IRE 803(7) is identical to the pre-amended federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. **FRE 803(7)(C)**, which had been added to the federal rule when the stylistic changes occurred, was again amended effective December 1, 2014. The amended language of subdivision (C) in the current federal rule is meant to clarify that the burden of showing "that the possible source of the information or other circumstances [that] indicate a lack of trustworthiness" is on the party opposing the absence of the records rather than on the proponent of the evidence.

Though the Illinois rule does not have a separate subdivision (C), effective September 28, 2018, the Illinois Supreme Court also amended IRE 803(7) to end any ambiguity about who has the burden, by placing the burden of proof concerning the lack of trustworthiness on the opponent of the evidence. This was a logical amendment because, as in the federal rule, the foundation for showing the absence of records will have been met through the satisfaction of the rule's other requirements, and because proving "lack of trustworthiness" is in the opponent's interest, and not a result sought by the proponent of the evidence.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(8)

This exception to the hearsay rule is "based upon the assumptions that public officers will perform their duties and are without motive to falsify, and that public inspection, to which some such records are subject, will disclose inaccuracies" (see *People ex rel Wenzel v. C&NW Ry. Co.*, 28 Ill. 2d 205, 212 (1963)), and that officials are unlikely to be available later or to remember details independently of the record.

IRE 803(8)(A) is identical to FRE 803(8)(A) before the latter's amendment solely for stylistic purposes effective December 1, 2011—resulting in what is now designated as FRE 803(A)(i). IRE 803(8)(B) is identical to pre-amended FRE 803(8)(B)—now designated as FRE 803(8)(A)(ii)—but with two exceptions, the first of which is the addition in the Illinois rule of the exclusions for "police accident reports" and, in criminal cases, "medical records," in order to codify Illinois law as provided in Illinois Supreme Court Rule 236(b) (as to police accident reports) and in 725 ILCS 5/115-5(c) (as to medical records). (See **Appendix L** for both the statute and the supreme court rule.) However, Illinois' exclusion of "medical records" in IRE 803(6)—based on its reasoning in *People v. Deroo*, 2022 IL 126120—should apply to this evidence rule as well. So, despite the current status of IRE 803(8) as of this writing, expect the supreme court to make a similar amendment to this rule.

Supreme Court's Addition of Subdivision (C)

When the Illinois rules first were codified, IRE 803(8) did not include what was FRE 803(8)(C) in the pre-amended federal rule, and is now FRE 803(8)(A)(iii) in the current federal rule. Although the reason for non-adoption of that subdivision is unclear, it may have been due to concern about the expansion of the federal rule in *Beech Aircraft Corporation v. Rainey*, 488 U.S. 153 (1988), where the United States Supreme Court interpreted the rule to allow not only the admission of "factual findings" but also the admission of the opinion that pilot error was the cause of an airplane crash. That interpretation is inconsistent with Illinois common law. Illinois has not adopted the *Beech Aircraft* interpretation. But the portion of the rule that was not adopted refers to "factual findings," and Illinois decisions make it clear that the hearsay exception applies only to "factual findings," not opinions or conclusions.

So, it is not surprising that, effective September 28, 2018, the Illinois Supreme Court amended IRE 803(8) to include what is now subdivision (C)., with the special precaution, that the fac-

tual findings from a legally authorized investigation not include "expressions of opinions or the drawing of conclusions."

For a supreme court decision that provides the justification for this common-law exception to the hearsay rule, see *People ex rel Wenzel v. Chicago and North Western Ry. Co.*, 28 Ill. 2d 205, 211-12 (1963):

> "At common law it has long been settled as an exception to the hearsay rule that records kept by persons in public office, which they are required either by statute or the nature of their office to maintain in connection with the performance of their official duties, are admissible in evidence and are evidence of those matters which are properly required to be maintained and recorded therein. [Citations.] This exception, as pointed out by Professor Cleary, is 'based upon the assumptions that public officers will perform their duties and are without motive to falsify, and that public inspection, to which some such records are subject, will disclose inaccuracies.'"

For an example of an Illinois case distinguishing factual findings from conclusions, see *Barker v. Eagle Food Centers*, 261 Ill. App. 3d 1068 (1994), where the appellate court held that a statement in a "Care Report" prepared by firefighters was properly not admitted because the firefighters were not qualified to provide evidence concerning the cause of the plaintiff's slip and fall, and where the general common-law rules concerning admission of public records in Illinois were provided:

> "Official records kept by public officials are generally admissible as an exception to the hearsay rule if required by statute or authorized to be maintained by the nature of the office; however, records made by public officials or employees that concern causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions, are generally not admissible under the public records exception unless they concern matters about which the official would be qualified to testify at trial."

In *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643 (2003), a decision that illustrates the admissibility of "factual findings," the appellate court approved the admission of the National Transportation Safety Board's factual report based on the information contained in flight planning documents. The court favorably cited a federal district court that: "The majority of courts allow the admission of factual reports as long as they do not contain agency conclusions on the probable cause of accidents." *Barker*, 261 Ill. App. 3d at 1074.

Examples of Illinois decisions on the non-admissibility of "opinions" contained in public reports include *Bloomgren v. Fire Insurance Exchange*, 162 Ill. App. 3d 594 (1987) (error to admit opinion as to the cause of a fire in a fire incident report "that the 'ignition factor' of the fire was 'electrical,' and that the equipment involved in ignition was 'fixed wiring'); *Lombard Park District v. Chicago Title & Trust Co.*, 105 Ill. App. 2d 371 (1969) (agency was not authorized to make flood plain determinations).

The adoption of IRE 803(C)—without *Beech Aircraft*'s interpretation—appropriately reflects Illinois common law. That adoption accurately reflects Illinois' allowance of "factual findings from a legally authorized investigation," while eschewing "causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions."

September 28, 2018 Clarification that the Burden of Proof for "Lack of Trustworthiness" Is on the Party-Opponent

When the federal rules were amended effective December 1, 2011—solely for stylistic purposes—the last clause of what had been FRE 803**(8)(C)** became FRE 803**(8)(B)**. It then read: "neither the source of information nor other circumstances indicate a lack of trustworthiness." That version of FRE 803(8)(B) was again amended to its present form, effective December 1, 2014, this time to establish that the burden of proving "lack of trustworthiness" is on the party-opponent. According to the federal Advisory Committee on Evidence Rules, the amendment that resulted in the current version of FRE 803(8)(B) was meant merely to clarify that the burden of showing "that the source of the information or other circumstances [that] indicate a lack of trustworthiness" is on the party opposing the admission of public records rather than on the proponent of the evidence.

As part of its amendments effective September 28, 2018, the Illinois Supreme Court also added language to IRE 803(8) that clarified that the burden of proving lack of trustworthiness is on the opponent of the evidence. That language is justified because, as in the federal rule, the foundation for admission will have been met through the proponent's satisfying the rule's other requirements, and because showing "lack of trustworthiness" is what the opponent seeks, not a result sought by the proponent of the evidence. Moreover, there is common-law support for placing the burden on the opponent of the evidence. In *Steward v. Crissell*, 289 Ill. App. 3d 66 (1997), where the issue was the admissibility of the medical examiner's toxicology report under section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1) the appellate court held:

> "Courts generally allow public records into evidence based in part on the presumption that public officials, with no motive to falsify records, will perform their assigned duties properly. [Citations.] To overcome this presumption, the party challenging such records has the burden of presenting evidence to show that the records are unreliable."

Committee's General Commentary

See also the Committee's general commentary related to this rule and IRE 803(6) in the paragraph entitled "Structural Change" starting on page 6 of this guide.

Rules for Authenticating, for Self-Authenticating by Certification, and for Admitting a Copy

For the rule that provides methods for authenticating or identifying public records and reports, see **IRE 901(b)(7)**. For the rule that provides for self-authentication by the certification of public records, see **IRE 902(4)**. For the rule that allows the admissibility of public records by a "copy certified as correct in accordance with Rule 902," see **IRE 1005**. Also, see Ill. S. Ct. R. 216(d), which is provided in the *Author's Commentary on Ill. R. Evid. 1005*, and which provides a method for admitting public records by furnishing notice to an adverse party, who has 28 days to object.

Post-Codification Decisions

People v. Broches, 2022 IL App (2d) 200001, ¶¶ 23-38, presents an excellent example of the application of IRE 803(8), as well as other relevant Illinois evidence rules. In that prosecution for financial institution fraud, defendant was charged in 2018 with presenting and cashing a check on a bank for $4,100, knowing that there were insufficient funds in his bank account on which the check was drawn. The trial court allowed the State's motion to admit evidence that in 2000 defendant had committed a similar federal offense. Because the State could not locate witnesses in the earlier offense and the bank records in that case had been destroyed, the State presented evidence of the earlier crime by reading to the jury a certified transcript of the federal court proceedings in which the defendant had pleaded guilty to the prior offense. Before the evidence was admitted, the trial court gave the jury a limiting instruction that the evidence, if believed, was to be considered only for defendant's intent, plan, identity, knowledge, and absence of mistake or accident.

On appeal, defendant contended that the transcript was inadmissible because it was hearsay. Pointing out that the transcript was a presentation by the prosecution of the factual basis of defendant's plea of guilty, a presentation to which defendant had consented, the appellate court held that, because defendant as a party-opponent had adopted those statements, it was not hearsay under IRE 801(d)(2).

Defendant also contended that the transcript was inadmissible hearsay because it did not meet the business record hearsay exception under IRE 803(6) and that the transcript was not properly self-authenticated under IRE 902(11).

In response to defendant's contention that the transcript did not meet IRE 803(6)'s business record hearsay exception, the court held that the transcript was admissible as a public record or report under IRE 803(8)(B), which provides a hearsay exclusion for "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Because the official court reporter had a duty to report what she observed during the earlier proceeding, that evidence was not excluded by the hearsay rule. Conceding, however, that it was unaware of any Illinois case holding that IRE 803(8) includes transcripts,

the appellate court noted that the Illinois evidence rules largely mirror the federal rules, and federal courts have held that a trial transcript is admissible under FRE 803(8) to prove that the testimony of a party was given in a prior proceeding. Finding that interpretation persuasive, the court held that the transcript evidence was properly admitted.

In response to defendant's contention that the transcript was not properly self-authenticated, the court held that the transcript testimony was properly admitted under IRE 902(4). because it had been certified by the court reporter.

For other examples of appellate court cases applying IRE 803(8), see *People v. Schwandt*, 2022 IL App (4th) 200583 (distinguishing the holding in *People v. Diggins*, 2016 IL App (1st) 142088, where the appellate court had held that admitting a "certified letter" to prove that the defendant did not have an FOID card "constituted an affidavit that was issued 'presumably in preparation for trial' and, as such, was a testimonial statement" (see *Schwandt*, at ¶14), in holding that, in this case, the admission in evidence of the secretary of state's certification of defendant's driving abstract, which showed that her driver's license had been suspended, "was not created for the purpose of establishing a fact at trial and, therefore, was not testimonial" (see *id,* at ¶15); and further holding that the certified driving abstract was admissible under this public records exception to the hearsay rule and did not violate defendant's right to confrontation); *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245 (holding that an IRS Report and a Waiver were admissible under this public records exception to the hearsay rule (and were self-authenticating under IRE 902(1)), and thus reversing a grant of summary judgment for defendant and granting summary judgment in favor of plaintiff); *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748 (affirming affiant's reliance on public records and holding that county treasurer reports are public records, and further holding that, before the adoption of IRE 803(8), Supreme Court Rule 236 recognized both business records and public records as exceptions to the hearsay rule and that the legal principles behind the rule are not new and that the rule makes no distinction between public records and computerized public records); *Feliciano v. Geneva Terrace Estates HOA*, 2014 IL App (1st) 130269, ¶¶ 50-51 (holding admissible under IRE 803(8) both a document prepared by the city's department of planning and development, after plaintiffs submitted their building plans for approval, and an e-mail reporting on the activities of the office in answering the parties' inquiry in reporting on finding no official record of an easement); and *People v. McCullough*, 2015 IL App (2d) 121364, ¶113 (holding that FBI reports written after a kidnapping and murder of a seven-year-old girl more than 50 years before charges were brought against the defendant were not admissible as public documents under this rule, because they contained multiple layers of hearsay, thus violating the requirement of IRE 805 that each layer of hearsay be excused by its own exception. (Postscript on *McCullough*: On April 22, 2016, charges against Jack McCullough were dismissed by the circuit court, four years after his conviction, and a week after his conviction had been vacated, based on the statement of the successor to the state's attorney who prosecuted the case that there had been flaws in the investigation and prosecution.)).

***People v. McClanahan*: Invalidity of Section 115-15**

Note that section 115-15 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-15), for prosecutions under the Cannabis Control Act, the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or for reckless homicide or DUI, allows the State to use lab reports in lieu of actual testimony as *prima facie* evidence of the contents of the substance at issue unless the defendant files a demand for the testimony of the preparer of the report. That statute, however, though not repealed, has been held unconstitutional as violative of the confrontation clause of the federal and Illinois constitutions by the Illinois Supreme Court in *People v. McClanahan*, 191 Ill. 2d 127 (2000).

Section 115-5.1: Autopsy Reports

Note also that section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1), which is provided in the appendix to this guide at **Appendix M**, makes admissible as an exception to the hearsay rule, in both civil and criminal actions, records kept in the ordinary course of business related to medical examinations on deceased persons or autopsies, when they are "duly certified by the county coroner, or chief supervisory coroner's pathologist or medical examiner." The

reports that are admissible include, but are not limited to, certified pathologist's protocols, autopsy reports, and toxicological reports. The statute provides that the preparer of the report is subject to subpoena but, if that person is deceased, a duly authorized official from the coroner's office may offer testimony based on the reports.

Cases applying the statute, culminating in the Illinois Supreme Court's decision in *People v. Leach*, are discussed just below under the next topic headings.

Appellate Court Decisions Construing Section 115-5.1

A number of appellate court cases have applied and upheld the business records exception to the hearsay rule in section 115-5.1 ((725 ILCS 5/115-5.1); available at **Appendix M**) against attacks in criminal cases premised on the confrontation clause in general and the decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) (barring testimonial hearsay), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009) (barring admission of certificates of analysis that substance was cocaine), in particular. The Illinois Appellate Court cases include *People v. Antonio*, 404 Ill. App. 3d 391 (2010); *People v. Cortez*, 402 Ill. App. 3d 468 (2010); *People v. Pitchford*, 401 Ill. App. 3d 826 (2010); *People v. Leach*, 391 Ill. App. 3d 161 (2009) (*judgment affirmed on appeal, in People v. Leach, 2012 IL 111534*) (see discussion below); *People v. Moore*, 378 Ill. App. 3d 41 (2007). *See also Fatigato v. Village of Olympia Fields*, 281 Ill. App. 3d 347 (1996) (holding that a toxicology report was a business record), but see also *People v. Lovejoy*, 235 Ill. 2d 97 (2009), where the supreme court based its approval of a pathologist's reliance on a toxicology report, where the toxicologist did not testify, not on the basis that it was admitted substantively as a business record, but that it contained data reasonably relied upon by expert pathologists in determining cause of death. (Note also that in a case that predates the *Crawford* decision, *People v. Nieves*, 193 Ill. 2d 513 (2000), the supreme court affirmed the testimony, in a murder prosecution, of the chief medical examiner about the cause of death of the decedent, on whom the autopsy was performed by a retired pathologist who was out of the country at the time of trial. The testimony was based on the autopsy report of the absent pathologist, before the effective date of section 115-5.1. There, the supreme court's approval of the admission of the chief medical examiner's testimony was based on the reasonable reliance standard of Rule 703, and not on the business record exception.)

Subsequent to the above cases, the United States Supreme Court decided *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705 (2011). In that case, the Court applied *Melendez-Diaz* in holding that the testimony of a forensic analyst, who testified instead of the forensic analyst who had actually tested and reported on the blood-alcohol concentration of the DWI defendant but who was on "uncompensated leave," constituted a violation of the confrontation clause.

In *People v. Dobbey*, 2011 IL App (1st) 091518, the first appellate court case addressing the issue of the admissibility of autopsy reports after the decision in *Bullcoming*, the court adhered to the holdings in the appellate court cases listed above, and distinguished the case at bar from *Melendez-Diaz* (which, based on the admission of certificates of analysis, dealt with proof of the specific fact that material connected to the defendant was cocaine) and *Bullcoming* (which, based on a lab report certifying results of a blood-alcohol test performed on a sample taken from the defendant when he was arrested for driving while intoxicated, dealt with proof of the specific fact that the defendant's blood-alcohol content was above a certain limit). *Dobbey* distinguished those U.S. Supreme Court decisions on the basis that they involved reports prepared "solely for an 'evidentiary purpose'" and were made in "aid of a police investigation," which made them testimonial in nature. *Dobbey*, at ¶¶ 75-76.

***People v. Leach*: Admissibility of Autopsy Reports as Not "Testimonial"**

In *People v. Leach*, 2012 IL 111534, on review of one of the appellate court decisions listed above, the Illinois Supreme Court affirmed the appellate court's judgment, but "for reasons other than those offered in the appellate court opinion." *Leach*, ¶ 158. The supreme court therefore did not accept the appellate court's reasons for the admissibility of the autopsy report, which was based on the rationales that: (1) business records are historically nontestimonial and thus excluded from the

Crawford rule related to the confrontation clause, and (2) the report was admissible as reasonably relied upon by experts to explain the bases of their opinions under IRE 703. *Leach*, ¶ 48.

The *Leach* court noted the plurality opinion in *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221 (2012), but distinguished that opinion from the case at bar, pointing out that "in *Williams*, the 'report itself was neither admitted into evidence nor shown to the factfinder.' The expert witness 'did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.'" In contrast to *Williams*, the court noted that, in the case at bar, the testimony of the expert witness (who was not the pathologist who performed the autopsy and prepared the report) included the contents of the autopsy report and the report itself was admitted into evidence. *Leach*, at ¶¶ 56-57. The court therefore needed to determine (1) whether the autopsy report was hearsay offered for the truth of the matters inserted therein; (2) if hearsay, whether the report was admissible under a hearsay exception; and (3) if admissible under a hearsay exception, whether the report was testimonial in nature and thus violated the confrontation clause in violation of the *Crawford* holding. The answers to the first and second inquiries were "yes," the autopsy report was hearsay, but it was admissible under both IRE 803(6) and IRE 803(8), as well as the statutory provisions of section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1; provided at **Appendix M**).

As for the third and dispositive inquiry concerning the confrontation clause, the supreme court concluded that the designation of a document as a business record does not automatically make it nontestimonial. The court then engaged in an in-depth analysis of the evolving reasoning of the United States Supreme Court in general, and its members in particular, related to the Court's holdings from *Crawford*, through *Malendez-Diaz* and *Bullcoming*, to *Williams*. The court concluded that, in analyzing the "primary purpose" concerning extrajudicial statements that animates the views of the members of the U.S. Supreme Court, and with special focus on conclusions drawn from both the plurality and the dissent in *Williams*, "the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." *Leach*, at ¶ 122. The court held that, even when foul play is suspected and the medical examiner's office is aware of this suspicion, because the autopsy might reveal that the deceased died of natural causes, an autopsy report is not prepared to provide evidence against a targeted person. *Leach*, at ¶ 126. Observing that, in addition to the plurality and dissenting views in *Williams*, even "under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial" (*id.* at ¶ 136), the supreme court concluded that, because the autopsy report was nontestimonial in nature, it did not violate the confrontation clause and it was properly admitted.

Application of *Leach*

Leach was applied in *People v. Hensley*, 2014 IL App (1st) 120802, where, as in *Leach*, a pathologist other than the one who performed the autopsy testified and the autopsy report was admitted into evidence. In *Hensley*, the defendant argued that error occurred because, unlike in *Leach*, the autopsy report was certified. The appellate court rejected that argument, noting that the report had not been certified by the examining pathologist, but that a certified *copy* of the report had been entered into evidence. The court noted that in an earlier case, *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 151, n. 12, the facts were identical, and in that case, too, the appellate court approved the admission of the report. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶¶ 145-153 for that court's application of *Leach*.

Coroner's Verdict Inadmissible

Note that, in contrast to section 115-5.1 of the Code of Criminal Procedure discussed above, section 8-2201 of the Code of Civil Procedure (735 ILCS 5/8-2201), which applies to both civil and criminal cases and addresses *records* related to autopsies, prohibits admissibility of evidence related to a coroner's *verdict* to prove any fact in controversy in a civil action.

Chain of Custody Evidence Unnecessary for Breathalyzer Certification

Another Illinois case that analyzed the *Melendez-Diaz* case—in the context of DUI and the certification of the accu-

racy of the Breathalyzer machine—is *People v. Jacobs*, 405 Ill. App. 3d 210 (2010). In that case, the appellate court pointed out that *Melendez-Diaz* stated in a footnote that it "did not hold 'that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.'" The court concluded that "the testimony and logbooks provided in this case as to the certification of the Breathalyzer were not testimonial and established a sufficient foundation that it was regularly tested and accurate."

For more on the *Crawford* decision and its holding concerning a criminal defendant's right to confrontation, see the discussion of *Williams v. Illinois* in the Author's Commentary on Ill. R. Evid. 703 *supra*, and the discussion of *Crawford* and its progeny in connection with various Illinois statutory hearsay exceptions in the *Author's Commentary on the Non-Adoption of Fed. R. Evid. 807*, *infra*.

FEDERAL RULES OF EVIDENCE

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

ILLINOIS RULES OF EVIDENCE

(9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(9)

Except for the clarifying addition of the phrase "Facts contained in" at the beginning of the rule, IRE 803(9) is identical to FRE 803(9) before the latter's amendment solely for stylistic purposes effective December 1, 2011.

This codified rule should be considered together with the provisions of the Vital Records Act, 410 ILCS 535/1 *et seq*. That Act, similar to the subject matter addressed by the codified rule, defines "vital records" as "records of births, death, fetal deaths, marriages, dissolution of marriages, and data related thereto." It establishes in the Department of Public Health an Office of Vital Records, which is responsible for installing, maintaining, and operating the system of vital records throughout the State. In addition to explaining the duties and responsibilities of the Office of Vital Statistics and its director, the State Registrar of Vital Records, the Act provides for the compilation of vital records and the methods for the public to obtain desired records.

(10) Absence of a Public Record. Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or objection.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(10)

IRE 803(10) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. Note, however, that with the December 1, 2011 amendments, the federal rule added subdivisions (A) and (B). Then, effective December 1, 2013, another amendment to the federal rule altered subdivisions (A) and (B), designating them (i) and (ii) under subdivision (A) (FRE 803(10)(A)(i) and (ii)), without altering substance. That amendment also added a new provision in the subdivision designated as (B), **FRE 803(10)(B)**. The newly created federal subdivision (B), which does not have a specific counterpart in the Illinois rule, allows a prosecutor in a criminal case to submit a written certification of the absence of a public record which, if not objected to by the defense, satisfies the requirements of the rule. This "notice and demand" procedure in the federal rule is designed to satisfy the procedure referred to and seemingly approved by the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2541 (2009).

Note that the reference in the rule to "a certification in accordance with rule 902" (as well as the substantially identical phrase in the federal rule) refers to the procedures related to the certification allowed by Rule 902(11).

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.	**(11) Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(11)

IRE 803(11) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.	**(12) Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(12)

IRE 803(12) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.	**(13) Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(13)

IRE 803(13) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. This codification eliminates the prerequisites contained in *Sugrue v. Crilley*, 329 Ill. 458 (1928), that the declarant be unavailable (which would have required its placement in a Rule 804 hearsay exception) and that the statement be made before the controversy or a motive to misrepresent arose. See section (7) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.	**(14) Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(14)

IRE 803(14) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.	**(15) Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(15)

IRE 803(15) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.	**(16) Statements in Ancient Documents.** Statements in a document that was prepared before January 1, 1998, and whose authenticity is established.

COMMENTARY

Author's Commentary on Fed. R. Evid. 803(16)

Effective December 1, 2017, FRE 803(16) was significantly amended.

The amendment was initiated because the federal Advisory Committee on Evidence Rules questioned the premise that the mere authenticity of a document in existence 20 years or more means that the assertions in the document are reliable. Initially, the Committee recommended the abrogation of the federal rule. That recommendation was based on the Committee's stated concern that electronically stored information (ESI), which will be voluminous in the future and may not be reliable—and which was not contemplated under the common law or when the federal rule was codified—would be admissible under the rule simply because it was in existence for 20 years or more. The Committee reasoned that, though the age of such a document might lead to the conclusion that the *document* is genuine, its age does not ensure that its *contents* are truthful.

The Advisory Committee ultimately withdrew its recommendation to abrogate the rule, and instead recommended the current version as an amendment. That recommendation was adopted by the Judicial Conference of the United States and the United States Supreme Court, and became effective on December 1, 2017. The amendment deletes the former 20-years-in-existence requirement and substitutes for it the requirement that the document "was prepared before January 1, 1998." The Committee conceded the arbitrariness of the selected date in the amended rule, but concluded that "it is a rational date for treating concerns about old and unreliable ESI."

Author's Commentary on Ill. R. Evid. 803(16)

Effective September 28, 2018, the Illinois Supreme Court amended IRE 803(16), resulting in a rule substantially identical to the December 1, 2017 amendment of FRE 803(16). The rationale for the rule's amendment was identical to what prompted the federal rule's amendment: the concern about this hearsay exception resulting in the admission of a vast amount of electronically stored information (ESI) simply because that information may have been in existence for 20 years or more, with the ease of establishing the authenticity of the *existence* of the ESI, but without any assurance of the *truthfulness* of its contents.

For the Illinois definition of "ESI," see Illinois Supreme Court Rule 201(b)(4), which reads:

> "(4) *Electronically Stored Information*. ('ESI') shall include any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."

The pre-amended version of IRE 803(16) was identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, and before the significant substantive change to the federal rule effective December 1, 2017. Its original codification—as well as the current codification—eliminated the prior requirement that the document be related to real property. Also, the "20 years" time period provided for in the former rule represented a change from previous Illinois common law, which required that the document be in existence for 30 years. See section (9) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

IRE 803(16)'s Relation to IRE 901(b)(8)

Note that, by allowing admission of statements prepared before January 1, 1998, the amended rule effectively preserves the former 20-years-in-existence requirement. A statement in a document prepared before 1998 necessarily exceeds the former 20-year requirement. Thus, there was no need to amend IRE 901(b)(8), a rule that furnishes a method (but not the only method) for authenticating statements in ancient documents. Aside from the looming problem concerning the volume of electronically stored information, IRE 803(16) was and is premised on the belief that the authentication requirements in IRE 901(b)(8)(A) and (B) minimize the danger of mistake, as well as the belief that the time requirement of IRE 901(b)(8)(C) offers assurance that the writing antedates the present controversy.

***McCullough*: Application of IRE 803(16)**

The pre-amendment decision in *People v. McCullough,* 2015 IL App (2d) 121364, ¶¶ 105-12, provides a relevant discussion of the reliability aspects of this "ancient documents" exception to the hearsay rule. In *McCullough*, the defendant was charged with the kidnapping and murder of a seven-year old girl more than 50 years after the offenses. During trial, the defendant sought the admission of FBI reports that contained exculpatory information. He relied on the age of the reports, pointing out the age of the case and the inability to obtain other contemporary evidence. The trial court denied his motion to admit the reports. On appeal, the appellate court cited this evidence rule as well as its pre-amended federal counterpart and acknowledged that the age requirement of the reports was satisfied. Noting, however, that the reports were prepared by FBI agents who had no personal knowledge of the substance of the underlying assertions, the court pointed out that "[t]he FBI reports at issue here present the problem of multiple hearsay." *McCullough*, at ¶ 109. Confronting the issue of whether multiple layers of otherwise inadmissible hearsay may be admitted under this rule, the court concluded that:

> "the better view is that each layer of hearsay contained in an ancient document must be excused by its own hearsay exception. This is the view adopted by our own Seventh Circuit in *United States v. Hajda*, 135 F. 3d 439, 444 (7th Cir. 1998) (the admissibility exception applies only to the document itself; if a document contains more than one level of hearsay, an appropriate exception must be found for each level). The court in *Hajda* found this to be consistent with Federal Rule of Evidence

805, which provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception. Illinois Rule of Evidence 805 (eff. January 1, 2011) is identical. If we were to read Rule 803(16) as inoculating multiple levels of hearsay, Rule 805 would be superfluous. [Citation.] In other words, ordinarily Rule 803(16) applies only where the declarant is the author of the ancient document." *McCullough*, at ¶110.

Although there is room for debate as to the correctness of *McCullough's* holding on this issue, there is no doubt that the court was properly concerned about the shortcomings of the ancient document rule.

As a postscript to *McCullough*, note that, after the appellate court affirmed McCullough's conviction for murder, in early 2016 a new State's Attorney announced that his investigation showed that McCullough could not have committed the crime. When the State's Attorney agreed that the conviction should be overturned, the circuit court released McCullough from custody, vacated the conviction, and dismissed the case without prejudice.

FEDERAL RULES OF EVIDENCE

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

ILLINOIS RULES OF EVIDENCE

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(17)

IRE 803(17) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011.

Section 2-724 of the Uniform Commercial Code (810 ILCS 5/2-724) provides for the statutory admissibility of market quotations:

"Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the publication of such a report may be shown to affect its weight but not its admissibility."

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(18) Reserved. [Learned Treatises]

COMMENTARY

Author's Commentary on the Reservation of Ill. R. Evid. 803(18)

IRE 803(18) was reserved because the adoption of FRE 803(18) would have represented a substantive change in Illinois law. Illinois common law is consistent in its rejection of this hearsay exception. Learned-treatise evidence therefore is not admitted substantively. Although not admitted to prove the truth of the matter asserted, such evidence is allowed for impeachment purposes on cross-examination, usually with limiting instructions.

During its public hearing in Chicago in May 2010, the Committee was informed that trial courts throughout the State differ radically in their treatment of learned-treatise evidence on direct examination. Although trial courts uniformly do not allow learned-treatise evidence to be admitted substantively in direct examination, the Committee was told that there is no uniformity concerning whether a learned treatise might be referred to at all on direct examination; whether a learned treatise could be referred to as data or information relied upon by an expert, with or without quotes from the treatise; whether the contents of a learned treatise may be disclosed to the jury; and whether jurors are allowed to review a learned treatise in instances where the court has allowed some evidence about it.

Trial courts that prohibit admissibility on direct examination do so on the basis that Illinois has not accepted the learned treatise exception to the hearsay rule, and that information garnered from such treatises are therefore hearsay and not substantively admissible. On the other hand, trial courts that allow admission of evidence related to learned treatises on direct examination do so pursuant to Rule 703, which allows admission of facts or data reasonably relied upon by experts even though they are not substantively admissible. These courts give limiting instructions to the jury to explain the non-substantive and proper application of the evidence.

As noted below, the Illinois Supreme Court has definitively approved the use of learned treatises on cross-examination for impeachment, but not for substantive purposes. The requirement to allow cross-examination on learned treatises is consistent with the holding of the United States Supreme Court in *Reilly v. Pickens*, 338 U.S. 269, 70 S. Ct. 110 (1949), where the Court reasoned:

> "It has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent this knowledge was acquired from medical text books and publications, on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were

> not permitted. We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books."

Note that redirect examination on a learned treatise after a cross-examination does not convert the statements in the treatise to substantive evidence. Illustrative is *McKinney v. Hobart Brothers Company*, 2018 IL App (4th) 170333, where plaintiff cross-examined defendant's corporate representative based on "the Compton studies." The defendant objected on the basis of hearsay, but plaintiff responded that he was not offering the study substantively but merely to impeach the witness. On redirect, defendant questioned the witness in more detail about the studies, intending to expose their flaws and unreliability. Defendant even displayed pages from the studies on a large screen. Because defendant had displayed or "published" the studies to the jury on redirect examination, the trial court agreed with plaintiff that the studies should be admitted in evidence and sent them to the jury during its deliberations. In reversing the judgment for plaintiff and holding that the trial court's ruling was erroneous, the appellate court held that defendant was entitled "to attempt to neutralize the impeachment without transforming the Compton studies into substantive evidence." *McKinney*, at ¶ 51. The court reasoned that "[t]he redirect examination did not forfeit the hearsay objection and did not make the Compton studies admissible as substantive." *Id.* at ¶ 53.

Following are summaries of Illinois Supreme Court cases (in chronological order) and a few Illinois Appellate Court cases (also in chronological order) that are relevant to what Illinois courts of review have held on the issue of learned treatises. A review of these cases may bring perspective to the status of such evidence in Illinois, and may help explain the lack of uniformity in dealing with learned-treatise evidence on direct examination.

Supreme Court Decisions

In ***Darling v. Charleston Community Memorial Hospital***, 33 Ill. 2d 326 (1965), the supreme court approved the use of learned treatises in the cross-examination of expert witnesses for impeachment purposes, even where experts did not purport to base their opinions on such authorities. Because the issue was not before it, the court did not address whether an expert could testify about reliance on a learned treatise in direct examination.

In ***Lawson v. G.D. Searle & Co.***, 64 Ill. 2d 543, 557 (1976), the supreme court approved of an expert basing his opinion on "a detailed study of all the clinical studies that have been published in the literature." Without stating the significance of the observation, the court noted that the expert "did not mention the reports by name, nor did he recite the empirical data drawn from the reports or the conclusions of the researchers."

In ***Walski v. Tiesanga***, 72 Ill. 2d 249 (1978), the supreme court noted that learned treatises are not admissible as substantive evidence in Illinois and, because the plaintiff had not sought to admit the treatise as substantive evidence, it refused to consider whether a learned treatise used to cross-examine the defendant doctor who recognized the treatise as an authority, should have been admitted substantively.

In ***People v. Anderson***, 113 Ill. 2d 1 (1986), in a criminal case involving the insanity defense, the supreme court held that facts and data from other sources, such as psychiatrists, doctors and counselors, if reasonably relied upon by experts in forming opinions, although not admissible as substantive evidence, could be disclosed to the jury. The court held that "expert witnesses may disclose the contents of otherwise inadmissible materials upon which they reasonably rely." *Anderson*, 113 Ill. 2d at 9. The court went on to state:

> "To prevent the expert from referring to the contents of materials upon which he relied in arriving at his conclusion 'places an unreal stricture on him and compels him to be not only less than frank with the jury but also *** to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be.' [Citation.] Absent a full explanation of the expert's reasons, including

> underlying facts and opinion, the jury has no way of evaluating the expert testimony [citation] and is therefore faced with a 'meaningless conclusion' by the witness [citation]." *Id.* at 10-11.

In *Anderson*, because the hearsay statements relied upon by the expert were not from learned treatises, the court did not explicitly address the issue of the admissibility of learned treatises under Rule 703.

In ***Roach v. Springfield Clinic***, 157 Ill. 2d 29 (1993), the supreme court refused to consider whether FRE 803(18) should be adopted and thus learned treatises should be given substantive admissibility because, as in *Walski*, the issue had not been properly preserved in the trial court.

Appellate Court Decisions

In *Mielke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42 (1984), citing and relying upon other appellate court cases that refused to allow learned treatises as substantive evidence, the appellate court approved the trial court's refusal to allow an expert witness to read from his notes about the subject of treatises or to read from the treatises themselves. This case provides the foundation for the general principle that, in direct examination, experts may not quote from learned treatises or summarize findings of studies contained within them.

The appellate court case of *Schuchman v. Stackable*, 198 Ill. App. 3d 209 (1990), is worthy of note because it applied the holding in *Mielke*, but even more for the dissenting judge's views on why the supreme court's holding in *Anderson* implicitly overruled the holding in *Mielke* and why, in his view, *Mielke* was wrongly decided.

See also Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (1993) (recognizing that "this area of the law is evolving toward more openness in the presentation of evidence," but refusing "to go as far" as the dissenting judge in *Schuchman*, while approving the admission of articles based on its conclusion that the literature was not used to support or bolster the expert's opinion, but rather as the underlying facts for the expert's opinion). *See also Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 1021 (2001) (holding it was error, justifying in part the trial court's grant of a new trial, for defendant to provide evidence from its expert about a statement in a medical treatise that was consistent with defendant's theory and contradicted what plaintiff's expert had said about the statement in his discovery deposition, when plaintiff's expert admitted at trial that he had erred in testifying at the deposition that the treatise supported his opinion, because the testimony of defendant's expert was not impeaching of the plaintiff's expert's testimony at trial and could not be admitted for substantive purposes).

The appellate court decision in *Sharbono v. Hilborn*, 2014 IL App (3d) 120597 (as modified upon denial of rehearing), is noteworthy for its observation that a learned treatise may be used on direct examination, under the holding in *Wilson v. Clark*, 84 Ill. 2d 186 (1981), and under IRE 703, "if a proper foundation has been established and if there has been proper disclosure." *Sharbono*, at ¶ 35. In a footnote, the appellate court also noted that the rulings of the supreme court in *People v. Anderson*, 113 Ill. 2d 1, 9-12 (1986), and in *People v. Pasch*, 152 Ill. 2d 133, 176 (1992), "albeit in cases that did not involve the use of a learned treatise," seemed to indicate that a party could properly bring out the bases for its medical opinion through the use of a learned treatise on direct examination. *Sharbono*, at note 4. The *Sharbono* court ultimately held, however, that the use of the learned treatise in that case was improper because a proper foundation for its use had not been established since there was no proof that the treatise was a reliable authority, and because there had not been proper pretrial disclosure concerning the use of the treatise. *Sharbono*, at ¶¶ 34-37.

Also noteworthy is the appellate court decision in *Fragogiannis v. Sisters of St. Francis Health Center, Inc.*, 2015 IL App (1st) 141788. In that case, in stressing the authoritativeness of a manual later used in cross-examination by the plaintiff, the appellate court said this:

> "On direct examination, plaintiff's expert, Dr. Sobel, testified about the Manual, not for the truth of the matters asserted therein, but to explain that he considered the Manual in arriving at his opinions. Dr. Sobel further testified that the authors were recognized authorities in the field of emergency medicine and that the Manual is 'highly regarded' and the 'most comprehensive

> source there is' dealing with emergency airway management." *Fragogiannis*, at ¶ 28.

Having pointed out this use of an authoritative manual on direct examination, the appellate court addressed the use of the manual on cross-examination. Reasoning that "there is no blanket prohibition on an attorney reading the text of an authoritative treatise on cross-examination" (*id.* at ¶ 29), the appellate court held that it was not improper for plaintiff's counsel to read from a treatise favorable to plaintiff on cross-examination, and to question defense witnesses (the defendant physician and two defense-physician experts) "relatively extensively" about its contents. (*id.* at ¶ 9). The witnesses were questioned "by reading them sections of the book and asking the witnesses whether they agreed with the contents." (*Id.*) The appellate court reasoned that the defense had pretrial notice of the plaintiff's use of the treatise, and the defendant's "witnesses had every opportunity to explain why the book did not discredit their expert opinions in the case and to reiterate why their positions correctly reflected the standard of care and that it was complied with." *Id.* at ¶ 32. Perhaps taking into account the use of the manual on direct examination (which was not an issue addressed by the court, except to point out that it established the authoritativeness of the manual), the appellate court made this observation:

> "Even if defendants could have somehow shown that the trial court committed error, a party is not entitled to reversal based on an erroneous evidentiary ruling unless the error substantially prejudiced the aggrieved party and affected the outcome of the case, and the party seeking reversal bears the burden of establishing prejudice." *Id.*

Establishing that a Treatise Is Authoritative

In cases where reference to a learned treatise have been upheld, the appellate court has held that a treatise may be qualified as authoritative through the trial court's taking judicial notice of the fact, or through the witness's conceding or an expert witness's testifying that the treatise is authoritative. In like fashion, in *Stapleton v. Moore*, 403 Ill. App. 3d 147 (2010), the appellate court cited numerous decisions in holding that a treatise's authoritativeness may be based upon the competency of the author through the trial court's taking judicial notice of the author's competence, the witness's conceding the author's competence, or the cross-examiner's proving the author's competence by a witness with expertise in the subject matter.

FEDERAL RULES OF EVIDENCE

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

ILLINOIS RULES OF EVIDENCE

(19) Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(19)

IRE 803(19) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

This rule allows *reputation* evidence among a person's family or among a person's associates or in the community about the personal or family history of that person. It differs from IRE 804(b)(4), which is a hearsay exception involving: (1) under IRE 804(b)(4)(A), an unavailable declarant's *statement* about his or her own personal or family history—including some matters about which the declarant could not have personal knowledge, such as his or her own birth; or (2) under IRE 804(b)(4)(B), an unavailable declarant's *statement* about the personal or family history of another person (including that person's death) where the declarant was related to or intimately associated with the other person's family.

FEDERAL RULES OF EVIDENCE

(20) Reputation Concerning Boundaries or General History. A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

ILLINOIS RULES OF EVIDENCE

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(20)

IRE 803(20), like IRE 803(19) and IRE 803(21) which are premised on evidence of *reputation*, is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.	**(21) Reputation as to Character.** Reputation of a person's character among associates or in the community.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(21)

IRE 803(21) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. This rule, like the common law before its codification, permits, as an exception to the hearsay rule, "reputation" testimony (*i.e.*, what people say about a person) concerning a person's character.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.	**(22) Judgment of Previous Conviction.** 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 year, to prove any 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.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(22)

Except for the non-adoption of the parenthetical "(but not upon a plea of nolo contendere)" which was in the pre-amended federal rule and is now incorporated in FRE 803(22)(A), IRE 803(22) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The non-adoption of the exclusion for the plea of *nolo contendere* in the Illinois rule means that such pleas are subject to the hearsay exception provided by the rule.

For a case relevant to the rule, see *American Family Mutual Ins. Co. v. Savickas*, 193 Ill. 2d 378 (2000). There, the supreme court held that collateral estoppel barred recovery from an insurer for wrongful death and survivor actions based on negligence, where the insurance policy excluded coverage

for bodily injury "expected or intended by any insured," and the insured had been convicted of first degree murder. In so holding, the supreme court abrogated the holding in *Thornton v. Paul*, 74 Ill. 2d 132 (1978), which had held that a conviction constituted only *prima facie* evidence, which had the effect of preserving the opportunity to rebut the factual basis of the conviction insofar as those facts were applicable to a civil proceeding. The supreme court adopted instead the "modern trend" that a criminal conviction acts as a bar and collaterally estops the retrial of issues in a later civil trial that were litigated in the criminal trial.

In *In re Estate of Marjorie Ivy*, 2019 IL App (1st) 181691, however, the appellate court distinguished the decision in *Savickas*. There, the respondent had been found not guilty of the first degree murder of the decedent by reason of insanity (NGRI). The issue addressed by the appellate court was whether the trial court had properly entered summary judgment against the respondent based on the prohibition in the Probate Act's "Slayer Statute" (755 ILCS 5/2-6), which provides that a "person who intentionally and unjustifiably causes the death of another" shall not receive property from the decedent's estate. Pointing out that the NGRI determination in the criminal proceedings did not determine whether the respondent intentionally and unjustifiably caused the death of the decedent, the appellate court held that the doctrine of collateral estoppel did not apply, and thus the summary judgment order was improperly entered.

Note that the rule makes admissible, as an exception to the hearsay rule, evidence of previous convictions. It does not address whether such convictions should be given preclusive effect in subsequent litigation. From the holding in *Savikas*, it appears that the general rule in Illinois is that a conviction is given preclusive effect. In *Wells v. Coker*, 707 F.3d 756 (7th Cir. 2013), however, the Seventh Circuit discussed what it referred to as Illinois' inconsistent general practice regarding preclusion in convictions based upon pleas of guilty. The court thus held that the entry of summary judgment was erroneous and remanded the case to give the plaintiff-appellant "an opportunity to contest or otherwise explain the facts that underlie his guilty plea." *Wells*, 707 F.3d at 764. It should be noted, however, that the *Wells* court cited only post-*Thornton v. Paul* decisions but no post-*Savikas* decisions.

FEDERAL RULES OF EVIDENCE

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

ILLINOIS RULES OF EVIDENCE

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(23)

IRE 803(23) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
(24) [Other Exceptions.] [Transferred to Rule 807.]	**(24) Receipt or Paid Bill.** A receipt or paid bill as prima facie evidence of the fact of payment and as prima facie evidence that the charge was reasonable.

COMMENTARY

Author's Commentary on Ill. R. Evid. 803(24)

Former FRE 803(24), which was entitled "Other Exceptions," has been transferred to FRE 807, which is entitled "Residual Exception." IRE 803(24) has no counterpart in the federal rules. The Illinois rule is adopted to codify Illinois common law. *See Arthur v. Catour*, 216 Ill. 2d 72, 82 (2005) ("When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is *prima facie* reasonable."). *See also Wills v. Foster*, 229 Ill. 2d 393 (2008) (clarifying the holding in *Arthur* and adopting the "reasonable-value approach," not the "benefit-of-the-bargain approach;" and holding that "defendants are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services. Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule.").

See *Klesowitch v. Smith*, 2016 IL App (1st) 150414, for a discussion of *Arthur* and *Willis*, and its holding that the "trial court improperly admitted the written-off or settled portion of plaintiff's medical bills into evidence and the jury awarded damages based on the improperly admitted medical bills." *Id.* at ¶ 47. The remedy imposed by the appellate court was a remand for remittitur, and in the absence of consent to remittitur by the plaintiff, reversal and remand for new trial.

See also *Verci v. High*, 2019 IL App (3d) 190106-B (applying *Arthur* and *Wills* in holding that the trial court erred in not allowing defendant to cross-examine the owner of medical services concerning its advertised cash prices for medical services, and in allowing defendant's billing expert to testify concerning what other area medical providers charged for their services where such testimony was based not on information from medical providers but from insurance companies which used the information to set reimbursement rates and not to determine the reasonableness of medical services).

In *People v. Coleman*, 2014 IL App (5th) 110274, ¶¶155-59, where the defendant was convicted of murdering his wife and two sons and spray paint was on the walls of the home where the murders occurred, the appellate court held that a hardware store receipt, which showed that spray paint had been purchased with a charge card found in the home, was properly admitted into evidence under this exception to the hearsay rule. The court rejected the defendant's argument that this exception applied only to medical bills to show that the bill was reasonable.

In *Stanford v. City of Flora*, 2018 IL App (5th) 160115, quoting the parenthetical provided in connection with *Arthur* in the first part of this commentary, the appellate court held that, in not awarding medical expenses, the jury's verdict was against the manifest weight of the evidence. The appellate court provided the following principles related to the admission of a paid bill into evidence:

> "The defendant may rebut the *prima facie* reasonableness of a medical expense by presenting proper evidence casting doubt on the transaction. *Baker v. Hutson*, 333 Ill. App. 3d 486, 494 (2002). The proponent's offering of a paid bill or the testimony of a witness that a bill is fair and reasonable simply satisfies the requirement to prove reasonableness. *Baker*, 333 Ill. App. 3d at 494. The proponent must also present evidence that the costs were incurred as a result of the defendant's negligence. *Baker*, 333 Ill. App. 3d at 494. Furthermore, satisfying the minimum requirements for the admission of a bill

into evidence does not conclusively establish that the entire amount of the bill must be awarded to the plaintiff. *Baker*, 333 Ill. App. 3d at 494. The admission of a bill into evidence merely allows the jury to consider whether to award none, part, or all of the bill as damages. *Baker*, 333 Ill. App. 3d at 494." *Stanford*, at ¶ 30.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(a)

At the outset, note that under the 803 rules, whether the declarant is available or unavailable is not relevant in determining admissibility. In contrast, the 804 rules require the unavailability of the declarant. If the declarant is unavailable and the standards specified by the 804 rules are met, a hearsay exception is applied and the evidence is admitted substantively. IRE 804(a), like its federal counterpart, provides the definitions of unavailability, and is identical to FRE 804(a) before the latter's amendment solely for stylistic purposes effective December 1, 2011.

In *People v. Wright*, 2017 IL 119561, ¶ 81, noting that "Rule 804(a)(1) specifically provides that a witness's exercise of a privilege satisfies the requirement of unavailability," the supreme court held that "a declarant who properly asserts his fifth amendment right not to testify is unavailable for purposes of the rule." The court cited its pre-codification decision in *People v. Caffey*, 205 Ill. 2d 52 (2001), where it had held that a

witness's invocation of a privilege satisfied the requirement of unavailability, and also noted that, although it had not "adopted Rule 804(a) as an exhaustive definition of 'unavailability' under Illinois law," it had "embraced the general principles reflected therein."

In *People v. Garcia*, 2012 IL App (2d) 100656, the appellate court quoted and relied on the rule's provisions concerning "unavailability" in affirming the trial court's ruling that denied admissibility of the plea of guilty for the offense of cocaine possession by the passenger in the defendant's truck, where the State's theory was that the defendant and his passenger jointly possessed the cocaine and the defendant sought admissibility of the passenger's plea of guilty as a statement against interest under IRE 804(b)(3), the appellate court held that the passenger's plea of guilty was not inconsistent with his having joint possession of the cocaine with the defendant and that the defendant had failed to show the existence of any of the bases provided by IRE 804(a) for establishing the passenger's unavailability.

FEDERAL RULES OF EVIDENCE

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

ILLINOIS RULES OF EVIDENCE

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)

IRE 804(b) is identical to FRE 804(b) before the latter's amendment solely for stylistic purposes effective December 1, 2011. Note that there are a number of Illinois statutes in the Code of Criminal Procedure of 1963 that provide exceptions for hearsay statements (or, depending on statutory language, confer not-hearsay status on out-of-court statements) of absent witnesses in criminal cases but are not listed in IRE 804. These statutory provisions supplement the well accepted hearsay exceptions addressed in the various subdivisions of IRE 804(b). Because of the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), however, the constitutional validity of many of them is questionable. They might be referred to as residual exceptions, and are discussed in the *Author's Commentary on Non-Adoption of Fed. R. Evid. 807*, *infra*. They include: section 115-10, hearsay exceptions related to specified offenses committed on children under 13 years of age or on mentally retarded persons (725 ILCS 5/115-10; see **Appendix U**); section 115-10.2, non-hearsay when a person refuses to testify despite a court order to do so if the prior statements were made under oath and were subject to cross-examination by the opposing party in a prior trial, hearing, or other proceeding (725 ILCS 5/115-10.2; see **Appendix O**); section 115-10-2a, non-hearsay of prior statements in domestic violence prosecutions when the witness is unavailable (725 ILCS 5/115-10.2a; see **Appendix P**); section 115-10.3, hearsay exception involving elder adults suffering from mental or physical disability who are victims of specified offenses (725 ILCS 5/115-10.3; see **Appendix Q**); section 115-10.4, non-hearsay when the witness, who has testified under oath regarding a material fact and was subject to cross-examination, is deceased (725 ILCS 5/115-10.4; see **Appendix R**).

(b)(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(b)(1) Former Testimony. Testimony given as a witness (A) at another hearing of the same or a different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or (B) in a discovery deposition as provided for in Supreme Court Rule 212(a)(5).

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)(1)

IRE 804(b)(1)(A) is identical to FRE 804(b)(1) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the change in the phrase "in a deposition" (referred to as "lawful deposition" in the current federal rule in FRE 804(b)(1)(A)) to "in an evidence deposition" in the Illinois rule. This was done, and subdivision (B) was added to the Illinois rule because in Illinois, unlike in the federal system, discovery depositions are not admissible except in very limited circumstances, which includes discovery depositions of an IRE 801(d)(2) witness and, under Supreme Court Rule 212(a)(2), a party-opponent and, as indicated by subdivision (B), by a rule such as Supreme Court Rule 212(a)(5), which allows admission at trial of the discovery deposition of a deponent who is unable to attend the trial because of death or infirmity and who is not a controlled expert witness.

IRE 804(b)(1) and Amended Supreme Court Rule 212(a)(5)

Note that the supreme court amended Rule 212(a)(5), effective January 1, 2011, by retaining the exclusion of a controlled expert's discovery deposition, while deleting the prior exclusion of a *party's* discovery deposition. The effect of the amendment is to make admissible, in addition to the admissibility of the discovery deposition of a mere unavailable witness as described above, the discovery deposition of an unavailable party (even one who is the proponent of admissibility and not a party-opponent), where the witness or the party is unavailable due to death or infirmity. But note that the Committee Comments to the rule state that, as applied to a party's discovery deposition, the amendment "applies to cases filed on or after the effective date" of January 1, 2011, and that it refers to "rare, but compelling circumstances" where it should be permitted and that "it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited." Note, too, that the discovery deposition testimony of an absent or deceased (or even an available) *party opponent* is admissible (under IRE 801(d)(2) and under Supreme Court Rule 212(a)(2)), and was admissible even before these codified rules and the amendment to Rule 212(a)(5). *See In re Estate of Rennick*, 181 Ill. 2d 395 (1998).

For an appellate court decision addressing generally S. Ct. R. 212(a)(5) and particularly the inappropriate way it was employed, see *In re Parentage of K.E.*, 2020 IL App (5th) 210236, ¶¶ 61-74.

Statutes that Are Duplicative of IRE 804(b)(1)

Section 115-10.2 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.2; provided at **Appendix P**) allows admissibility of a witness's prior statements when the witness refuses to testify despite having been ordered by the court to do so. As worded—before the U.S. Supreme Court's decision

in *Crawford v. Washington*, 541 U.S. 36 (2004)—the statute allowed the admission of a witness's prior statements, even those that had not been given under oath and had not been subject to cross-examination, based on the witness's refusal to comply with the court's order to testify. Because refusal to testify renders the witness unavailable (*see* section 115-10.2(c) and IRE 804(a)(2)), the statute effectively expanded the common law former-testimony rule (as well as the now-codified former-testimony rule at IRE 804(b)(1)), but it would have violated *Crawford's* application of the confrontation clause. That problem was remedied, however, by Public Act 94-53, effective June 17, 2005, which added subdivision (f) to the statute and which states: "Prior statements are admissible under this Section only if the statements were made under oath and were subject to cross-examination by the adverse party in a prior trial, hearing, or other proceeding." That addition makes the statute duplicative of IRE 804(b)(1).

Section 115-10.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.4; provided at **Appendix R**), which allows the admission of prior statements when the witness is deceased, is another statute that was affected by *Crawford*. Public Act 94-53 added language to the statute's subdivision (d), which already required that the prior statement sought to be admitted must have been made under oath at a trial, hearing, or other proceeding. The added language requires that the statement must have "been subject to cross-examination by the adverse party." That amendment also makes the statute duplicative of IRE 804(b)(1).

People v. Torres: Prerequisites for Admissibility of Former Testimony

The former-testimony exception to the hearsay rule is often invoked by the State when a witness who had testified at a preliminary hearing in a criminal case is unavailable for trial testimony. In *People v. Torres*, 2012 IL 111302, without referring to the codified rule, the supreme court addressed the issues presented by this hearsay exception in criminal cases. The court began its analysis by noting that (at least in a criminal case) "constitutional considerations are inextricably intertwined" with an evidentiary analysis on the question of admissibility. *Torres*, ¶ 47. This is based on a criminal defendant's Sixth Amendment right of confrontation. See *Crawford v. Washington*, 541 U.S. 36, 57-58 (2004). Consistent with U.S. Supreme Court and its own holdings in prior cases, the Illinois Supreme Court noted the two prerequisites for the admission of former testimony: (1) the unavailability of the witness who testified at the prior hearing, and (2) an adequate opportunity for effective cross-examination during the prior testimony.

Regarding the "unavailability" requirement, the court stressed the need for the prosecution to undertake good-faith efforts prior to trial to locate and present the witness. *Torres*, ¶¶ 54-55. Although the court questioned whether unavailability was adequately shown in this case by the State's allegation that the absent witness had been deported (noting that "simply establishing the fact of deportation, in support of unavailability, may no longer be enough to establish that requisite for admission"), it concluded that the record reflected that the defendant appeared to have stipulated to the witness's unavailability, or conceded it or had forfeited the issue. *Torres*, ¶¶ 55-56.

Regarding the "adequacy of cross-examination" requirement, the court held that factors that must be considered include: (1) that the cross-examination of the witness had the same "motive and focus" as the cross-examination at the subsequent proceeding, and (2) that the opposing party had an opportunity for adequate cross-examination of the witness. As to the requirement of adequacy, the court noted that "what counsel *knows* while conducting the cross-examination may, in a given case, impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing." *Torres*, ¶ 62 (emphasis in original).

In applying these factors to the case under review, the supreme court held that the trial court had erred in admitting the absent witness's preliminary hearing testimony, based on its conclusions that at the earlier hearing: (1) defense counsel was not privy to certain inconsistent statements the witness had given to the police, (2) counsel did not know of the witness's status as an alien or the circumstances of his departure from this country, and (3) there were time and scope restrictions placed by the circuit court on counsel at the earlier hearing. *Torres*, ¶¶ 63-65.

Clearly, knowledge of the requirements provided by the *Torres* decision is essential for proper application of IRE 804(b)(1) in determining the admissibility of former testimony as a hearsay exception.

Examples of Decisions Establishing Adequate and Inadequate Opportunity for Previous Examination

In *People v. Rice*, 166 Ill. 2d 35 (1995), the supreme court determined that the State had an inadequate opportunity to cross-examine the defendant's codefendant during a hearing on a motion to suppress evidence, because of the limited focus at such a hearing. The supreme court thus reversed the appellate court's reversal of the trial court's exclusion of the codefendant's prior testimony during the trial when the codefendant invoked his fifth amendment privilege against self-incrimination. The supreme court reasoned that the suppression hearing did not allow the State to learn of the codefendant's relationship with the defendant and to confront the codefendant's exculpatory evidence on behalf of the defendant at the prior hearing.

In *People v. Sutherland*, 223 Ill. 2d 187 (2006), the supreme court determined that the defendant had ample opportunity in a prior trial to cross-examine a witness and the same motive and focus. It thus affirmed the admission of the deceased witness's prior testimony during a retrial.

In *People v. Kent*, 2020 IL App (2d) 180887, ¶¶ 93-107, the appeal from the defendant's second conviction for first-degree murder after his first conviction was reversed in *People v. Kent*, 2017 IL App (2d) 140917, the appellate court applied *Torres* and other cases in holding that the circuit court had erred in admitting, under IRE 804(b)(1), the testimony from the first trial of a witness whom the State alleged was unavailable. The State's proffer, the court held, was unsupported by affidavit or sworn testimony. This decision highlights, as *Torres* and other cited cases had emphasized, the necessity of presenting evidence of the efforts used to procure the presence of an allegedly unavailable witness.

In *People v. Lard*, 2013 IL App (1st) 110836, the appellate court approved the trial admission of the preliminary hearing testimony of a deceased police officer who had testified to identifying the defendant as one of two men he observed at a burglary scene, despite the defendant's contention that his attorney did not possess knowledge during the preliminary hearing examination that the deceased officer had responded hours earlier to a break-in at the same location. The court held that the earlier offense was irrelevant to the case at bar.

In *People v. Starks*, 2012 IL App (2d) 110273, the State appealed the trial court's grant of defendant's motion *in limine* that excluded the deceased complainant's testimony from an earlier sex-offense trial, in which convictions had been reversed and the case remanded. Citing section 115-10.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.4, which allows admission of a statement of a deceased declarant — see **Appendix R**), IRE 804(b)(1), and other relevant cases (not including *Torres*, which had been decided 12 days earlier), the appellate court upheld the trial court's ruling. The court reasoned that at the first trial, "defendant did not have an adequate opportunity or similar motive to cross-examine complainant, because defendant was provided with incorrect serology test results, did not know about exculpatory DNA tests, and *** was improperly barred from asking complainant about prior sexual conduct." *Starks*, ¶ 28.

Decisions Involving Supreme Court Rule 414

In *People v. Hood*, 2016 IL 118581, the State obtained a court order under Supreme Court Rule 414 permitting the video evidence deposition of the badly beaten 69-year-old victim of an aggravated battery offense. The evidence deposition was taken and admitted at trial under IRE 804(b)(1), and the defendant was convicted. On appeal, the defendant contended that the deposition testimony was improperly admitted because he had not been present and thus his right to confront the witness had been violated. In support, he alleged there was error in not obtaining a written waiver of his right to confront the witness for the evidence deposition as required by Rule 414(e).

The supreme court rejected his contentions. It held that the requirements of *Crawford* had been satisfied: the witness was unable to attend the trial because of his mental condition, and the defendant had a prior opportunity to cross-examine the victim at the evidence deposition. Though the defendant had not attended the deposition, he had waived his right to do so, and two of his attorneys had been present and had cross-examined the witness. The court acknowledged that the requirement

of a written waiver under Rule 414(e) had been violated, but held that it was not a constitutional requirement, and there was ample evidence, including a stipulation by defense counsel, that the defendant had waived his right to be present. He thus had waived his sixth amendment right to confront the witness.

People v. Weinke, 2016 IL App (1st) 141196, provides an example of a case where an evidence deposition taken under Supreme Court Rule 414 was determined to have been taken pursuant to an unjustified emergency basis, and under circumstances that deprived defense counsel of an adequate time to prepare. The deposition, which incriminated the defendant and was admitted into evidence after the deponent died months later from a cause that defendant argued was unrelated to his actions, was determined to have violated the defendant's constitutional rights, thus resulting in a reversal of his conviction for first degree murder and a remand for a new trial.

Seventh Circuit Decision Related to Rule 804(b)(1)

For an example of the Seventh Circuit's application of FRE 804(b)(1) (in circumstances equally applicable to IRE 804(b)(1)), see *U.S. v. Wallace*, 753 F.3d 671 (7th Cir. 2014) (trial court properly refused admission of a videotaped recantation by a non-testifying alleged purchaser of cocaine from the defendant, on the basis that the tape was inadmissible hearsay that had not satisfied FRE 801(b)(1)'s requirements that the statements were made at a deposition or court hearing in which the declarant had been subject to cross-examination).

FEDERAL RULES OF EVIDENCE

(b)(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

ILLINOIS RULES OF EVIDENCE

(b)(2) Statement Under Belief of Impending Death. In a prosecution for homicide, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)(2)

IRE 804(b)(2) is identical to FRE 804(b)(2) before its amendment solely for stylistic purposes effective December 1, 2011, except for the non-adoption of the phrase "or in a civil action or proceeding" (replaced by "or in a civil case" in the current federal rule). That phrase was not adopted because, contrary to the federal rule, in Illinois statements under belief of impending death are admissible only in homicide cases, and not in civil cases.

The historical acceptance of the "dying declaration" exception to the hearsay rule was recognized in both *Crawford v. Washington*, 541 U.S. 36 (2004) and *Giles v. California*, 554 U.S. 353 (2008), but without a clear statement that it satisfied *Crawford*'s "testimonial statements" requirements. *People v. Harris*, 2020 IL App (5th) 160454, ¶¶ 37-provides an historical discussion of the treatment of this hearsay exception in Illinois, which includes the Second District decision in *People v. Gilmore*, 356 Ill. App. 3d 1023 (2004) and the First District decision in *People v. Graham*, 392 Ill. App. 3d 1001 (2009). In *Harris*, the appellate court reasoned, "We find no reason to depart from the decisions in *Gilmore* and *Graham* finding that the admission of dying declarations do not offend the sixth amendment confrontation clause."

People v. Beier, 29 Ill. 2d 511 (1963), furnishes the underlying rationale for the dying-declaration exception to the hearsay rule:

> "The belief of the dying man that death is impending furnishes the guaranty of truthfulness which makes his declaration admissible in evidence. The rule is that such a declaration must be made under the fixed belief and moral conviction of the person making it that his death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance, when he has despaired of life and looks to death as at hand. (*People v. Maria*, 359 Ill. 231.) As this court said in the *Maria* case (359 Ill. p. 235), 'In the first instance the court must be satisfied, beyond a reasonable doubt, that the statement was made *in extremis*, and unless it was so made it should not be allowed to go to the jury.'" *Beier*, 29 Ill. 2d at 515.

People v. Gilmore, 356 Ill. App. 3d 1023 (2005), provides the elements necessary for admission of a dying declaration:

> "In order to admit a statement as a dying declaration, the proponent must show beyond a reasonable doubt that: (1) the statement relates to the cause or circumstances of the underlying homicide; (2) the declarant believes death is impending and almost certain to imminently follow; and (3) the declarant is mentally capable of giving an accurate statement regarding the cause or circumstances of the homicide." *Gilmore*, 356 Ill. App. 3d at 1031.

People v. Perkins, 2018 IL App (1st) 133981, provides an interesting analysis for the non-application of the dying declaration exception. In that case the victim was shot in the face by the defendant. She made three statements identifying the defendant as the person who shot her. However, despite the seriousness of her injury, she gave no indication of a belief in her impending death, she was coherent in making each of her statements, and she died nine days after the shooting. Reviewing and applying a number of decisions related to the dying-declaration exception to the hearsay rule, the appellate court concluded that the exception did not apply in this case. *Perkins*, at ¶¶ 56-66. Ultimately, however, the court allowed admissibility under the forfeiture-by-wrongdoing exception to the hearsay rule. *Id.* at ¶¶ 81-88.

(b)(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(b)(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)(3)

IRE 804(b)(3) is identical to FRE 804(b)(3) before the latter's amendment effective December 1, 2010 (a year before the general amendments solely for stylistic purposes on December 1, 2011), except for Illinois' change in the second sentence from the specific, "to exculpate the accused," to the general, "in a criminal case" (a change also made in the current federal rule in FRE 804(b)(3)(B)). The federal rule's December 1, 2010 amendment added subdivision (A) and (B). Because the federal rule already had been amended effective December 1, 2010, no changes (except for initial upper case letters in the title) were made to it by the December 1, 2011 amendments solely for stylistic purposes. Both rules apply in civil and criminal cases, and the change in the Illinois version makes it clear that the rule applies both to the State and to the defendant in a criminal case, and that the requirement of trustworthiness likewise applies to both parties in a criminal case. (See section (10) under the "Modernization" discussion in the Committee's general commentary on page 4 of this guide.)

Sword and Shield Attributes

The rule has both "sword and shield" attributes. When invoked by the defendant in a criminal case, it is intended to exculpate. When invoked by the State, on the other hand, it is for the purpose of inculpating the defendant. That is so because, when statements of an out-of-court declarant satisfy the requirements of the rule, they frequently inculpate the defendant on trial. Such against-the-interest-of-the-declarant statements are admissible as an exception to the hearsay rule against an implicated defendant if they pass the trustworthiness test. For an example of such a case, see *U.S. v. Watson*, 525 F.3d 583 (7th Cir. 2008) (statement of a codefendant implicating the defendant met trustworthiness test of FRE 804(b)(3) and its admission did not violate the confrontation clause as a "testimonial statement" under *Crawford v. Washington*, 541 U.S. 36 (2004)).

In applying the rule when it is invoked by the State, it must be recognized that a declarant might seemingly (and sometimes unknowingly) implicate himself in the commission of an offense while trying to shift total or primary responsibility onto the defendant, thus making the trustworthiness of the statement questionable. See, for example, *People v. Caffey*, 205 Ill. 2d 52 (2001), where the supreme court observed that "a statement admitting guilt and implicating another person, made while

in custody, may well be motivated by a desire to curry favor with the authorities and, accordingly, fail to qualify as against interest." *Caffey*, 205 Ill. 2d at 99, citing *Williamson v. United States*, 512 U.S. 594, 601-02 (1994) (holding that statements of the declarant that were partially self-exculpatory but that inculpated the defendant were improperly admitted).

Chambers v. Mississippi

Chambers v. Mississippi, 410 U.S. 284 (1973), is often cited in cases that address the common-law version of this rule. In that case the United States Supreme Court found that, in addition to having erred in not allowing an adverse examination by the defendant of the witness who allegedly made the extrajudicial statements that he (the witness) had committed the murder, the trial court also erred in not allowing the defendant to call the witnesses to whom the statements allegedly had been made. The Court offered four factors that provided indicia of reliability that were relevant in that case: (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's penal interest; and (4) in that case, there was an adequate opportunity to cross-examine the declarant. Note, however, that *Chambers* did not involve an out-of-court statement by an absent witness. Rather, it involved prior testimony by a witness who was present and available for cross-examination.

People v. Bowell

Indeed, in *People v. Bowell*, 111 Ill. 2d 58 (1980), the Illinois Supreme Court held that the *Chambers* factors were "regarded simply as indicia of trustworthiness and not as requirements of admissibility." For an Illinois Supreme Court case that discusses both *Chambers* and the application of the rule before its codification, see *People v. Rice*, 166 Ill. 2d 35 (1995) (finding that there was insufficient indicia of the reliability of the codefendant's testimony at an earlier suppression hearing, and thus holding that the testimony was inadmissible at trial under either *Chambers* or FRE 804(b)(3)). See also *People v. Tenney*, 205 Ill. 2d 411 (2002) (holding that it was error to exclude testimony from a witness that another had provided her a statement that inculpated him and exculpated the defendant because there was sufficient indicia of reliability concerning the witness's extrajudicial statement.

People v. Luna

In *People v. Luna*, 2013 IL App (1st) 072253, the appellate court held that the trial court's denial of the defendant's motion to admit the out-of-court statements of two persons under this exception to the hearsay rule was proper, where neither of them implicated themselves in the offenses, but merely asserted that they were present at the crime scene. Citing *Tenney* (quoting *People v. Keene*, 169 Ill. 2d 1, 29 (1995)), the court stated that statements must be self-incriminating and against penal interest, and that the supreme court has directed that because "'a statement of such a nature is the bedrock for the exception, that factor, obviously, *must be present*.'" *Luna*, at ¶ 145 (emphasis added by the court).

People v. Cross

In *People v. Cross*, 2021 IL App (4th) 190114, a prosecution for first degree murder, defendant moved i*n limine* to allow at trial evidence of a rap music video made by defendant's cousin, a video that defendant argued was a third-party confession to the shooting of the victim. In the video, defendant's cousin raps, "Nigga shot up Granny house. Had to hunt him down. He gone. Where he at? Body resting in the fucking ground. He gone." Defendant's cousin had been shot and killed earlier, so he was not available to testify. The trial court denied admission of the video, concluding that sufficient indicia of trustworthiness did not exist.

On appeal after his jury conviction, defendant contended that the trial court had erred in not allowing admission of the rap music video because it prevented him from presenting evidence that his cousin had made the music video in which he "took credit" for shooting the victim. After separately determining that defendant had properly been found guilty beyond a reasonable doubt, the appellate court held that the trial court had properly excluded the music video. The court offered a number of reasons (see *id.* at ¶¶ 122-141) for so holding: (1) the statements were not made spontaneously to a close acquaintance shortly after the crime occurred, their having been made in a music video three months after the shooting, which clearly required significant planning and effort; (2)

the statements lacked substantial corroboration, lacking any details, other than the killing itself; (3) the statements were not particularly self-incriminating and against the declarant's interest because they were very vague, and that other segments of the video may have indicated that defendant's cousin may not have been referring to himself specifically as the killer but instead could have been "glorifying" the murder of the victim by others, including defendant; (4) there was no opportunity to cross-examine defendant's cousin because he was killed before trial; and (5) the music video was an artistic endeavor in which hip hop artists in particular frequently use their music to boast about crimes that either they had no part in or are even entirely fictional, so that the reliability of a statement is diminished when it is created as a part of an artistic endeavor.

People v. Wright

The takeaway from the cases, as illustrated by the wording of Rule 804(b)(3) itself, and as emphasized by the Illinois Supreme Court in *People v. Wright*, 2017 IL 119561, is that, for this exception to the hearsay rule to apply in a criminal case there are "three conditions that must be satisfied before a statement will be admitted under the rule: '(1) the declarant must be unavailable, (2) the declarant's statement must have been against his or her penal interest, and (3) corroborating circumstances must support the trustworthiness of the statement.'" *Wright*, at ¶ 80, citing *People v. Rice*, 166 Ill. 2d 35, 43 (1995). The statement in *Bowell* that the four factors in *Chambers* are merely related to trustworthiness and not requirements of admissibility is borne out by the fact that the rule says nothing about the first or fourth factors provided by *Chambers*, and that are listed above—factors which, when present, merely contribute to trustworthiness.

Decisions on Trustworthiness

For a Seventh Circuit decision discussing in detail the "trustworthiness" requirement of the rule, see *United States v. Henderson*, 736 F.3d 1128 (7th Cir. 2013), where the court held that the trial court had not erred in barring the testimony of a witness, who would have testified that another person admitted to him that he possessed the gun that the defendant was charged with possessing, because of the lack of corroborating circumstances that clearly indicated that the other person's hearsay statement was trustworthy.

In *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶¶ 77-89, based on the lack of trustworthiness, the appellate court affirmed the trial court's exclusion of a codefendant's statement that he alone was responsible for the murder offense and his denial that defendant "had anything to do with this." The appellate court stressed that, though a surveillance video showed that the codefendant was the shooter, it also undermined the codefendant's other statements related to the offense.

In *United States v. Hammers*, 942 F.3d 1001 (10th Cir. 2019), the Tenth Circuit Court of Appeals cited the same required conditions provided by *Wright*. It reasoned that a "close relationship between the declarant and the defendant can damage the trustworthiness of a statement." *Id*. at 1011. In that case, the court held that the district court had not abused its discretion in barring the declarant's suicide note, which accepted full responsibility for the offenses while exonerating the defendant, reasoning that the declarant (who did commit suicide) had been dishonest and untrustworthy in connection with her underlying criminal conduct, and that her suicide note showed that she "had no intention of sticking around to face criminal prosecution." *Id*.

Need for "Unavailability"

See also the *Author's Commentary on IRE 804(a)*, discussing the holding in *People v. Garcia*, 2012 IL App (2d) 100656, where, in a case alleging joint possession, the plea of guilty to the offense of possession of cocaine of the passenger in defendant's truck was held to be inadmissible on the basis that the passenger was not "unavailable" as required by IRE 804(a) in order to trigger application of IRE 804(b)(3).

(b)(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(b)(4) Statement of Personal or Family History.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)(4)

IRE 804(b)(4) is identical to FRE 804(b)(4) before the latter's amendment solely for stylistic purposes effective December 1, 2011.

IRE 804(b)(4)(A) allows evidence of an unavailable declarant's *statement* about that declarant's own personal and family history—including about some matters of which the declarant could have no personal knowledge, such as his or her own birth.

IRE 804(b)(4)(B) allows evidence of an unavailable declarant's *statement* about another person's personal or family history—including about the other person's death—where the declarant was related to the other person or intimately associated with the other person's family.

Note that IRE 803(19) differs form this rule in allowing *reputation* evidence, from among members of a person's family or among a person's associates or in the community, about a person's personal or family history.

(b)(5) [Other Exceptions.] [Transferred to Rule 807.]

(b)(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

(b)(5) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMENTARY

Author's Commentary on Ill. R. Evid. 804(b)(5)

IRE 804(b)(**5**) is identical to FRE 804(b)(**6**) before the latter's amendment solely for stylistic purposes effective December 1, 2011, former FRE 804(b)(5) "Other Exceptions," having been transferred to FRE 807, which is now entitled "Residual Exception." The rule applies to both civil and criminal cases. It codifies the common-law doctrine of forfeiture by wrongdoing.

People v. Drew Peterson

People v. Peterson, 2017 IL 120331, represents the Illinois Supreme Court's most definitive rulings on the forfeiture by wrongdoing exception to the hearsay rule. In that case, the court reviewed and affirmed the appellate court's decision from an interlocutory ruling of the trial court in *People v. Peterson*, 2012 IL App (3d) 100514-B, and the appellate court's decision affirming the defendant's jury-trial conviction for first degree murder in *People v. Peterson*, 2015 IL App (3d) 130157.

In *Peterson*, the trial court had ruled inadmissible certain out-of-court statements made by the defendant's deceased third wife and his missing fourth wife. The statements had been ruled inadmissible despite the trial court's determination, by a preponderance of the evidence, that the defendant had murdered both wives and that he had done so to make them unavailable as witnesses. The trial court had based its rulings barring the statements of the wives on its conclusion that the State had failed to establish the reliability of the excluded out-of-court statements as required by (now-repealed) section 115-10.6 of the Code of Criminal Procedure of 1963. *See* now-repealed 735 ILCS 5/115-10.6(e)(2); available as the first statute provided at **Appendix N**.

Noting that under both the common law and the codified rule, only two factors are necessary and both had been found to be present by the trial court, and noting further that reliability of the out-of-court statements is not an element of forfeiture by wrongdoing, the supreme court first considered the separation of powers issue in order to determine whether the statute or the rule should govern. Finding that the reliability requirement of the statute created an irreconcilable conflict with a rule of the court, and considering the court's rule-making authority to adopt rules of evidence governing the admission of evidence at trial, the supreme court held that "separation of powers principles dictate that the rule will prevail." *Peterson*, at ¶ 34. The court thus found that the admissibility of the hearsay statements of the two wives "was governed by the common-law doctrine of forfeiture by wrongdoing, embodied in Illinois Rule of Evidence 804(b)(5), and not section 115-10.6 of the Code." *Id.* The supreme court thus held that the reliability of out-of-court statements is not required by the codified rule.

The supreme court then considered the sufficiency of the evidence at the pretrial forfeiture hearing. The court first held that the State's burden of proof at a forfeiture by wrongdoing hearing is a preponderance of the evidence, and that the standard of review is whether the trial court's finding is against the manifest weight of the evidence. It then held that the State needed to establish that the defendant's intent was to prevent

the out-of-court declarant from testifying, but that the State need not "identify the specific testimony from the absent witness that the defendant wished to avoid." *Peterson*, at ¶ 42. Noting that, under IRE 104(a), hearsay evidence is admissible at a forfeiture hearing, and that "the court is not bound by the rules of evidence except those with respect to privilege" (*Peterson*, at ¶ 44), the supreme court found that the evidence established that defendant sought to prevent his third wife from testifying "at least in part" on matters related to their divorce, such as child custody, child support, maintenance, and division of property, and that it did not matter that the defendant may have had other motives for killing his wife. As for the missing fourth wife, the supreme court held valid the State's contention that the defendant sought to prevent her from reporting his criminal conduct to the police, holding that the existence of a pending legal proceeding is not a requirement. In supporting its conclusion that intentionally silencing a *potential* witness justifies application of the forfeiture by wrongdoing rule, the court stated:

> "Were we to hold otherwise, the equitable underpinnings of the forfeiture by wrongdoing doctrine would be undermined, and the doctrine's very purpose—to prevent a defendant from thwarting the judicial process by taking advantage of his own wrongdoing (*Reynolds* [*v. United States*], 98 U.S. [145], at 159 [1819]; [*In re*] *Rolandis G.*, 232 Ill. 2d [13] at 40 [(2008)]—would be defeated. Equity demands that a defendant who silences a witness, or a potential witness, through threats, physical violence, murder, or other wrongdoing should not be permitted to benefit from such conduct based solely on the fact that legal proceedings were not pending at the time of his wrongdoing." *Peterson*, at ¶ 57.

Finally, regarding the defendant's contention that statements made by his missing fourth wife were privileged and thus should not have been admitted, the supreme court held that the statements she made to an attorney were not barred because the attorney had informed her that he could not represent her, so there was no attorney-client privilege; and the statements she made to her pastor were not barred by the clergy privilege because the pastor had testified that there were no rules, practices, precepts, or customs of his church that bound him with respect to the confidentiality of his counseling sessions.

Perkins, Krisik, and *Zimmerman*: Appellate Court's Application of *Peterson*

People v. Perkins, 2018 IL App (1st) 133981, provides an application of the doctrine of forfeiture-by-wrongdoing. After first rejecting the application of the dying declaration and excited utterance exceptions to the hearsay rule, the decision provides a review of the supreme court decision in *Peterson*, applying the holding in that decision to the case at bar, and concludes that three statements identifying the shooter, made by the victim who was shot in her face before her death, qualified as exceptions to the hearsay rule under the forfeiture-by-wrongdoing exception, despite the absence of pending legal proceedings. Pointing out that the equitable doctrine of forfeiture-by-wrongdoing extinguishes confrontation clause claims, the appellate court held admissible the victim's three statements and rejected the defendant's claim to sixth amendment protection. *Perkins*, at ¶¶ 81-88.

In *People v. Krisik*, 2018 IL App (1st) 161265, the defendant was convicted of aggravated battery, which for sentencing purposes was merged with a conviction for aggravated domestic battery. The victim of the offense was the defendant's girl friend, who was the mother of his infant son. After the offense, the victim gave an assistant state's attorney a typewritten statement, which described the violence inflicted on her by the defendant. The State provided the trial court recorded evidence of the defendant's conversations with the victim and the defendant's mother wherein he sought to have the victim relocate to a different state or otherwise avoid the service of a subpoena for trial. The victim was unable to be served with a subpoena and did not appear for trial. The issue on appeal concerned the propriety of the admission in evidence of the victim's typed statement, with the defendant contending that the State failed to prove the causation element of its forfeiture by wrongdoing claim. Because the victim had testified at the preliminary hearing that "she did not want to press felony charges against defendant because he is her son's father and she was concerned about the

child not having his father around" (*Krisik* at ¶ 42), there was some basis for the defendant's contention that the victim chose to avoid service and to not attend court on her own initiative. The appellate court rejected that argument, concluding that causation need not be established by direct evidence or testimony and may be established by inference from circumstantial evidence. *Id.* at ¶ 55. Based on the preponderance-of-evidence requirement and the standard of review applicable to forfeiture by wrongdoing, the appellate court concluded that the trial court's admission of the typed statement was not against the manifest weight of the evidence. *Id.* at ¶ 57.

In *People v. Zimmerman*, 2018 IL App (4th) 170695, an interlocutory appeal of the trial court's rulings related to the doctrine of forfeiture by wrongdoing, the appellate court rejected numerous arguments made by the State. Initially, the court noted that in this case the application of the doctrine of forfeiture by wrongdoing was not at issue, the only issue being "the scope of the evidence admissible under the doctrine of forfeiture by wrongdoing and the trial court's role in determining that scope." *Zimmerman,* at ¶ 99. The court first rejected the State's contention that the trial court erred in barring statements made to witnesses by the victim before the victim was murdered, a contention based on the trial court's insistence, during the hearing to bar statements, that witnesses relate to the best of their ability specific statements made by the victim, rather than providing conclusions, opinions, or speculation. The appellate court ruled that the State's contention was not borne out by the record, which established that the trial court did not unduly limit or restrict testimony by any witness during the hearing on the motion to suppress statements, despite its understandable preference for specific statements.

Arguing that IRE 804(b)(5) does not limit the subject matter of the statements that may be admissible under the doctrine of forfeiture by wrongdoing, the State contended also that the trial court had erred in limiting the admissible evidence to statements that "are evidence of defendant's specific intent to prevent the victim from being a witness." *Id.* at ¶ 108. Acknowledging that the State was correct on the legal issue of the rule not limiting the subject matter of the victim's statements, the appellate court held that, once the trial court decided that the doctrine of forfeiture by wrongdoing applied, the only questions for the trial court to consider was whether evidence was (1) relevant and (2) otherwise admissible, which is what the trial court did in admitting three of the victim's statements while holding that other statements offered by the State were unnecessary and of limited probative value—a proper application of Rule 403 because the excluded statements had reduced probative value for they start to become cumulative. *Id.* at ¶ 121.

Finally, the appellate court held that the victim's "statements that she was afraid of defendant, without any further context, amount to an opinion as to defendant's character, opening the door to the possibility that the jury would convict defendant on an impermissible basis," and were thus properly barred by the trial court. *Id.* at ¶ 124.

Conspiracy Theory Applied to Doctrine of Forfeiture by Wrongdoing

In *People v. Davis*, 2018 IL App (1st) 152413, ¶¶ 30-42, a witness to the offenses of murder and attempted murder testified before the grand jury, providing incriminatory evidence against the two defendants. Afterwards, the witness was murdered by two men who were later convicted of that offense. Although it was clear that the defendants had not personally killed the witness who had given grand jury testimony implicating them in the earlier offenses, the grand jury testimony of the deceased witness was admitted under the doctrine of forfeiture by wrongdoing. The issue confronting the appellate court was whether the doctrine could be invoked based on a conspiracy theory of liability as set forth in *Pinkerton v. U.S.*, 328 U.S. 640 (1946).

Citing decisions of federal circuit courts of appeal and relying on the evidence—including even hearsay evidence as allowed by IRE 104(a)—the appellate court held that the trial court's finding that the defendants intended to, and did procure the unavailability of the witness was not against the manifest weight of the evidence. The court held that there was evidence to support finding that the defendants and the killers of the witness were in a conspiracy to kill the witness, and that the killing of the witness was undertaken with the purpose of causing the witness's unavailability as a witness. Pointing out that the misconduct of one conspirator may be imputed to another conspirator if the misconduct was within the scope and in

furtherance of the conspiracy, and was reasonably foreseeable to him, the court concluded that "there is evidence defendants' co-conspirator killed [the witness] because of his cooperation with police and that intent can be imputed to them." *Davis*, at ¶ 42.

United States Supreme Court Decisions: No Confrontation Clause Bar and Intent to Prevent Witness from Testifying a Necessary Factor

In *Davis v. Washington*, 547 U.S. 813, 833 (2006), the United States Supreme Court noted that the federal rule codified the common-law forfeiture doctrine as a hearsay exception that does not violate the confrontation clause; and in *Giles v. California*, 554 U.S. 353, 374 (2008), citing *Davis*, the Court stated: "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'" *Giles* limited the doctrine's application to cases where there is evidence of the defendant's intent to prevent the witness from testifying, holding that it did not automatically apply where the offense is murder.

***Stechly* and *Hanson*: Pre-Codification Illinois Decisions**

For an early pre-codification and a pre-*Giles* Illinois Supreme Court decision on forfeiture by wrongdoing, one that provides a thorough analysis of the common-law rule and its application in Illinois, see *People v. Stechly*, 225 Ill. 2d 246 (2007) (holding that, based on prior U.S. Supreme Court decisions and the specific wording of FRE 804(b)(6), which codified the common-law equitable doctrine of forfeiture by wrongdoing and is the counterpart to the Illinois rule, the common law required proof of an intent to prevent the witness from testifying, proof that is established by a preponderance of the evidence). See also *People v. Hanson*, 238 Ill. 2d 74, 97-99 (2010) (expressly recognizing that the doctrine of forfeiture by wrongdoing serves as an exception to the hearsay rule; also holding that the doctrine applies to both testimonial and nontestimonial statements, thus extinguishing confrontation clause claims; and further holding that the reliability of the statement is not relevant in determining admissibility, because such a requirement is inconsistent with the party's having forfeited the right to examine the absent declarant and would thus "undermine the equitable considerations at the center of the doctrine," and because of the party's right to challenge the credibility of the witness who offers testimony about the statement through cross-examination).

Repealed Statutes

Note that, because they were decided before the Illinois evidence rules were codified, *Stechly* and *Hanson* considered application of this hearsay exception based on a statute that was repealed by Public Act 99-243, effective August 3, 2015. That statute was section 115-10.6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.6). The statute made admissible the statements of a declarant who was killed by the defendant to prevent the declarant from testifying in a criminal or civil case. It was substantially identical to IRE 804(b)(5), except for its murder requirement and its requirement—in section 115-10.6(e)(2)—for reliability of the statement. As noted above, *Hanson* held that reliability is not an element for admissibility of a statement under the doctrine of forfeiture by wrongdoing. And, as also noted above, that principle is the focus of the *Peterson* decision. Thus, the repeal of section 115-10.6 means that IRE 804(b)(5) alone will be applied in all current and future cases involving forfeiture by wrongdoing—ending the confusion related to having a statute and a rule addressing the same subject, with one of them (the statute) containing an extra (and, as illustrated by the cases, an unnecessary) provision.

Note, too, that Public Act 99-423 also repealed what was section 115-10.7 of the Code of Criminal Procedure (725 ILCS 5/115-10.7). That statute made admissible the statements of any unavailable witness whose absence was wrongfully procured. The repeal was appropriate because it was unnecessary to have two statutes applying the same principles to similar factual scenarios, when a single rule would suffice. IRE 804(b)(5) alone suffices for all cases involving forfeiture by wrongdoing—whether by murder or by any other means. Because both statutes provided pre-codification application of the hearsay exception for forfeiture by wrongdoing, they are provided in the appendix at **Appendix N**.

People v. Nixon* and *People v. Coleman

In *People v. Nixon*, 2016 IL App (2d) 130514, the appellate court affirmed the circuit court's admission of the victim's

written statement to police about the defendant's actions. The court held that the absence of the victim from the trial had adequately established forfeiture by wrongdoing based on the victim's fear of the defendant and evidence of the defendant's "friendly inducement" efforts.

In *People v. Coleman*, 2014 IL App (5th) 110274, ¶¶ 130-39, where the defendant was convicted of murdering his wife and his two sons, the appellate court approved the testimony of five witnesses who testified about statements made to them by the wife/victim about her concern that the defendant wished to divorce her because she and their sons were ruining his life. There also was evidence that the defendant had made plans to divorce his wife, and that there was the possibility of his losing his job with a religious organization if he did so. Although the appellate court did not cite IRE 804(b)(5), it cited the relevant statute (section 115-10.6 of the Code of Criminal Procedure of 1963 before its repeal effective on August 3, 2015), as well as the counterpart federal rule of evidence and common law, to conclude that, under the statute and the common law, the admission of the statements related to the witnesses by the deceased wife established a motive for the defendant's committing the murders, and that the forfeiture-by-wrongdoing exception to the hearsay rule justified the admission of the statements, even though there had not yet been a divorce filing.

Seventh Circuit Decisions Applying the Rule

For a Seventh Circuit opinion applying FRE 804(b)(6) (the federal counterpart to IRE 804(b)(5)), see *U.S. v. Jonassen*, 759 F.3d 653 (7th Cir. 2014). In *Jonassen*, where the defendant was convicted of kidnapping his 21-year-old daughter and obstruction of justice, the daughter, who had given pretrial statements to the FBI, testified at trial, but responded to questions with answers that were the equivalent of having no memory of the underlying facts. Based on substantial evidence that the defendant had made numerous efforts at convincing his daughter not to testify against him, efforts that the court concluded were successful, the Seventh Circuit held that the daughter was unavailable under Rule 804(a), and her pretrial statements to the FBI were therefore properly admitted.

For an example of a Seventh Circuit decision that applied the holding in *Giles v. California*, 554 U.S. 353 (2008) (holding the forfeiture by wrongdoing exception to the hearsay rule applies only where the reason for the defendant's wrongdoing is to prevent the declarant from testifying), see *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015), where in the context of the review of a mandamus ruling, the court held that, in the prosecution of the defendant for murder, in the absence of evidence that the defendant killed his wife to prevent her from testifying, it was error—and not harmless error—to admit a letter and other accusatory statements made by the defendant's wife prior to her death.

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

COMMENTARY

Author's Commentary on Ill. R. Evid. 805

IRE 805 is identical to FRE 805 before the latter's amendment solely for stylistic purposes effective December 1, 2011. For a supreme court case that predates the codified rule but illustrates its application, see *People v. Thomas*, 178 Ill. 2d 215 (1997) (proper to admit at trial out-of-court statement of witness's fiancée to the defendant because the statement qualified as a statement by a coconspirator involving an effort at concealment or as an excited utterance, and also proper to admit the prior inconsistent statement of the witness under section 115-10.1(c)(2) of the Code of Criminal Procedure (now incorporated into IRE 801(d)(1)(A)(2)); thus making both statements admissible as exceptions to the hearsay rule).

For an appellate court example of the application of the rule, see *Holland v. Schwan's Home Service , Inc.*, 2013 IL App (5th) 110560, where, citing the rule, the court held that statements in a business record (an insurance carrier's claim form), which were made by defendant's employees, were party admissions; and that statements made by a non-employee (an employee of the third-party administrator of the insurance carrier's workers' compensation claims) were admissible to establish only that she made the statements, which were relevant to show defendant's knowledge, not as proof of the matter asserted in the statements, and thus were not hearsay. *Holland*, at ¶¶ 182-86.

For another example, see *In re D.D.*, 2022 IL App (4th) 220257, where the circuit court found the mother-respondent to be an unfit parent of her four minor children and that it was in the minor children's best interests to terminate the mother's parental rights. The mother contended that the admission into evidence of the service plans and DCFS investigative reports, which are admissible as business record exceptions under section 405/2-18(4)(a) and (b) of the Juvenile Court Act (705 ILCS 405/2-18(4)(a) and (4)(b)), contain multiple levels of hearsay that cannot be admissible evidence merely because the hearsay appears in an otherwise admissible report. *In re D.D.*, at ¶ 41. Relying on IRE 805, she contended, that the State was required to show that each layer of hearsay contained in the service plans and investigation packets was excused by its own exception. *Id.* Rejecting that contention, the appellate court reasoned that the language of section 405/2-18(4)(a) of the Juvenile Court Act necessarily "indicates the document will contain additional levels of hearsay," and that, under section 405/2-18(4)(b) of the Juvenile Court Act, the investigative packets were admissible in evidence. *Id.* at ¶ 42.

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), (E), or (F), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

COMMENTARY

Author's Commentary on Ill. R. Evid. 806

IRE 806 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the addition of (F) in the first part of the first sentence, which was done to reflect that subdivision (F) was added to IRE 801(d)(2).

Note that this rule is consistent with the provisions of the last sentence of IRE 613(b), which excuses the need to afford a party-opponent under IRE 801(d)(2) an opportunity to explain or deny a prior inconsistent statement and affords the opposing party an opportunity to interrogate the witness on the statement, as a prerequisite to the admissibility of extrinsic evidence of the prior inconsistent statement. IRE 806 is more expansive than IRE 613(b), however, for it applies to all admitted hearsay statements, in addition to those admitted under IRE 801(d)(2).

Note, too, that the rule may have dispensed with the requirement, as provided in *People ex rel Korzen v. Chicago, Burlington & Quincy R.R. Co.*, 32 Ill. 2d 554 (1065), that when a prior inconsistent statement occurs before the taking of a deposition offered in evidence at trial, a prerequisite for the introduction of the prior inconsistent statement was that the witness must have been confronted with the statement at the deposition. See section (11) under the "Modernization" discussion in the Committee's general commentary on page 4 of this guide.

In *People v. Fillyaw*, 2018 IL App (2d) 150709, after a retrial ordered by the appellate court, the two defendants were convicted by a jury of first-degree murder and two counts of attempted murder. At the retrial, a key witness was unavailable because the State was unable to procure his attendance, so his testimony at the earlier trial was admitted pursuant to IRE 804(a)(5) and (b)(1). But the trial court denied the defendant's motion *in limine* to admit a notarized affidavit in which the witness recanted his earlier testimony. Noting that "[n]o published decision in Illinois has dealt with the admissibility of an affidavit pursuant to Rule 806" (*Fillyaw*, at ¶ 56), the appellate court applied that rule in holding that the trial court's refusal to admit the affidavit constituted reversible error. In its analysis, the appellate court first pointed out that the defendants had

satisfied the requirements of IRE 901 by authenticating the affidavit through the testimony of the notary. As part of its analysis, the court noted that, even before the codification of Illinois' evidence rules, the appellate court in *People v. Smith*, 127 Ill. App. 3d 622, 630 (1984) had "recognized that, where a statement of an absent declarant is properly admitted into evidence under a hearsay exception, 'the opposing party may impeach such statement with a prior inconsistent statement by the declarant.'" *Id.* at ¶ 46. The appellate court rejected the State's argument that the defendants had failed to satisfy the requirements of section 115-10.1 and 115-10.2 of the Code of Criminal Procedure of 1963, because the defendants had "never sought admission of the affidavit as substantive evidence under these statutory provisions." *Id.* at ¶ 55. Pointing out that the defendants sought admission of the affidavit only for impeachment purposes, consistent with the provisions of IRE 806, and noting that error in denying admission of the affidavit was not harmless because of the importance of the testimony of the witness, the appellate court reversed the convictions and remanded the case for retrial, during which the affidavit may be admitted as a prior inconsistent statement.

Rule 807. Residual Exception

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

[FRE 807 NOT ADOPTED.]

[Although it has not adopted this residual (some say "catch-all") exception to the hearsay rule, Illinois has adopted statutes that seek to accomplish the same goal. Those statutory provisions are discussed in the *Author's Commentary on Non-Adoption of Fed. R. Evid. 807; Illinois Statutory Residual Hearsay Exceptions; Application of Crawford's "Testimonial Hearsay" in Criminal Cases*.]

COMMENTARY

Author's Commentary on Fed. R. Evid. 807

FRE 807 provides a residual exception for the hearsay rule. It is intended to admit out-of-court statements deemed to be trustworthy and probative but not admissible under a hearsay exception under Rule 803 or 804. Understanding the rationale for this federal rule's amendment, effective December 1, 2019, should assist in determining the underlying rationale for the rule itself. We thus begin with the wording of the rule before its amendment:

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including

the declarant's name and address, so that the party has a fair opportunity to meet it.

Note that the current amended rule deletes two of the four pre-amended conditions for admissibility. The deleted subdivisions are (a)(2), related to "evidence of a material fact," and (a)(4), related to serving "the purpose of these rules and the interests of justice." The amended rule retains subdivision (a)(1), related to the requirement of trustworthiness, but it deletes the equivalence standard and explains how "sufficient guarantees of trustworthiness" are determined. The amended rule also retains as subdivision (a)(2) what was (a)(3) in the pre-amended rule, and does so without any alteration.

Providing a portion of the note on the amendment of Rule 807 by the federal Advisory Committee on Rules of Evidence best explains the purposes of the amended rule and the reasons for its amendment:

> Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, *e.g.*, Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard" has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.
>
> The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.
>
> The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.
>
> In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.
>
> The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

> The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (see, Rules 102, 401).

Seventh Circuit's Handling of Pre-Amended FRE 807

In *United States v. Moore*, 824 F.3d 620 (7th Cir. 2016), the Seventh Circuit noted that "[a] proponent of hearsay evidence must establish five elements in order to satisfy [Federal] Rule [of Evidence] 807: '(1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice.'" The court also noted that it had previously warned against the liberal and frequent utilization of FRE 807 "lest the residual exception become the exception that swallows the hearsay rule." In *Moore*, which involved a probation officer's notes concerning a deceased person and the probation records of the deceased person's phone numbers—phone numbers frequently called by the defendant, who claimed he was not close to the deceased person—the Seventh Circuit held that the exception was particularly apt. *Moore* also cites to other Seventh Circuit Court decisions that admitted hearsay statements under FRE 807.

In *United States v. Wehrle*, 985 F.3d 549 (7th Cir. 2021), the Seventh Circuit applied the five elements required by FRE 807 before its 2019 amendment. Pointing out that trade inscriptions—such as "Made in China" and "Product of China" affixed to such items as cameras, flash cards, and hard drives—"are self□authenticating, meaning they 'require no extrinsic evidence of authenticity in order to be admitted'" (*Wehrle*, at 556, citing FRE 902), the Seventh Circuit held that such inscriptions "exhibit a high level of trustworthiness, satisfying Rule 807." *Id.* In rejecting the defendant's argument based on the confrontation clause, the court held that the inscriptions are nontestimonial because "[t]he inscriptions denoting an item's foreign origin are not created in preparation for a future judicial proceeding. Rather, they are created to comply with federal regulations requiring labels of place of origin for imported products." *Id.*

The Takeaway

As the amended rule and the Advisory Committee's note make clear, two of the five requirements provided by *Moore* for Rule 807 application no longer exist. Although federal judges can be expected to exercise appropriate discretion in applying the rule, so that the residual exception does not swallow the rule, there is no question that its amendment makes its application less difficult.

Author's Commentary on Non-Adoption of Fed. R. Evid. 807; Illinois Statutory Residual Hearsay Exceptions; Application of *Crawford*'s "Testimonial Hearsay" in Criminal Cases

The Illinois Supreme Court "has specifically declined to adopt this [predecessor to FRE 807's residual] exception" to the hearsay rule. *People v. Olinger*, 176 Ill. 2d 326, 359 (1997). Illinois, however, provides a number of statutory hearsay exceptions, which may be referred to as "residual exceptions," for certain available and unavailable witnesses in both criminal and civil cases. So, although Illinois has not codified FRE 807, it has created a number of reliability-based residual exceptions to the hearsay rule through statutory enactments.

Crawford v. Washington

A number of Illinois criminal statutes provide for the admissibility of hearsay statements where the out-of-court declarant is unavailable. The admissibility of some of these statements is open to question, however, because of the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court repudiated the "indicia of reliability" standard set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), which had held that hearsay statements were admissible where indicia of reliability were present if the evidence fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. *Crawford* held that, rather than the indicia of reliability test, the Sixth Amendment confrontation clause prohibits admission of "testimonial" statements when the out-of-court declarant does not testify or the

defendant did not have an opportunity to cross-examine the unavailable declarant in a prior proceeding. Further discussion of *Crawford* and its progeny is provided *infra*.

Illinois Statutes that Allow Residual Hearsay Exceptions in Criminal Cases

Numerous Illinois statutes allow the admission of what would normally be hearsay statements but, depending on the statutory language, are referred to as either not hearsay or an exception to the hearsay rule. Most of the statutes are in the Code of Criminal Procedure of 1963. They include:

- **Section 115-10** (725 ILCS 5/115-10; provided at **Appendix U** and addressed, *infra*, under the three separate headings of *People v. Cookson*, *People v. Kitch*, and *Other Decisions Applying Section 115-10*), where a child under the age of 13 or a person who is mentally retarded is the victim of the types of physical or sexual acts enumerated in the statute.

Section 115-10 has two subdivisions that merit special attention. **Section 115-10(a)(1)** allows, as an exception to the hearsay rule, "testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another." This section creates a hearsay exception when the victim testifies to what he or she previously said about the act. It fully accommodates *Crawford's* requirements, because the declarant/victim testifies about his or her own out-of-court statements and is subject to cross-examination about them.

Section 115-10(a)(2), on the other hand, provides for a hearsay exception for "testimony of an out of court statement made by the victim describing any complaint of such act or matter or offense which is the subject of a prosecution for a sexual or physical act against that victim." This section anticipates testimony from someone other than the victim—someone who was told about the act by the victim or who heard the victim's statement. It creates a hearsay exception where the victim does not testify—provided that, as required by section 115-10(b)(2)(B), the victim "is unavailable as a witness and there is corroborating evidence of the act which is the subject of the statement."

Note, also, that **section 115-10(c)** requires a jury instruction (provided by IPI Criminal 4th No. 11.66) when a statement is admitted under this section. See *People v. Mitchell*, 155 Ill. 2d 344, 353-54 (1993) (holding that failure to give the instruction, combined with the error in the trial court's not determining reliability of the statements, "together with the serious contradictions in the testimony of [the victim]," resulted in plain error). But see also *People v. Jackson*, 2015 IL App (3d) 140300, ¶¶ 50-57, where the defendant had not objected to the trial court's failure to give the required instruction, the appellate court cited *People v. Sargent*, 239 Ill. 2d 166, (2010), in holding that, because the defendant had not contended that review was required under the first prong of the plain error test and review was not warranted under the second prong of that test, the failure to give the required cautioning instruction did not constitute error.

- **Section 115-10.2** (725 ILCS 5/115-10.2; provided at **Appendix O**), where a witness refuses to testify despite a court order to do so and the prior statements were made under oath and were subject to cross-examination by the opposing party in a prior trial, hearing, or other proceeding.
- **Section 115-10.2a** (725 ILCS 5/115-10.2a; provided at **Appendix P**), where a declarant is deemed to be unavailable to testify in a domestic violence prosecution. For a relevant decision on this statute, see *People v. Burnett*, 2015 IL App (1st) 133610 (holding that the victim of the defendant's violation of an order of protection was unavailable as a witness under the statute because she refused to answer some questions, thus satisfying the statute's requirement for a hearsay exception, and further holding that the victim was available under *Crawford* because she answered both preliminary questions as well as questions about the offense, thus satisfying sixth amendment confrontation clause requirements). For another relevant decision, see *People v. Busch*, 2020 IL App (2d) 180229 (reasoning that the requirements of the statute were satisfied, but noting that the statutory requirement

of "circumstantial guarantees of trustworthiness" in section 115-10.2(a) had been designed to comport with the requirements of *Ohio v. Roberts*, 448 U.S. 56 (1980), which was repudiated by *Crawford v. Washington*, 541 U.S. 36 (2004), and holding that, though the statements of the alleged victim to one person satisfied *Crawford* requirements, the admission of the alleged victim's statements to another witness and her statements to a 911 operator were testimonial statements, which were improperly admitted and not harmless error, and thus resulted in the reversal of the defendant's conviction and a remand for a new trial).

- **Section 115-10.3** (725 ILCS 5/115-10.3; provided at **Appendix Q**), where a declarant is an elder adult who is a victim of certain specified offenses and is unable to testify because of physical or mental disability.
- **Section 115-10.4** (725 ILCS 5/115-10.4; provided at **Appendix R**), where the declarant is deceased and the prior statements were made under oath at a trial, hearing, or other proceeding and the declarant was subject to cross-examination by the opposing party.
- **Section 106-B-5** (725 ILCS 5/106-B-5) authorizes the trial court to allow an intellectually disabled person or an under-18-years-of-age victim of certain sex offenses, who may suffer serious emotional distress from testifying in the defendant's presence in the courtroom, to provide closed-circuit testimony. In *Maryland v. Craig*, 497 U.S. 836, 851 (1990) the U.S. Supreme Court held that such out-of-court testimony does not impinge on the confrontation clause. Later, in *People v. Dean*, 175 Ill. 2d 244, 254 (1997), the Illinois Supreme Court held that section 106-B-1 was constitutional. Still later, *Crawford v. Washington*, 541 U.S. 36 (2004) did not mention *Craig* when if provided a different framework for confrontation clause analysis. This time-line of cases has resulted in an appellate court decision that expressed concerns about limitations on the rights of defendants, but also a recognition that only the Illinois Supreme Court may alter its prior ruling. See *People v. Pope*, 2020 IL App (4th) 180773 ¶¶ 34-47, where the appellate court expressed those concerns, but held that "[u]nder prevailing law, the trial court did not abuse its discretion by allowing the children [of various sexual offenses] to testify by use of a videoconferencing system, nor did the trial court err by allowing support persons to be present with the children while they testified." *Id.* at ¶ 47. See also *People v. Rajner*, 2021 IL App (4th) 180505, where the special concurring justice, who was the author of the *Pope* decision, wrote in concurrence "in the hope that the Illinois Supreme Court might reconsider its holding in *Dean*. *Rajner*, at ¶ 34.

Illinois Civil Statutes and Cases Unaffected by *Crawford*

Section 2-18(4)(c) of the Juvenile Court Act of 1987 (705 ILCS 405/2-18(4)(c)) allows hearsay statements in civil cases involving abused or neglected minors. It states:

> "Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be admissible in evidence."

For a decision involving application of that statute and a discussion of other cases, see *In re J.L.*, 2016 IL App (1st) 152479 (holding that, because abuse or neglect actions are civil in nature, they are not subject to the confrontation requirements of *Crawford*, and noting that the supreme court in *In re A.P.*, 179 Ill. 2d 184, 196 (1997), has interpreted the statute to require *either* cross-examination or corroboration, but not both).

In re An. W., 2014 IL App (3d) 130526, applied the *In re A.P.* interpretation of section 2-18(4)(c). In that case, three children initially reported that their father had sexually abused them, but at the adjudicatory hearing on the State's abuse and neglect petitions they testified that they had not made the statements or that their prior statements had been lies. The appellate court held, consistent with *In re A.P.*, that corroboration was

not required because all three had testified at the adjudicatory hearing and the trial court's determination of abuse and neglect was not against the manifest weight of the evidence.

In *In re Natalia O.*, 2019 IL App (2d) 181014, the appellate court applied *In re A.P.* and *In re An. W.* in holding that prior statements by the respondent's daughter concerning sexual abuse, which she later recanted through her testimony at trial, were properly admitted in evidence and could serve as the basis for the trial court's findings of abuse and neglect without the need for corroboration.

Section 8-2701 of the Code of Civil Procedure (735 ILCS 5/8-2701; provided at **Appendix S**) has provisions involving an unavailable elder adult, which are similar to those in section 115-10.3 of the Code of Criminal Procedure (provided at **Appendix Q**). Consistent with statutes that apply to civil cases, the statute is unaffected by *Crawford*, because *Crawford* is limited to an accused's constitutional right to confrontation, and does not address evidentiary rules related to hearsay.

Section 8-2601 of the Code of Civil Procedure (735 ILCS 5/8-2601; provided at **Appendix T**) has provisions similar to section 115-10 of the Code of Criminal Procedure (provided at **Appendix U**) that are applicable to a child under the age of 13. That statute is unaffected by the *Crawford* decision because, like section 8-2701 of the Code of Civil Procedure, it applies only to civil proceedings.

Regarding **Order of Protection** cases, in *Arika M. v. Christopher M.*, 2019 IL App (4th) 190125, the appellate court pointed out that "the different districts of the Illinois Appellate Court disagree on the statute that governs the admissibility of a child's out-of-court statements regarding abuse in order of protection cases when the alleged abuser is a parent." *Id.* at ¶ 15. The court reasoned that the two possible statutes related to such cases are section 606.5(c) of the Illinois Marriage and Dissolution Act (750 ILCS 5/606.5(c)) and section 8-2601 of the Code of Civil Procedure (735 ILCS 5/8-2601). *Id.* It cited *Daria W. v. Bradley W.*, 317 Ill. App. 3d 194 (3d Dist. 2000); *Countryman v. Racy*, 2017 IL App (3d) 160379; and *In re Marriage of Gilbert*, 355 Ill. App. 3d 104 (1st Dist. 2004) as decisions that applied the Dissolution Act in such cases; and *In re Marriage of Flannery*, 328 Ill. App. 3d 602 (2d Dist. 2002), and *Trinidad C. v. Augustin L.*, 2017 IL App (1st) 171148, as decisions that applied the Code of Civil Procedure. Agreeing with the reasoning in *Flannery*, the court held that the Code of Civil Procedure's section 8-2601 is the applicable statute. *Id.* at ¶ 22. Noting that section 8-2601 is the civil counterpart to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10; see **Appendix U**) and that like the criminal statute it applies in both bench and jury trials, the court remanded the case to the circuit court because the three minor children whose out-of-court testimony had been admitted were old enough to testify in court, but the trial court had not complied with section 8-2601's requirement to determine whether they were unavailable to testify.

Regarding **Discharge Hearings**, see *People v. Waid*, 221 Ill. 2d 464 (2006) (holding that a discharge hearing under sections 104-23 and 104-25 of the Code of Criminal Procedure (725 ILCS 5/104-23, 104-25) is civil in nature, and thus "section 104-25(a), which allows the admission of hearsay or affidavit evidence at a discharge hearing, does not violate the confrontation clause," nor does it violate the due process clause). Two relevant appellate court cases are *People v. Orengo*, 2012 IL App (1st) 111071 (allowing admission in discharge hearing of outcry statements about criminal sexual misconduct made to two persons by the three-year-old victim), and *People v. Lewis*, 2021 IL App (3d) 180259 (applying *Waid* and *Orengo*, in allowing admission in discharge hearing of the deposition of an elderly witness with health problems).

Significance of These Statutes

The statutes that provide hearsay exclusions or exceptions, not otherwise provided by the codified evidence rules, represent the legislature's valid exercise of its ability to create evidence rules. Such rules are subject to codification and amendment. See *People v. Dabbs*, 239 Ill. 2d 277, 293 (2010) (holding that the "propensity rule" in Rule 404(b) is of common law origin and not of constitutional magnitude, and therefore subject to revision).

In civil cases, except for substantive due process considerations, there is no constitutional bar to creating exclusions or exceptions to the hearsay rule by statute, because the confrontation clause does not apply to such cases and because the

legislature can create and amend evidence rules. In criminal cases, however, the confrontation clause does apply, and out-of-court statements deemed to be "testimonial" are barred under *Crawford*.

The significance of the statutes that provide exclusions or exceptions to the hearsay rule in criminal cases is that they may provide a legitimate basis for the admission of out-of-court statements—because they eliminate the hearsay bar—as long as they satisfy the requirements of the confrontation clause. For example, when a witness, consistent with a statute that allows the substantive admission of hearsay under a hearsay exception or exclusion, gives testimony reciting her own prior statements that are consistent with her testimony at the proceeding, an objection that prior consistent statements are barred by the hearsay rule should fail, because the out-of-court declarant is the witness who is subject to cross-examination on her out-of-court statements, thus satisfying one of *Crawford's* exceptions for the prohibition related to "testimonial statements." For a close but not identical analogy, see *People v. Applewhite*, 2016 IL App (4th) 140588 (holding that section 115-10 of the Code of Criminal Procedure creates an exception to IRE 613(c)'s prohibition of the substantive application of prior consistent statements).

In sum, in criminal cases, these statutes, which might be referred to as residual exceptions to the hearsay rule, eliminate the hearsay obstacle, but they still require adherence to the confrontation clause.

***Crawford* and Its Progeny**

If the statements in the criminal statutes listed *supra* are deemed to be "testimonial statements" (a term not fully defined in *Crawford*, but one that certainly refers to statements made in response to police interrogation or police questioning "to establish or prove past events potentially relevant to later criminal prosecution" (*see Davis v. Washington*, 547 U.S. 813, 822 (2006)), and, in the words of *Crawford*, 541 U.S. at 68, "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial"), the *Crawford* decision renders the hearsay statements of each of the non-testifying declarants in each of the statutes inadmissible, *pursuant to the constitutional protection afforded by the confrontation clause (not by the rules of evidence related to hearsay)*, unless the out-of-court declarant is present or the defendant had an opportunity to cross-examine the unavailable declarant in a prior proceeding.

In *Crawford*, the prosecutor introduced a recorded statement that the defendant's wife had made during police interrogation, as evidence that the defendant's stabbing was not in self-defense in an assault and attempted murder prosecution. But the defendant's wife did not testify at trial because of the State of Washington's marital privilege. Following a thorough review of the confrontation clause and the evils it was designed to prevent, the U.S. Supreme Court held that, for reasons referenced above, the statements were testimonial hearsay and improperly admitted in violation of that clause.

Davis v. Washington*; *Hammon v. Indiana

After *Crawford*, in separate but consolidated cases, the U.S. Supreme Court decided cases that provided examples of both testimonial and nontestimonial statements. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court held that the declarant's statements in a 911 call (in which she described the defendant's contemporaneous violence) were nontestimonial—as descriptive of an ongoing emergency and not solely of past events—and thus admissible, despite the absence of the declarant (defendant's former girlfriend) at the trial.

In contrast, in a companion case decided along with *Davis* (*Hammon v. Indiana*), the defendant's wife, while separated from her husband in a separate room of their home, informed police of the domestic abuse she had just suffered at his hands. This was deemed not to have satisfied the "ongoing emergency" exception, but merely a narrative about past events, and thus constituted testimonial hearsay that was not admissible when the wife did not appear at her husband's trial.

From the holdings in *Davis*/*Hammon*, the Supreme Court articulated these general principles:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Bur they are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and

> that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

Michigan v. Bryant

Later, in *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court applied the "ongoing emergency" doctrine in a case where police questioned the mortally wounded victim, who had been shot and was found in a gas station parking lot. The victim's statements, which included naming the defendant, in response to police questioning about who shot him and where and how it happened, were deemed to be nontestimonial because they had the "primary purpose" of enabling police to meet an ongoing emergency caused by the potential danger to the victim, to the police, and to others because of the violence inflicted by an unapprehended person with a gun.

For a Seventh Circuit decision applying the ongoing emergency doctrine in affirming the denial of habeas corpus from an Illinois Appellate Court decision, see *Damon Goodloe v. Brannon*, 4 F.4th 445 (7th Cir. 2021), where the shooting victim who later died at the hospital told police that Damon had shot him and later identified the defendant as the shooter when the defendant was brought to him while he was in an ambulance.

See also *United States v. Graham* ___ F.4th ___, No. 19-2373 (7th Cir. August 29, 2022) (holding that the admission at trial of police body cameras that captured videos of a woman in a hotel parking lot shouting that she had been a victim of prostitution and that the defendant was holding a 19-year old girl as a prostitute did not violate the confrontation clause, because the declarant, who did not testify at trial, did not make testimonial statements, but rather provided spontaneous declarations to responding police officers, which indicated that the primary purpose of the police encounter was to respond to an ongoing emergency).

Ohio v. Clark

In *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173 (2015), another U.S. Supreme Court discussion of "testimonial hearsay," statements of the three-year-old victim to preschool teachers that the defendant was responsible for his bruises were held not to have violated the confrontation clause and to be admissible. Stating that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause" (*id.* at 576 U.S. at 246), while declining "to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment" (*id.*), the Court held that the "primary purpose" of the conversation (*i.e.*, the purpose of the interrogator and that of the out-of-court declarant) were not primarily intended to be "testimonial" (*i.e.*, the statements were not given with the primary purpose of creating an out-of-court substitute for trial testimony). In holding that the victim's out-of-court statements were properly admitted, the Court held that the fact that the victim did not testify because he was found incompetent to do so, or that the teachers who questioned him may have been subject to mandatory reporting requirements, did not affect the admissibility of the statements.

Two statements of the Court about out-of-court statements are noteworthy, and may be harbingers of later decisions: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause" (*id.* at 247-48), and "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 249.

Hemphill v. New York

Hemphill v. New York, 595 U.S. ___, 142 S. Ct. 681 (2022), is the most recent decision of the U.S. Supreme Court on the constitutional right to confrontation. Hemphill was convicted of murder for the stray 9-millimeter bullet that killed a 2-year-old child in the Bronx. Nicholas Morris was originally charged by the state of New York with the murder, but after his trial commenced the State did not oppose his motion for a mistrial, so that it could reconsider the charges against him. Six weeks later, the State offered him a plea deal to a new charge of criminal possession of a .357 magnum revolver, not the 9-millimeter handgun originally charged in the indictment and used in the killing. Morris then pleaded guilty to possession of a .357 magnum revolver. Under his agreement with the State, he was sentenced to time considered served. Many years later, Hemphill was arrested and charged with the child's murder.

At his trial, Hemphill blamed Morris for the murder. There was evidence that the child's shooter wore a blue shirt or sweater and that a blue sweater found in the apartment of Morris's best friend, who was present at the time of the shooting, matched Hemphill's DNA. There also was evidence that a 9-millimeter cartridge and three 357-caliber bullets were found on Morris' nightstand. Being out of the country, Morris was unavailable to testify, so the trial court, over Hemphill's objections, allowed the State to admit parts of the transcript of Morris' plea allocution (which included his possession of a .357 magnum revolver) to rebut Hemphill's theory that Morris committed the murder. The trial court did so based on New York's highest court's earlier ruling in another case that allowed Hemphill's trial judge to hold that Hemphill's evidence had "opened the door" to the introduction of Morris' testimonial out-of-court statements, which were not subjected to cross-examination and that would otherwise be inadmissible under the Confrontation Clause, because they were "reasonably necessary" to "correct" the 'misleading impression" Hemphill had created. *Hemphill*, 142 S. Ct. at 686.

The issue before the Supreme Court was whether the admission of Morris' plea allocution under New York's highest court's ruling, violated Hemphill's Sixth Amendment right to confront the witnesses against him. The Court held it did. Forcefully reciting the principles provided by *Crawford*, the Court rejected the opening-the-door principle of New York's highest court, which were applied in this case. Reversing Hemphill's conviction and remanding the case for further proceedings, the Court held "[t]he trial court's admission of unconfronted testimonial hearsay over Hemphill's objection, on the view that it was reasonably necessary to correct Hemphill's misleading argument, violated [the Confrontation Clause's] fundamental guarantee." *Hemphill*, 142 S. Ct. at 694.

Seventh Circuit Analysis of Evolution of "Testimonial Statements" Since *Crawford*

The U.S. Supreme Court has not provided a definitive definition of when "testimonial statements" are considered violative of the defendant's right to confrontation. But its decisions—those provided *supra* and *infra*—have provided some answers. For an insightful Seventh Circuit decision tracking the Court's evolution in answering that important question, see *United States v. Norwood*, 982 F.3d 1032 (7th Cir. 2020), at 1042-1051.

"Testimonial" Statements Related to Police Questioning

Davis (fortified by *Bryant* and *Clark*), provides insight as to when statements made to police officers are testimonial or nontestimonial. The quote from *Davis* deserves repetition:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

Consistent with this statement from *Davis* is the appellate court decision in *People v. Dobbey*, 2011 IL App (1st) 091518 (holding that statements identifying the shooter, made to a witness by the deceased victim shortly after the victim had been shot in the chest, were nontestimonial and thus not subject either to the *Crawford* analysis or exclusion under the confrontation clause).

For a discussion of the *Crawford*-related U.S. Supreme Court's decisions in *Melendez-Diaz* and *Bullcoming*, and the Illinois Supreme Court's decision in *People v. Leach*, 2012 IL 111534, see the *Author's Commentary on Ill. R. Evid. 803(8)*; and for a discussion of the U.S. Supreme Court's decision in *Williams v. Illinois*, see the *Author's Commentary on Ill. R. Evid. 703*. For summaries of other relevant cases, see the discussions immediately following and those at the end of this Commentary.

People v. Stechly

In *People v. Stechly*, 225 Ill. 2d 246 (2007), the Illinois Supreme Court endeavored to determine what constituted a "testimonial statement" under *Crawford*'s confrontation-clause analysis. The court concluded that such a statement has two components: (1) solemnity—the statement "must be made in solemn fashion," and (2) "the statement must be intended to establish a particular fact" about events that previously

occurred. The court concluded that statements produced by police interrogation about past events and statements made by persons without police interrogation, but with the intent of having them used in prosecution, qualify as testimonial. In determining the component involving the intent of the declarant, the court held that a person's age and extent of understanding should be "among the circumstances potentially relevant to evaluating whether the objective circumstances of the statement would have led a reasonable declarant to understand that his or her statement could be used in a subsequent prosecution of the defendant." In applying those considerations to the case at bar—involving sexual offenses on a five-year-old girl who was determined to be unavailable as a witness for trial because of the risk of trauma to her—the court held that (1) the girl's statements to her mother were admissible as nontestimonial and in compliance with the requirements of section 115-10 of the Code of Criminal Procedure (the statute is at **Appendix U** in this guide); and (2) the girl's statements given after those to her mother to two persons described as "mandated reporters" pursuant to statute, were testimonial and were therefore improperly admitted into evidence.

In re Rolandis G.

In *In re Rolandis G.*, 232 Ill. 2d 13 (2008), a juvenile defendant was adjudicated a delinquent based on an aggravated criminal sexual assault offense on a six-year-old boy. When asked at trial about the events that occurred on the day in question, the boy "resolutely refused to respond," and the trial court found him unavailable as a witness. Pursuant to section 115-10 of the Code of Criminal Procedure (see **Appendix U**), the trial court allowed into evidence statements the boy had made to his mother and later to a police officer, and a videotaped interview with a child advocate, in which a police detective was present. On appeal, the appellate court ruled that the statement to the mother was nontestimonial, but that the other two statements had been improperly introduced because they were testimonial. On review by the supreme court, the State accepted the appellate court's rulings regarding the nontestimonial nature of the statement to the mother and the testimonial nature of the statement to the police officer. The primary issue before the supreme court, then, concerned the nature of the videotaped statement. Applying the standards provided in *Stechly*, the supreme court held that the boy's videotaped statements during the interview conducted by the child advocate that was witnessed by the police detective was testimonial and therefore improperly admitted. Nevertheless, based on the overwhelming evidence of the defendant's guilt, the court found that the error was harmless beyond a reasonable doubt.

In re Brandon P.

In *In re Brandon P.*, 2014 IL 116653, the supreme court applied *In re Rolandis G.* in holding that out-of-court statements by a three-year-old were improperly admitted under section 115-10 (see **Appendix U**), after reasoning that the three-year-old was unavailable to testify because of her youth and her fear, and noting that she "could barely answer the trial court's preliminary questions, and then completely froze when the State attempted to begin its direct examination of her." *Brandon P.*, at ¶ 47. As in *In re Rolandis G.*, supreme the court held that, because of the other evidence of the defendant's guilt, the error was harmless beyond a reasonable doubt.

People v. Richter

People v. Richter, 2012 IL App (4th) 101025, is noteworthy because it addresses issues related to the admissibility of hearsay evidence allowed by statute when the out-of-court declarant is unavailable, as well as issues related to a criminal defendant's *constitutional right* of confrontation. At issue in *Richter* was the propriety of the admission in evidence of numerous hearsay statements of the deceased victim made to friends, family members, and coworkers. These statements of the deceased victim (about the defendant's mood swings and his abuse of her, the defendant's threats to kill her, and that she was leaving him and taking their children with her) were admitted in evidence under section 115-10.2a of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.2a; provided at **Appendix P**) during the defendant's jury trial for murdering the victim, the mother of his two children with whom he had a 17-year-live-in relationship. Section 115-10.2a allows admissibility of prior statements made by an unavailable witness in a domestic violence prosecution, without the requirement of a prior opportunity for cross-examination by the defendant.

On appeal, the appellate court first found that the victim's statements satisfied admissibility requirements under the statute. The court then considered whether the statements were properly admitted under *Crawford*'s confrontation-clause analysis. It analyzed the United States Supreme Court's holdings in the *Crawford* and *Davis* decisions, the conclusions of various legal scholars and evidence commentators, and out-of-state court decisions.

Based on these considerations, it held that the victim's hearsay statements did not implicate constitutional concerns and that they were therefore admissible, concluding that the victim's statements were not "testimonial hearsay" because they did not possess the solemnity of statements made to law enforcement investigators, and stating, "we conclude that absent government involvement in eliciting or receiving an accusatory hearsay statement, that statement does not constitute hearsay" (*Richter*, at ¶ 135) *** "Simply put, according to United States Supreme Court doctrine, [the victim's] statements at issue in this case did not constitute testimonial hearsay because there was no government involvement in eliciting or receiving them" (*Id.*at ¶ 156; *see also* ¶ 135).

The *Richter* court's holding that governmental involvement in obtaining statements from a witness is fundamental to determining whether the statements are "testimonial hearsay" represents the clearest expression of that principle by an Illinois reviewing court. Whether the United States Supreme Court and the Illinois Supreme Court share this view needs to be determined. So far, neither *Ohio v. Clark*, the latest U.S. Supreme Court decision on the issue, nor *People v. Barner*, 2015 IL 116949, the latest Illinois Supreme Court decision on the issue of testimonial statements, has adopted that view. On the contrary, the reasoning in those cases appears to be inconsistent with that in *Richter*.

People v. Cleary

In *People v. Cleary*, 2013 IL App (3d) 110610, the appellate court considered whether statements made by the victim to friends and her daughter, that her husband said he would kill her if she left him, were properly admitted in evidence against her husband in his prosecution for her murder, under section 115-10.2a of the Code of Criminal Procedure (see **Appendix P**). Concluding that the victim's statements did not bear the solemnity required by the supreme court in *Stechly* to qualify as "testimonial hearsay," the appellate court held both that the statements were properly admitted and that the statute was not unconstitutional as applied. The court, however, refused to apply the *per se* rule applied by *Richter*, which rendered as testimonial only statements elicited by or made to governmental entities.

People v. Cookson

Section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10; available at **Appendix U**) provides an example of a statute that partially complies with *Crawford* and partially may not. It allows admission of hearsay statements made by a victim of physical or sexual acts who is either a child under the age of 13 or a mentally retarded person.

Subdivision 115-10(b)(2)(**A**) (see **Appendix U**) allows admissibility of a hearsay statement of the victim's complaint about the act *when the victim testifies about it*. In *People v. Cookson*, 215 Ill. 2d 194 (2005), where the youthful victim of sexual offenses testified at trial, the Illinois Supreme Court upheld the statute in response to the defendant's contentions premised on *Crawford*, and also approved the admission of the victim's out-of-court statements about the offenses made to others, including to a DCFS investigator, police officers, and a foster parent.

People v. Kitch

On the other hand, section 115-10(b)(2)(**B**) (see **Appendix U**) allows (in the prefatory language of section 115-10(a)(2)) "testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of the prosecution," when the victim (in the language of section 115-10(b)(2)(B)) "is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement," and (under section 115-10(b)(1)) the court finds that the statement is reliable. In *People v. Kitch*, 239 Ill. 2d 452 (2011), in rejecting the defendant's contention that section 115-10 is facially unconstitutional, but in discussing section 115-10(b)(2)(B) (which was not directly under review in the case), the supreme court pointed out that

Crawford "requires something different: where the declarant is unavailable, the defendant must have had a prior opportunity for cross-examination."

Other Decisions Applying Section 115-10

Section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10; provided at **Appendix U**), which has been referred to numerous times in this commentary, provides for an exception to the hearsay rule for statements made by children under the age of 13 (or "a person with a moderate, severe, or profound intellectual ability") who are the victims of numerous listed physical and sexual offenses. It deserves special attention, because of its likely application in many offenses against children under the age of 13.

People v. Applewhite, 2016 IL App (4th) 140588, is illustrative. In that case, shortly after the offense, the 11-year-old victim informed her mother and a nurse and two police officers of the sex act the defendant committed on her. Her detailed description of the act, as well as two other previous acts involving the defendant, were testified to by her and by those who had interviewed her; and a videotaped police interview in which she described the sex act and the two previous similar acts was played for the jury.

In approving the admission of this evidence, the appellate court first rejected the defendant's contention that section 115-10, in allowing the admission of prior consistent statements of witnesses, conflicts with IRE 613(c) which denies substantive admission of such statements. The court held that section 115-10 specifically provides for a hearsay exception and is thus an exception to that rule. The court then rejected the defendant's contention that the evidence admitted was unnecessarily cumulative, specifically rejecting "any notion that current Illinois jurisprudence requires section 115-10 to be narrowly construed." *Applewhite*, at ¶ 73. Noting that the trial court had complied with the statute's requirement to conduct a hearing and had determined "that the time, content, and circumstances of the statement provide[d] sufficient safeguards of reliability" (*id.* at ¶ 74; citing 725 ILCS 115-10(b)(1)), the court affirmed the defendant's conviction.

In *People v. Rottau*, 2017 IL App (5th) 150046, the appellate court approved the admission of videotaped interviews of an under-13-years-of-age girl concerning sexual activities with her stepfather, under section 115-10, where the girl testified about them when she was 18 years of age.

In *People v. Dabney*, 2017 IL App (3d) 140915, the defendant, a family friend, was charged with committing four separate acts of sexual conduct against a 10 year-old girl. A forensic interviewer with Child Network conducted a video-recorded interview of the girl, who testified at trial about two of the acts of sexual conduct, but said nothing about the other two acts. The video recording of the girl's interview, which contained information about all four of the sexual acts, was admitted into evidence under section 115-10. The defendant was convicted of all four of the acts and sentenced to concurrent terms of imprisonment. The issue on appeal, based on the defendant's contention that his constitutional rights under the confrontation clause were violated, concerned the propriety of the admission of the video recording as to the two acts about which the victim had not testified, as well as the convictions for those two offenses.

Because the defendant had not objected to the admission of the video recording, the appellate court engaged in plain error review, which required an initial determination as to whether error had occurred. Noting that the video contained information about the four sexual acts, citing numerous appellate court decisions that had addressed similar circumstances and reached the same conclusion, and based on its reasoning that the defendant had an opportunity for effective cross-examination which did not guarantee effectiveness in the fashion that a defendant may desire, the appellate court held that the defendant's confrontation rights had not been violated. The convictions for the four separate charges were affirmed.

In *People v. Lee*, 2020 IL App (5th) 180570, the issue addressed by the appellate court was whether it had jurisdiction under S. Ct. R. 604(a)(1) to rule on the State's interlocutory appeal of the trial court's order excluding admission of statements, sought to be admitted under section 115-10(a), of the defendant's three young daughters about his alleged sexual abuses. Reasoning that the trial court's order did not have the effect of suppressing evidence, as required by Rule 604(a)(1), the court dismissed the appeal based on lack of jurisdiction

because the State had acknowledged that the evidence was admissible by other means, specifically, the testimony of the three daughters.

The appellate court distinguished its prior holding under section 115-10(a), in which it reversed excluded evidence, in *People v. Brindley*, 2017 IL App (5th) 160188, where the suppressed evidence was an audio-video recording of the very drug transaction at issue, rather than a statement about the transaction. It also distinguished the holding in *People v. Bowen*, 183 Ill. 2d 103 (1998), where, on the direct appeal of the defendant, the supreme court affirmed the admission of the videotaped statement of the three-year-old victim of a sexual offense in addition to her trial testimony. In this interlocutory appeal by the State, based on Rule 604(a), the appellate court stated the jurisdictional issue and its response as follows:

> "The jurisdictional question, however, is not whether evidence is admissible, how reliable the evidence is, or what purpose it serves; the question is simply whether the ruling appealed precludes the State from presenting information to the jury by any means. See *K.E.F.*, 235 Ill. 2d at 540; *Brindley*, 2017 IL App (5th) 160189, ¶ 16. In this case, the answer to that question is no." *Lee*, at ¶ 13.

Admissibility of "Nontestimonial" Statements

Despite the limitations on admitting "testimonial" statements, when out-of-court statements are deemed to be "nontestimonial" section 115-10 (see **Appendix U**) allows admissibility when its provisions are satisfied, even when the minor witness does not testify. An example of a case allowing such out-of-court statements is *In re Kenneth W*, 2012 IL App (1st) 102787, ¶¶ 64-72 (holding out-of-court statements made to her father by a four-year-old girl, who was a victim of sex offenses, were admissible under section 115-10 because they were both reliable and corroborated, and they were found to be nontestimonial and thus did not violate *Crawford*).

***People v. Melchor*; *In re E.H.*—Determining Evidentiary Issues before Constitutional Questions**

Although it is a rule that has primary significance in courts of review, because it also is relevant to the process that should be followed by a trial court in determining admissibility of evidence that might have a constitutional impediment, it is important to be aware of the supreme court's mandate that "[w]hen a court is asked to evaluate the admission of out-of-court statements into evidence, the *first* step is determining whether the statement passes muster as an evidentiary matter." *People v. Melchor*, 226 Ill. 2d 24, 34 (2007), citing *In re E.H.*, 224 Ill. 2d 172, 179 (2006) (emphasis in original). In *Melchor,* the supreme court went on to state:

> "If the proponent seeks to admit the statement pursuant to a statutory hearsay exception, the court must evaluate the statement to determine whether it meets the statute's requirements. We reasoned [in *E.H.*]: 'Only once the statement has first been found admissible as an evidentiary matter should constitutional objections—including *Crawford*-based confrontation clause claims—be dealt with. [Citations.] This is the only analytical "flow chart" that comports with the rule that courts must avoid considering constitutional questions where the case can be decided on nonconstitutional grounds.'" *Melchor*, 226 Ill. 2d at 34, citing *E.H.*, 224 Ill. 2d at 179-80.

Additional Author's Commentaries Related to *Crawford*

For more on *Crawford's* application of the confrontation clause to "testimonial statements," in addition to those cases discussed above and below, see the *Author's Commentary on Ill. R. Evid. 703* related to *Williams v. Illinois*, and the *Author's Commentary on Ill. Rs. Evid. 803(6)* and *803(8)* related to *People v. Leach* concerning autopsy reports as business records.

Seventh Circuit's Holding Regarding Trial Court's Discretionary Limitations on Cross-Examination Consistent with Confrontation Clause

In *United States v. Groce*, 891 F.3d 260 (7th Cir. 2018), the Seventh Circuit had this to say about the district court's discretion in limiting cross-examination within the bounds of the confrontation clause:

> "A court has broad discretion to limit cross, within the Confrontation Clause's bounds. The Confrontation Clause guarantees a defendant an opportunity for effective cross-examination,

but there is no guarantee of cross-examination to whatever extent the defense might wish. We review a limit on cross *de novo* if it directly implicates the Confrontation Clause's core values; otherwise we review for abuse of discretion. Impeaching a witness is a core value. Exposing a witness's motivation, biases or incentives for lying is a core value. But once a trial court permits a defendant to expose a witness's motivation, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury. The Confrontation Clause does not give a defendant a boundless right to impugn the credibility of a witness. The court has wide latitude to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. If the defendant already has had a chance to impeach the witness's credibility and establish that she has a motive to lie, then any constitutional concerns vanish and we review the district court's decision to limit additional inquiries only for abuse of discretion. Even if the court errs in barring cross, that error is harmless depending upon factors such as the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence, and the overall strength of the prosecution's case." *Groce*, 891 F.3d at 268-69 (internal citations, ellipsis, and quotation marks omitted).

Synopsis of United States and Illinois Supreme Court Decisions Addressing DNA Analysis, Lab Reports, and Expert Testimony Based on Work of Others

This commentary has focused on decisions about statutes designed to allow admissibility of out-of-court statements under certain conditions and the effect of *Crawford* on their admissibility. But no discussion of the confrontation clause and the jurisprudence that stems from *Crawford's* holding would be complete without a discussion of United States and Illinois Supreme Court decisions that address the broader question of whether statements unrelated to a specific statute are testimonial or nontestimonial. Other parts of this guide have discussed the first three of the four cases listed below. But they are listed again and one is added, together with parenthetical summaries, to complete this commentary—a commentary focused in large part on the evolution of *Crawford's* jurisprudence.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (sworn certificates of forensic analysts reporting the results of testing that were admitted into evidence to establish that the substance seized from the defendant was cocaine constituted testimonial statements for confrontation clause purposes; four of the five justices who comprised the majority reasoned that the sworn certificates were prepared for use in a criminal trial, and that they therefore were the equivalent of testimony against the defendant).

For a relevant decision applying *Melendez-Diaz* (and *Bullcoming*), see *United States v. Barber*, 937 F.3d 965 (7th Cir. 2019) (holding that, though an ATF report that a firearm dealer was currently federally licensed (to establish that element in the count for stealing firearms from a federally licensed firearm dealer) was improperly admitted in violation of the confrontation clause, that error was harmless because the owner of the dealership testified to its current licensing and produced a current license).

Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705 (2011) (a lab report that certified the results of a blood-alcohol test on a sample taken from the defendant when he was arrested for driving while intoxicated was improperly admitted into evidence, because the test results were testimonial as the lab report was created for an evidentiary purpose in aid of a police investigation, and the surrogate testimony of a scientist who did not participate in the testing did not meet constitutional requirements).

Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221 (2012) (DNA expert's testimony that DNA taken from a vaginal swab of the rape victim matched the defendant's DNA was properly admitted into evidence, even though the expert had no first-

hand knowledge of the sources of the DNA or of the underlying testing, and where, unlike in *Melendez-Diaz* and *Bullcoming*, no report was admitted into evidence. Four of the five justices in the plurality reasoned that the testimony was admissible under Rule 703 as evidence reasonably relied upon by experts; and admissible, in the alternative, even if the report of the lab that did the testing had been admitted into evidence, because it was dissimilar from statements such as affidavits, depositions, prior testimony, and confessions, which the confrontation clause was designed to reach, this alternative basis being very similar to Justice Thomas' reasoning (as the fifth vote for the plurality) that the lab test lacked the solemnity necessary to trigger confrontation clause application). See the *Author's Commentary to Ill. R. Evid. 703* for a discussion of *Williams*.

People v. Barner, 2015 IL 116949. The facts in this Illinois case, which concerns DNA evidence related to a sex offense, are similar to those in *Williams*. In its opinion, the Illinois Supreme Court provides a comprehensive summary of the three U.S. Supreme Court decisions given above, as well as its own decision in *People v. Leach*, 2012 IL 111534, which is thoroughly discussed in the *Author's Commentary on IRE 803(8)*. In this, its most recent decision on *Crawford*, and consistent with *Williams*, the supreme court held that there was no violation of the confrontation clause where State witnesses were allowed to testify concerning the DNA laboratory work and conclusions of nontestifying scientists regarding the restriction fragment length polymorphism (RFLP) analysis method and the short tandem repeat (STR) method. Applying the test provided in *Leach* in regard to the testimony about the RFLP method, the court held that the analysis was not performed for the primary purpose of accusing a targeted individual or for the primary purpose of providing evidence in a criminal case. As for the evidence about the STR testing, the court noted that the record failed "to establish that it was done for the primary purpose of targeting defendant or creating evidence for use in a criminal prosecution" (*Barner*, at ¶ 69), but even if the defendant's right of confrontation had been violated, the court held, any error in the admission of the evidence was harmless beyond a reasonable doubt.

FEDERAL RULES OF EVIDENCE

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

ILLINOIS RULES OF EVIDENCE

Rule 901. Requirement of Authentication or Identification

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics of an item, including those that apply to the source of an electronic communication, taken in conjunction with the circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.

COMMENTARY

Author's Commentary on Ill. R. Evid. 901(a)

IRE 901(a) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule requires that, to have an item of evidence admitted, there must be evidence sufficient to prove that the item is what the proponent claims it to be. Under IRE 104(b), without being bound by the rules of evidence (except those with respect to privilege) and as with all determinations concerning admissibility of evidence, the trial court initially determines whether there is a sufficient basis for the jury to reasonably determine that the proffered evidence is authentic. If the evidence is admitted, the jury then makes the ultimate determination as to whether there is a factual basis for determining that the evidence is authentic and, if it so finds, what weight to give to the evidence.

There is no codified rule that deals with "chain of custody." For an Illinois Supreme Court case addressing issues concerning evidentiary issues related to laying a proper foundation for admitting evidence, see *People v. Woods*, 214 Ill. 2d 455

(2005) (holding that, on appeal, a "defendant's challenge to the State's chain of custody is properly considered an attack on the admissibility of the evidence, rather than a claim against the sufficiency of the evidence, and is subject to the ordinary rules of waiver").

Application of the Silent Witness Theory

People v. Reynolds, 2021 IL App (1st) 181227, deserves serious consideration for it provides the bases for authenticating audio recordings of two jail telephone calls without relying on the typical foundations for admission of such recordings and without relying on any subdivision of IRE 901(b), by relying on proof of authentication through the "silent witness theory." In *Reynolds*, the State presented evidence that, while the defendant was in pretrial custody for felony offenses, two separate telephone conversations, which provided incriminating information against the defendant, were recorded by the jail's inmate phone system. The recorded conversations involved the same man and the same woman. The State contended that the recorded male's voice was defendant's. The defendant contended that the State failed to lay a proper foundation to authenticate the recordings.

In addition to pointing out the typical foundational requirements for admitting audio recordings (see *Reynolds*, at ¶ 50), and noting that an audio recording is generally authenticated "when a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the [recording] accurately portrays the conversation," the appellate court reasoned that "where there is no witness with personal knowledge of what the recordings portray, a sufficient foundation to admit the recording may be laid under what is known as the silent witness theory," where "a recording may be admitted without the testimony of a witness with personal knowledge of what the recording portrays as long as there is sufficient proof of the reliability of the process that produced the recording." *Id.* at ¶ 49.

Reynolds offers a thorough analysis of the evidence that sufficiently demonstrated the accuracy and reliability of the process that produced the recordings of the jail calls. It relied on the testimony of the sheriff's employee who testified concerning the workings of the jail's inmate phone system, including its monitoring and recording; the fact that the male caller provided the defendant's name and personal identification number; that there was no need for a voice recognition feature; and, citing *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 71, and *People v. Taylor*, 2011 IL 110067, ¶ 39, holding that "the fact that the audio recording[s] exist[] at all demonstrates [that] the system was acting correctly" (*Reynolds*, *at* ¶ 55), thus rejecting the defendant's contentions that the State "offered no evidence regarding the capability of the recording device, the competency of the individual who operated it, or whether the device was operating properly when the calls were made." *Id.*

Author's Commentary on Ill. R. Evid. 901(b) and its Subdivisions

IRE 901(b) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. Except for language added to IRE 901(b)(4), effective September 17, 2019 (which is discussed below), the numbered subdivisions that comprise IRE 901(b) are identical to their federal counterparts before the December 1, 2011 amendments. They offer a series of illustrations—as examples only, and not as a complete list—of evidence that satisfies the requirement of authenticating or identifying an item of evidence.

IRE 901(b)(1)

IRE 901(b)(1) provides the obvious illustration that testimony of a witness with knowledge that an item of evidence is what it is claimed to be provides sufficient evidence of authentication or identification. For an example of the application of the rule, see *People v. Tetter*, 2018 IL App (3d) 150243, ¶¶ 25-34, where the appellate court affirmed the admission of a voicemail recording which the complaining witness in a prosecution for aggravated criminal sexual abuse identified as a message she left on the defendant's voicemail, and on which she stated that she was 16 years of age, thus establishing the relevant element of defendant's knowledge of her age. That the recording was captured from the defendant's cell phone on a thumb drive by the U.S. Secret Service through an unknown method or that a challenge to the complaining witness's credibility may have affected the weight of the evidence, but not its admissibility.

The federal rule analysis is identical. See *United States v. Brewer*, 915 F.3d 408 (7th Cir. 2019) ("Rule 901 does not expressly describe how videotape evidence may be authenticated, but we have held that the government can authenticate a recording 'by offering testimony of an eyewitness that the recording accurately reflects' the events as they occurred. *United States v. Eberhart*, 467 F.3d 659, 667 (7th Cir. 2006); see also *United States v. Cejas*, 761 F.3d 717, 723 (7th Cir. 2014)." *Brewer*, 915 F.3d at 417.

IRE 901(b)(2) AND (3)

For a statute comparable to IRE 901(b)(2) and (3), see section 8-1501 of the Code of Civil Procedure, 735 ILCS 5/8-1501, which reads:

> "In all courts of this State it shall be lawful to prove handwriting by comparison made by the witness or jury with writings properly in the files of records of the case, admitted in evidence or treated as genuine or admitted to be genuine, by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the court."

Sections 8-1502 and 8-1503 of the same Code require notice of the use of handwriting standards to the opposing party and an opportunity for the opposing party to examine any proposed handwriting standards.

IRE 901(b)(3) AND (4)

IRE 901(b)(3) and IRE 901(b)(4) were subject to in-depth analysis by the appellate court in *People v. Pitts*, 2016 IL App (1st) 132205. In that case, at a motion-to-suppress hearing, the second page of a complaint for search warrant was missing. The complaint had been signed by the judge issuing the warrant and it led to the issuance of a search warrant that resulted in the recovery of firearms and ammunition, which in turn led to criminal charges based on weapons violations. To compensate for the missing page at the hearing, the State offered an unsigned copy of the complaint. The trial court accepted the copy and denied the motion to suppress. On appeal after the defendant's conviction, the issue before the appellate court concerned the propriety of the trial court's considering the purported duplicate copy of the second page of the complaint in denying the defendant's motion to suppress the evidence.

In its analysis, the appellate court first cited section 8-1206 of the Code of Civil Procedure (735 ILCS 5/8-1206), which "provides that the authenticity of court records 'may be proved by *copies* examined and sworn to by credible witnesses.'" *Pitts*, at ¶ 64 (emphasis added by the court). Acknowledging that the State had provided no live testimony regarding the authenticity of the copy of the complaint for the search warrant, the appellate court noted that "under the Illinois Rules of Evidence, sworn testimony is not the only way to authenticate a document." *Id*. at ¶71. The court pointed out that, in addition to witness testimony under IRE 901(b)(1) (which, the court reasoned, provided the same authentication method as that provided in section 8-1206), authentication may be established by the trier of fact comparing the document to other authenticated documents under **IRE 901(b)(3)**, "or by the document's '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances'" under **IRE 901(b)(4)**. *Pitts*, at ¶ 72.

The court concluded "that these alternative methods of authentication in the rules of evidence act to supplement the method of authentication provided in section 8-1206." Therefore, to avoid a conflict between the rules of evidence and a statutory rule of evidence, the court refused to read section 8-1206 as providing the exclusive method for providing authentication.

After then engaging in a thorough analysis of the first page of the complaint for search warrant and the warrant itself, and comparing it to the contents of the purported second page of the complaint, the appellate court determined that the requirement of authentication was satisfied because of a "[c]omparison *** with specimens which have been authenticated" under **IRE 901(b)(3)**; or alternatively, under **IRE 901(b)(4)**, "based on the '[a]ppearance, contents, *** or other distinctive characteristics' of the second page 'taken in conjunction with circumstances,' such as the fact that the second page continues a sentence from the first page, clearly covers the same subject matter, and contains the same distinctive legend as both the first page and the warrant itself." *Pitts*, at ¶ 79. Accordingly, the appellate court upheld the authentication of the substitute second page of the

complaint for search warrant and affirmed the conviction of the defendant.

IRE 901(b)(4)

Effective September 17, 2019, the supreme court amended IRE 901(b)(4). Immediately after the phrase "or other distinctive characteristics" the court added "of an item, including those that apply to the source of an electronic communication." Until that revision, no evidence rule had specifically addressed authentication of electronic communications such as text messages, emails, and social media sites. Before the amendment, Rule 901(b)(4), which provides circumstantial evidence of authenticity based on "distinctive characteristics," was nevertheless the go-to rule for a trial court's determination of an electronic communication's authenticity. But the supreme court's amendment now makes it clear that such communications are subject to the rule. The court recognizes the impact of rapidly evolving technology on the admissibility of evidence and the need for the rules to keep pace. The amendment makes explicit what previously was implicit. (Note that in *People v. Brand*, 2021 IL 125945, ¶ 38, which is discussed *infra*, in affirming the admission of the defendant's use of an alias name in Facebook postings, the supreme court quoted this paragraph, thus embracing the fact that IRE 901(b)(4) implicitly applied even before the court's September 17, 2019 amendment.)

It is especially important for those who proffer evidence of documents or communications (whether electronic or otherwise) to stress the distinctive characteristics that will lead the trial judge to determine that the proffered evidence is admissible as authentic and, if admitted, will lead the jury to give the evidence the desired weight. With those goals in mind, the following decisions are offered as examples of success and failure in obtaining admissibility.

Regarding IRE 901(b)(4), see the pre-codification decision in *People v. Towns*, 157 Ill. 2d 90, 104 (1993) ("In authenticating a document by circumstantial evidence, factors such as appearance, contents, and substance need to be considered.").

Regarding the admissibility of "**Caller ID**" as a foundational basis for proving the source of a phone call, see *People v. Caffey*, 205 Ill. 2d 52 (2001) ("Reliability may be established when the witness testifies that when he or she received telephone calls, the witness checked the caller ID and that the same number always appeared for the same caller."). For other examples of this rule's application to phone conversations, see the discussion of IRE 901(b)(6) just below.

Regarding circumstantial evidence of authorship for the admissibility of an **e-mail message**, see *People v. Diomedes*, 2014 IL App (2d) 121080, ¶¶ 17-19 (citing IRE 901(b)(4) in holding that authentication requirements for admissibility of an e-mail message may be satisfied where the document's contents, in conjunction with other circumstances, reflect distinctive characteristics; and there is no obligation to prove that the IP address from which the e-mail was sent was connected to the defendant).

Regarding the authentication requirements for admission of sent and received **text messages**, see *People v. Walker*, 2016 IL App (2d) 140566 (applying IRE 901(b)(4) to establish circumstantial evidence that defendant arranged or was accountable for a fourth cocaine sale, where text messages involving a phone number used by an undercover officer to receive and make calls to defendant and buy cocaine from him three prior times before using only text messages for the fourth drug purchase). Also, see the Seventh Circuit decisions in *United States v. Lewisbey*, 843 F.3d 653 (7th Cir. 2016) (applying FRE 901(b)(4), which is identical to its Illinois counterpart, in holding that the defendant's **text messages** and **Facebook** posts satisfied the rule's requirements and were properly admitted); and *United States v. Barber*, 937 F.3d 965 (7th Cir. 2019) (citing *Lewisbey* and relying on direct and circumstantial evidence that established **Facebook** account belonged to defendant).

In *People v. Harper*, 2017 IL App (4th) 150045, one of the issues was the propriety of the admission of a series of **text messages** to the defendant from an unidentified person. The gist of the texts was that the unidentified text-sender had heard that the defendant and "some of your guys" were responsible for a killing that had occurred just hours earlier. In its analysis, the appellate court held that a "record from the phone company, showing the time and recipient or maker of calls to or from a number registered to defendant, is admissible as a business record. The same is true with regard to text messages. The fact calls and texts were made and received by defendant

was properly authenticated." *Harper*, at ¶ 57. Despite the fact that the State had established a proper foundation to introduce evidence that calls and texts were made and received by the defendant, the appellate court held that the content of the text messages should not have been admitted, because the State had not identified who sent the messages, and the content of the messages was blatant hearsay. *Id.* at ¶ 62. Allowing the jury to see this prejudicial and inadmissible evidence constituted reversible error.

See also *People v. Watkins*, 2015 IL App (3d) 120882 (holding that drug-related **text messages** recovered from a cell phone located near recovered cocaine in an apartment shared by others, used to connect the phone and the drugs to the defendant, were improperly admitted into evidence because "there were no cell phone records to indicate that the cell phone belonged to or had been used by defendant or anyone else at the residence; there was no eyewitness testimony to indicate that the cell phone belonged to or had been used by defendant or that the messages were being sent to defendant; and there were no identifying marks on the cell phone itself or on the cell phone's display screen to indicate that the cell phone belonged to or had been used by defendant (other than possibly the references to 'Charles' [which was defendant's first name] in the text messages)" and because the police officer who provided expert testimony about the meaning of the text messages was unable to authenticate the text messages because he "had no personal knowledge of the text messages and had no idea who was the owner or user of the cell phone"). *Id.* at ¶ 38.

In *People v. Kent*, 2017 IL App (2d) 140917, the defendant was convicted of the first-degree murder of the victim who was shot and killed on his driveway. The victim had two children by the woman who was at that time in a relationship with the defendant. Two days before the shooting, the defendant, accompanied by the woman, had gone to the location where the victim resided. There, the defendant was involved in a violent altercation with the victim. The day after the shooting, a detective took a screenshot of a **Facebook** post on a profile under the name "Lorenzo Luckii Santos." The screenshot was deleted later on the day it was discovered. "Lorenzo" is the defendant's first name; "Luckii" is the defendant's nickname; "Santos" was represented to be the last name of the defendant's mother, but the State presented no evidence of that latter fact. The Facebook post contained "a photograph of someone allegedly resembling defendant and an undated post that states, 'its my way or the highway.....leave em dead n his driveway.'" *Kent*, at ¶ 81. During a pretrial hearing, there was a representation that the Facebook post was associated with an IP address belonging to the woman referred to above, but the State presented no Facebook records at trial. The Facebook post was admitted over the defendant's objections. The significant issue on appeal was the propriety of the admission of the screenshot of the Facebook post.

Noting that the parties had not cited, and that its research had not discovered, any Illinois case addressing the admissibility of a Facebook post allegedly attributable to a criminal defendant, the appellate court relied heavily (see *Kent*, at ¶¶ 88-100) on a Second Circuit Court of Appeals case, *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014)—a decision which the Seventh Circuit in *United States v. Barber*, 837 F.3d 965 (7th Cir. 2019), later distinguished, stating: "the government's case was so weak that at first it did not even try to admit the website at issue as the defendant's. When it did try, the government could point to nothing in the record suggesting that the defendant had ties to the website." *Barber*, 837 F.3rd at 970. Stressing the ease with which a fictitious Facebook posting can be achieved and that the State failed to present any evidence that it was not public knowledge that the victim was killed on his own driveway, the appellate court in *Kent* concluded that "to argue that the Facebook post was tantamount to an admission that defendant killed the victim in his driveway, Rule 901 required 'some basis' on which a reasonable juror could conclude that the post was not just any Internet post, but was in fact created by defendant or at his direction." *Kent*, at ¶ 119. The court reversed the defendant's conviction, holding that the admission of the Facebook posting was error and that the error was not harmless.

Postscript on *Kent*: The retrial of Kent, which resulted in another conviction for first-degree murder, was again reversed and remanded by the appellate court in *People v. Kent,* 2020 IL App (2d) 180887. In *Kent II*, the State's claim that a key witness

in the earlier trial was unavailable for trial resulted in the trial court's admission of the witness's earlier testimony under IRE 804(b)(1). The appellate court reversed the conviction and remanded the case because the State failed to support its claim that the witness was unavailable by affidavit or sworn testimony.

People v. Curry, 2020 IL App (2d) 180148, is another **Facebook**-related decision that distinguishes *Kent*. In so doing the appellate court noted that in *Kent* "the only evidence of authentication [of the Facebook post] was the defendant's nickname and a photograph allegedly resembling Kent." *Curry*, at ¶ 54 . In contrast, here the appellate court, noting that Facebook messages are akin to e-mails or text messages, held that Facebook postings sent by the defendant to the victim of his sexual offense were properly admitted under IRE 902(11) as self-authenticating business records, because the State had submitted the written certification of a qualified person from Facebook and the certification provided that the records were made and kept by Facebook in the course of its regularly conducted activity and as part of its regular business practice. The appellate court concluded "that was sufficient to admit the information regarding defendant's name, address, telephone number, and e-mail address, as indicated on the Facebook account, as self-authenticating business records." *Curry*, at ¶52. To satisfy additional authentication requirements, the appellate court cited IRE 901(b)(4), which allows authentication through circumstantial evidence, reasoning that the Facebook messages contained information that only defendant would have known, including the defendant's nickname for the victim and his personal knowledge of the offense.

In *People v. Brand*, 2021 IL 125945, a prosecution for home invasion, domestic battery, and possession of the female victim's stolen car, the supreme court upheld the admission of **Facebook** postings against the defendant Brand who used the nickname of Masetti Meech,

During its analysis, the supreme court quoted *People v. Kent*, 2020 IL App (2d) 180887, pointing out that "*Kent* held that the following factors were relevant for determining whether a social media post was properly authenticated:"

> "(1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a *prima facie* showing of authenticity." *Brand*, at ¶ 44, citing *Kent*, 2017 IL App (2d) 140917, at ¶ 118.

After citing these *Kent* factors, the supreme court clarified that:

> "[t]he appellate court in *Kent* noted that these examples 'are intended only as a guide' and that "'[e]vidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the 'type and quantum' of evidence necessary to authenticate a web page will always depend on context.'" Citing *Kent*, 2017 IL App (2d) 140917, at ¶ 119.

Having made those observations, the supreme court in *Brand* relied on the victim's familiarity with the defendant's alias name because he had used it in prior messages to her and because in one posting he accurately informed the victim of the location of her stolen car, and in the other posting he made reference to addresses where her relatives lived and where she had previously worked. In explaining the relevance of IRE 901(b)(4) before and after its amendment in 2019, the supreme court cited *People v. Diomedes*, 2014 IL App (2d) 121080, "in holding that authentication requirements for the admissibility of an e-mail message may be satisfied when the contents of the document, in conjunction with other circumstances, reflect distinctive characteristics and that there is no obligation to prove that the IP address from which the e-mail was sent was connected to the defendant." *Brand*, at ¶¶ 40-41. The court provided this explanation:

"Although the 2019 amendment to example (4) of Rule 901(b) was not available at the time of defendant's 2017 bench trial, the amendment merely clarified what was already implicit—that electronic communications are subject to the rule. Before the adoption of Rule 901 in 2011, Illinois case law had long recognized these same principles of authentication by use of circumstantial evidence, including factors such as appearance, contents, and substance. [Citation]. As we have explained, reliability may be established when a witness testifies as to the distinctive characteristics of the electronic communication as a foundational basis for proving the source of the electronic communication." *Brand*, at ¶ 40.

In contrast to the underlying facts in *Kent*, where "the State offered neither direct nor circumstantial proof of authentication" (*Brand*, at ¶ 46), the supreme court held that the State presented sufficient evidence authenticating the Facebook messages, thus justifying the trial court's reasonable conclusion that the messages were created by the defendant. In addition to distinguishing *Kent*, *Brand* embraced the decision in *Curry*.

Note that *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, demonstrates that, where a party fails to object in the trial court to the admission of a **Facebook** post on the grounds of authentication or hearsay, that party forfeits the right to raise the issue of admissibility on appeal. *Marsh*, at ¶ 17.

IRE 901(b)(5)

Regarding IRE 901(b)(5), see the Seventh Circuit Court of Appeals decision addressing the federal rule (equally applicable to the Illinois rule), in *United States v. Mendiola*, 707 F.3d 735 (7th Cir. 2013) (approving the application of the rule in admitting the testimony of a Spanish language interpreter in identifying the voice of the defendant on taped phone conversations through a comparison with a voice exemplar of the defendant; explaining the non-applicability of Rules 702 (related to expert opinion evidence) and 1002 (related to the best evidence rule); describing the "minimal familiarity requirement" of Rule 901(b)(5); and explaining how the personal knowledge requirements of Rule 602 and the lay opinion evidence requirements of Rule 701 were satisfied).

IRE 901(b)(6)

IRE 901(b)(6) provides illustrations for authenticating the admission of telephone conversations. The rule describes requirements where: (A) a call is made to a listed number and (B) where a call is made to a place of business. But the rule also applies—together with the requirements for "distinctive characteristics" provided by IRE 901(b)(4)—where the witness is the recipient of the call.

People v. Caffey, 205 Ill. 2d 52 (2001) is illustrative. There, the witness received numerous calls from a woman with whom she had never spoken. The woman identified herself on each call and the witness noted that her caller ID device always showed the name of the same woman. Holding that the evidence concerning the calls was improperly excluded by the trial court, the supreme court held that "[t]estimony as to a telephone conversation between a witness and another person is inadmissible in the absence of a claim by the witness that he or she knows the other person or can identify the person's voice or other corroborative circumstances from which the caller can be identified as the person who talked to the witness." In this case, the caller ID information was deemed to be sufficient corroboration to permit admissibility.

Another supreme court decision that illustrates the application of IRE 901(b)(4)'s corroborative effects on telephone calls is *People v. Edwards*, 144 Ill. 2d 108, 166 (1991). There, a number of ransom calls, two of which were recorded, were made by an unknown male. To gain the admission at trial of the two recorded calls, the State presented evidence that an acquaintance of the defendant saw him in the telephone booth to which one of the calls was traced at the approximate time of one of the recorded calls. Also, an FBI agent testified that he saw a man at the telephone booth where one of the calls had been traced, near a car where a woman was seated, within 30 seconds of the tracing of one of the calls. The car was later seen at defendant's home, with defendant and the woman exiting the car. The supreme court held that this circumstantial evidence was sufficient to justify the use of the tapes at trial.

Citing both *Caffey* and *Edwards*, in *People v. Camacho*, 2018 IL App (2d) 160350, the appellate court upheld the admission at trial of the recording of a 911 call, in which the caller asked for

police assistance because her husband had grabbed her by the neck. The caller gave her name and the name of the defendant, as well as his date of birth and what he was wearing. When police arrived at the apartment a few minutes later, defendant and his wife were the only two adults present. The information provided on the 911 call perfectly matched the officers' observations. A photo taken shortly after the officers' arrival showed redness around the wife's neck. Although defendant's wife did not testify at trial, the appellate court reasoned that "the content of the call was corroborated by other circumstances identifying [defendant's wife] as the caller," and it held that the trial court did not abuse its discretion in admitting the recording into evidence. *Camacho*, at ¶27.

IRE 901(b)(7)

IRE 901(b)(7) provides the authentication requirements for the admission of public records as an exception to the hearsay rule under **IRE 803(8)** . Such records may be admitted through judicial notice. See, *e.g.*, *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper."). The rule should be distinguished from IRE 902(4), which allows admission into evidence of public records by self-authentication through certification.

IRE 901(b)(8)

IRE 901(b)(8) provides the authentication requirements for **IRE 803(16)**, which provides the hearsay exception for statements in ancient documents. Note that the September 28, 2018 amendment of IRE 803(16), which provides a hearsay exception for an authentic document prepared before January 1, 1998, effectively requires the document to be in existence 20 years or more, so no amendment to IRE 901(b)(8)(C), which refers to the 20-year requirement, was necessary. In the future, however, to satisfy the rule's requirement for authenticating an ancient document, one of the required proofs will be, not that the document was prepared 20 years or more before the date offered for admission, but that it predates January 1, 1998.

Note that the 20-year provision in IRE 901(b)(8)(C) (and in pre-amended IRE 803(16)) for evidence of an ancient document or data compilation represented a substantive change in Illinois, because under the common law a 30-year time period had been required. See section (9) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide. As noted, though the 20-year provision remains in IRE 901(b)(8)(C), the September 28, 2018 amendment to IRE 803(16) has altered the time requirement for ancient documents to those prepared before January 1, 1998.

The rule furnishes a method (but not necessarily the only method) for authenticating statements in ancient documents under IRE 803(16). It is premised on the belief that the authentication requirements in subdivisions (A) and (B) of the rule minimize the danger of mistake and that the age of the document or data compilation in subdivision (C) offer assurance that the writing antedates the present controversy.

IRE 901(b)(9)

For a case relevant to IRE 901(b)(9), see *People v. Holowko*, 109 Ill. 2d 187 (1985) (pointing out that "the printout of results of computerized telephone tracing equipment represents a self-generated record of its operations, much like a seismograph can produce a record of geophysical occurrences, a flight recorder can produce a record of physical conditions onboard an aircraft, and an electron microscope can produce a micrograph, which is a photograph of things too small to be viewed by the human eye." *Holowko*, 109 Ill. 2d at 193 *(*internal quotation marks omitted), and holding that the admission into evidence of such results "requires only foundation proof of the method of the recording of the information and the proper functioning of the device by which it was effected") *Id.*

Also, see *People v. Caffey*, 205 Ill. 2d 52 (2001) (holding that "information displayed on a caller ID device is not hearsay because there is no out-of-court asserter" and holding further that "the only requirement necessary for the admission of caller ID evidence is that the caller ID device be proven reliable," which was satisfied in this case because the witness's caller ID displayed the caller's name for each of the numerous calls from the same woman).

See also *Grand Liquor Co. v. Department of Revenue*, 67 Ill. 2d 195 (1977) (finding that Department of Revenue failed to lay sufficient foundation for admission of records, but adopting decision of the Mississippi Supreme Court in holding

"that print-out sheets of business records stored on electronic computing equipment are admissible in evidence if relevant and material, without the necessity of identifying, locating and producing as witnesses the individuals who made the entries in the regular course of business if it is shown (1) that the electronic computing equipment is recognized as standard equipment, (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and (3) the foundation testimony satisfies the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission"); *People v. Hanna*, 207 Ill. 2d 486 (2003) (regarding breath analysis instruments for the testing of alcohol level); *People v. Orth*, 124 Ill. 2d 326 (1998) (providing foundation for admission of breath test in DUI case); *People v. Eagletail*, 2014 IL App (1st) 130252 (holding that a computer report of a breath test in a DUI case was properly admitted, and that the original printout sheet from the machine was unnecessary); *People v. Smith*, 2015 IL App (1st) 123306 (reversing defendant's conviction for driving with an alcohol concentration of 0.08 or more because of the absence of evidence of the certification of accuracy of the Breathalyzer machine within 62 days of the test); *People v. Hagan*, 145 Ill. 2d 287 (1991) (citing *Grand Liquor Co. v. Department of Revenue*, 67 Ill. 2d 198 (1977), in holding a faxed letter was properly admitted, for it satisfied the foundation requirements for computer printouts); *Aliano v. Sears, Roebuck & Co.*, 2015 IL App (1st) 143367 (explaining the difference between computer-generated records (using the definition and proof of the method for the recording of the information supplied by the quotes in the parenthetical of *Holowko* above) and computer-stored records, which consist of information placed into a computer by an out-of-court declarant, and holding that the business records exception to the hearsay rule was not satisfied for the purpose of proving attorney fees, because the original documents concerning those fees had not been presented in court or made available to the opposing party).

For a decision that provides authentication requirements for computer-generated business records, see the discussion about *People v. Dixon*, 2015 IL App (1st) 130132 under the heading *Computer-Generated Business Records* in the *Author's Commentary on Ill. R. Evid. 902 and Its Subdivisions*.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certi-

the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

fication or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, content, ingredients, or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Under Statutes. Any signature, document, or other matter declared by statutes to be presumptively or prima facie genuine or authentic.

(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record

(A) was made at or near the time of the occurrence of the matters set forth by, or from information

todian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the procedural requirements for Rule 902(11) certification. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the procedural requirements for Rule 902(11) certification. The proponent also must meet the notice requirements of Rule 902(11).

Author's Commentary on Ill. R. Evid. 902 and Its Subdivisions

As the lead sentence of Rule 902 explains, the subject of each of the rule's subdivisions is self-authenticating, for each requires no extrinsic ("extra") evidence of authenticity to be admitted into evidence. That many of the subdivisions require some form of certification to qualify for self-authentication is merely a necessary element for the self-authenticating designation and for admissibility—barring relevance, hearsay, or some other basis for exclusion.

IRE 902 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. The following subdivisions of IRE 902, all substantially identical to their federal counterparts, describe items of evidence that are self-authenticating.

For an appellate court case applying **IRE 902(1)**, see *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245 (finding that an IRS Report and a Waiver were self-authenticating under the codified rule).

For an Illinois statute relevant to **IRE 902(2)** and **(3)**, see the Uniform Recognition of Acknowledgments Act, 765 ILCS 30/1 *et seq*.

Except for the federal rule's reference to "an Act of Congress" (for the word "statute" in the Illinois rule) in its last clause, **IRE 902(4)** is identical to FRE 902(4) before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule provides for self-authentication through the certification of public records and reports which are admissible as an exception to the hearsay rule under IRE 803(8), and should be contrasted to IRE 901(b)(7), which is not self-authenticating because it lacks a certification requirement.

Statutes relevant to **IRE 902(5)** include 735 ILCS 5/8-1202 (related to court records) and 735 ILCS 5/8-1203 (related to municipal records).

For a case relevant to **IRE 902(6)**, see *Alimissis v. Nanos*, 171 Ill. App. 3d 1005 (1988) (regarding stock quotations).

Note that "content" and "ingredients" were added to **IRE 902(7)** to codify Illinois common law. *See People v. Shevock*, 335 Ill. App. 3d 1031 (2003) (proper to admit, as exception to hearsay rule, boxes of Sudafed with labels that showed active ingredient was pseudoephedrine, a necessary ingredient of methamphetamine); *In re T.D.*, 115 Ill. App. 3d 872 (1983) (approving admission into evidence of statutorily required label, whose information was deemed reliable based on the way the glue tube was packaged and purchased).

For statutory counterparts of **IRE 902(8)**, see sections 6 and 7 of the Uniform Recognition of Acknowledgments Act, 765 ILCS 30/1 *et seq*.

IRE 902(10) is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for changes to distinguish it from the federal system. Examples of the statutes referred to by the rule include 65 ILCS 5/1-2-6 (authorized published municipal ordinances are *prima facie* evidence of their contents); 810 ILCS 5/8-114 (presumption that signatures on securities certificates are "genuine or authorized").

IRE 902(11) is distinguishable from the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. Minor differences in the Illinois rule include: (1) the deletion of the word "domestic" in the title and in the first part of the first sentence; (2) replacing "declaration" for the word "certification" to correspond to the term used in IRE 803(6); (3) adjusting the rule to distinguish it from federal proceedings; and (4) defining "certification" in the first sentence of the last paragraph.

A major difference between the two rules exists, however, because in defining "certification," the Illinois rule, unlike its federal counterpart, requires "a written declaration under oath and subject to the penalties of perjury." See the first sentence of the last paragraph of IRE 902(11). **FRE** 902(11) does not contain that oath requirement. Note, too, that the Illinois rule in IRE 902(11) and the federal rule in FRE 902(12) contain the same requirement for a record from a foreign country, except for Illinois' oath and perjury requirements. Thus, by incorporating FRE 902(12)'s provisions related to the certification of foreign business records into IRE 902(11), there was no need to have separate Illinois rules for domestic and foreign records.

Consistent with common law, the keeper of the records or other qualified person may still provide testimony for the foundational requirements for admission of business records

under IRE 803(6). But **IRE 902(11)** now also permits the foundational requirements to be furnished by certification. The rule thus dispenses with the need to have a witness testify at trial, and it abrogates Illinois' former requirement for a live witness to establish the foundation for admission. It thus represents a substantive change in Illinois law. *See also* the Committee's general commentary about self-authentication in section (12) under the "Modernization" discussion on page 4 of this guide.

In *People v. Hauck*, 2022 IL App (2d) 191111, the appellate court invoked the IRE 902(11) requirement discussed above for the need for "a written declaration under oath and subject to the penalties of perjury," which contrasts with the absence of such a requirement in FRE 902(11). In *Hauck*, a Verizon employee's certification, which was admitted to establish evidence of cell phone records, stated, "I Andrew M. Connors, being duly sworn, depose and say..." The appellate court held that assertion alone did not satisfy IRE 902(11)'s certification requirement, because it was "a document purporting to be 'sworn' but which otherwise does not contain any indication that an oath was sworn or to whom it was sworn." *Hauck*, at ¶ 49. Because the State, as the proponent of the document, failed to provide sufficient evidence to establish that the certification was what it claimed to be, the court reasoned that the certification did not comply with the requirements of IRE 902(11) and was therefore improperly admitted in evidence. Nonetheless, the court held the admission of the certification constituted harmless error and therefore affirmed defendant's convictions.

In *People v. Fox*, 2022 IL App (4th) 210262, the appellate court again confronted the issue related to IRE 902(11)'s requirement of "a written declaration under oath and subject to the penalties of perjury." In that case, five separate certifications related to cell phone records were admitted in evidence—from employees of Sprint, T-Mobile, and Verizon. The certifications mirrored the requirements of IRE 902(11), except for its requirements related to oath. Each of the certifications contained the statement, "I declare under penalty of perjury the foregoing is true and correct." Declaring that the language of IRE 902(11) could not be more clear," the appellate court held, "There is nothing on the face of the certificates at issue in this case to indicate they were made under oath." *Fox*, at ¶ 81. The court reasoned that the certifications "omitted that they were made 'under oath,'" and that "[h]ad the State simply included the words 'under oath' in its certificate, defendant would have had no basis on which to complain on appeal." *Id.* at ¶ 82. Holding that the trial court erred in admitting the certifications, the appellate court nonetheless held that the admission constituted harmless error.

The takeaway from *Hauck* and *Fox*: Both cases highlight the importance of IRE 902(11)'s requirement of "a written declaration under oath and subject to the penalties of perjury." But in *Hauck* the appellate court held that the error was in not establishing that the person providing the certification did so under oath, despite his self-serving statement that he had been "duly sworn." On the other hand, in *Fox* the court held that if the statements of those providing certifications included the words that they did so "under oath," IRE 902(11)'s requirements are satisfied, despite—as in *Hauck*—the need for independent proof of that fact. In any case, litigants and trial judges addressing certification should be aware of the requirements of IRE 902(11), especially the certification requirement that "a written declaration under oath and subject to the penalties of perjury" and also IRE 902(12) and IRE 902(13), both of which likewise require compliance "with the procedural requirements for IRE 902(11) certification."

For a relevant case on a declaration for certification of records in a foreign country, see I*n re Ersch's Estate*, 29 Ill. 2d 572 (1963). For relevant statutes on "Records and Patents," which include court, municipal, and corporate records, see 735 ILCS 5/8-1201, *et seq*.

For an appellate court decision unrelated to the certification allowed by IRE 902(11), but that nevertheless has significant effect on **computer-stored** business records, see *Aliano v. Sears, Roebuck & Co.*, 2015 IL App (1st) 143367. In that case, brought under the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.*), the plaintiff was awarded a judgment of $3.10 based on the defendant's improper collection of a sales tax. The plaintiff also was awarded attorney fees in the amount of $157,813.53. In explaining his calculation of those fees, the plaintiff's attorney, the firm's sole shareholder,

testified that an attorney or paralegal who worked on the case wrote time sheets that were placed on a shelf in his office. "Every month or so," his secretary inputted these handwritten time sheets into a computer program called Time Slips, after which he compared the time sheets with the itemized entries created by the computer program for accuracy, and then he discarded the handwritten time sheets. Because there was no other evidence of a record upon which a fee award could be based, the propriety of the award in this case was dependent on the admissibility of the billing statement derived from the computer. Because the records had been admitted under the business record exception to the hearsay rule, the issue addressed by the appellate court was whether they were properly admitted under that exception.

Explaining the difference between computer-generated and computer-stored data, the court held that, when "computer-stored records sought to be admitted are the product of human input taken from information contained in original documents, the original documents must be presented in court or made available to the opposing party, and the party seeking admission of a record of that computer-stored data must be able to provide testimony of a competent witness who has seen the original documents and can testify to the facts contained therein." *Aliano*, at ¶ 31. Because those records were not and could not be produced, the appellate court reversed the attorney fee award and remanded the case to the circuit court to afford the plaintiff "the opportunity to attempt to establish the reasonable fees to which he is entitled by means other than the billing statement." *Id.* at ¶ 34.

As a follow-up to this decision, on remand plaintiff sought attorney fees in the amount of $335,971, and the circuit court awarded him attorney fees in the amount of $267,470. On appeal from that award in *Aliano v. Transform SR LLC, as Successor in Interest to Sears, Roebuck & Co.*, 2020 IL App (1st) 172325, the appellate court applied the law-of-the-case doctrine in holding that its earlier opinion that the computerized billing statement offered in evidence by the plaintiff in support of his original fee petition was inadmissible and therefore the circuit court abused its discretion in admitting the document into evidence. The appellate court made the same determination of inadmissibility concerning the plaintiff's revised petition for attorney fees for a later time period. The court also rejected plaintiff's justification for attorney fees through testimony based on refreshed recollection, which the court determined to be unbelievable and thus against the manifest weight of evidence. Finally, the appellate court acknowledged that the plaintiff was entitled to some attorney fees for obtaining a $3.10 compensatory damage judgment for a single violation of the Consumer Fraud Act, but it remanded the matter to the circuit court for a hearing to determine whether its $106,322 award of attorney fees for post-January 1, 2014 was reasonably based on the defendant's militant defense tactics.

IRE 902(12) AND 902(13)

To keep pace with current computer technology, two substantially identical federal and Illinois evidence rules have been added. The rules are designed to provide a method for establishing foundational requirements for self-authentication by the certification of computer-generated and computer-stored records and data.

FRE 902(13) and **FRE** 902(14) became effective on December 1, 2017. **IRE** 902(12) and **IRE** 902(13) became effective on September 28, 2018. FRE 902(13) is substantially identical to IRE 902(12), and FRE 902(14) is substantially identical to IRE 902(13) (except for reasons explained in the next paragraph). The rules' number designations differ only because there is a separate federal rule for the certification of foreign business records (FRE 902(12)). Because Illinois merged the rules related to domestic and foreign business records into a single rule—IRE 902(11)—there was no need for another rule such as FRE 902(12), which separately addresses the certification of foreign business records.

Despite their separate designations, these Illinois and federal rules are substantially identical, except for one significant difference. As pointed out above in the discussion of IRE 902(11), the two Illinois rules differ from the federal rules because of the requirements for certification contained in the last paragraph of IRE 902(11), which requires "a written declaration under oath and subject to the penalties of perjury." Both IRE 902(12) and (13), which allow for certification of records or data from an electronic device, require "a certification of a qualified

person that complies with the procedural requirements for rule 902(11) certification." Those rules thus require "a written declaration under oath and subject to the penalties of perjury," as contained in IRE 902(12)—a requirement not included in the federal rules.

The added rules create procedures, like that in Rule 902(11), by which parties may authenticate evidence "by a certification of a qualified person" without the testimony of a witness. **IRE** 902(12) and **FRE** 902(13) do this for computer-generated records (as provided in Rule 901(b)(9)). **IRE** 902(13) and **FRE** 902(14) do it for computer-stored records. The rules were proposed based on the recognition that, as is the case with business records generally (and as exemplified in allowing the certification of domestic business records under FRE 902(11) and of foreign business records under FRE 902(12) and of both domestic and foreign business records under IRE 902(11)), evidence required for authentication is often stipulated to before a witness is called or, where testimony is presented, it frequently is admitted without challenge. As with FREs 902(11) and (12) and IRE 902(11), the rules are designed to avoid the expense and inconvenience of presenting what is frequently an unnecessary witness. But note that the adoption of these rules does not alter the foundational requirements for evidence admission. They allow merely the admission of a certification in lieu of a live witness.

The process the rules allow—a certification that must contain information that would be sufficient to establish authenticity were that information provided by a foundation witness at trial—is designed merely to establish that the proffered item has satisfied the requirements for authenticity. An opponent is nonetheless free to object to the admissibility of the proffered item on other grounds, including hearsay, relevance, or in criminal cases the right to confrontation. And the opponent is free also to present evidence that a computer-generated report is erroneous because, for example, although a proffered spreadsheet is authentic (*i.e.*, that the output came from a computer), it is based on unreliable data; or, that although a webpage containing a defamatory statement is authentic (*i.e.*, that the webpage was properly retrieved), it was not placed on the webpage by the defendant; or evidence that computer-stored documents are not reliable because they are based on hearsay; or that information on a hard drive was not placed there by the opposing party.

The notice requirement in both rules, like the notice required in Rule 902(11) for authenticating business records through certification, provides adequate opportunity for the opposing party to challenge the certification. This means that the parties will know in advance, through a ruling on a motion *in limine* if necessary, whether a given certification is satisfactory. If it is not satisfactory, to establish the appropriate evidence for authentication, a witness will need to be called at the trial or hearing.

Confronting the Confrontation Clause

In *People v. Coleman*, 2014 IL App (5th) 110274, ¶¶ 144-153, a representative of Google testified at trial that she provided the Internet Protocol (IP) address for eight specific messages pursuant to a police subpoena and that such addresses were kept by Google in the normal course of business. Police tracked relevant threatening email messages to the defendant's computer through the unique IP addresses. In response to the defendant's contention that his right to confrontation had been violated because no representative of his Internet provider (AT&T) had testified, the appellate court held that the business record exception to the hearsay rule provided a sufficient foundation for allowing the nontestimonial IP addresses into evidence and for allowing police testimony about them.

In *People v. Diggins*, 2016 IL App (1st) 142088, over the defendant's objection at his bench trial, the trial court admitted a certified letter from the Firearm Service Bureau of the Illinois State Police certifying that the defendant had been denied a firearm owner's identification card (FOID) based on his having a pending felony indictment. Not possessing an FOID was a necessary element for the charged offense of aggravated unlawful use of a weapon (AAUW). *See* 720 ILCS 5/24-1.6(a)(3)(C). Applying the holding in *Crawford v. Washington*, 541 U.S. 36 (2008), which expressly included "affidavits" in the class of testimonial statements barred by the confrontation clause, and further relying on the holding in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which had held that certificates of analysis that reported recovered substances to be cocaine and provided their weight were testimonial hearsay,

the appellate court reversed the defendant's conviction and remanded the case for a new trial, holding that the admission of the certified letter constituted a violation of the defendant's sixth amendment right to confrontation and that the violation did not constitute harmless error.

Later, in *People v. Cox*, 2017 IL App (1st) 151536, a case described as strikingly similar to *Diggins* in many respects (*Id.* at ¶ 80), the appellate court distinguished the holding in *Diggins* based on the fact that, not only did the defendant not object to the admission of the certified document in the case at bar, he expressly did not object to its admission.

Still later, in *People v. Stevens*, 2018 IL App (4th) 150871, noting that in the pretrial hearing defense counsel did not object to the admission of the certified report, the appellate court applied the doctrine of invited error, distinguishing *Diggins* and, like the court in *Cox*, held that there was no ineffective assistance of counsel.

The takeaway from the above cases, based on the point that each case provides, is that in a *criminal case* the evidence rule alone may not satisfy the requirements for admission. The confrontation clause must be addressed. Where a defendant in a criminal case does not object to the admission of certified documents, there is no "testimonial statement" problem. But when a defendant charged with a crime objects to the admission of such evidence on confrontation grounds, to satisfy the sixth amendment requirement, a witness with knowledge must be produced. Because the sixth amendment does not apply to civil cases, there is no confrontation issue in such cases.

Note that in *People v. Schwandt*, 2022 IL App (4th) 200583, a prosecution for driving while the defendant's license was suspended, the appellate court also distinguished *Diggins* in holding admissible a Secretary of State certified copy of the defendant's driving abstract. The court held that there was no violation of the right of confrontation, reasoning that, in contrast to the "certified letter" about the lack of a FOID in *Diggins*, IRE 803(8) provides a hearsay exception for public records such as the driving abstract the Secretary of State was required to keep and, unlike the situation in *Diggins*, the abstract was collected prior to defendant's traffic stop and not in anticipation of trial.

Computer-Generated Records

As noted above in discussing both **IRE 902(11)** and under the heading "**IRE 902(12) and 902(13)**," Illinois has adopted codified rules dealing explicitly with certification of computerized records. See IREs 902(11) (certified records of regularly conducted activity), 902(12) (certified records generated by an electronic process or system), and 902(13) (certified data copied from an electronic device, storage system, or file). The latter two rules were adopted effective September 28, 2018. But before that date, Illinois decisions provided the requirements for the admissibility of such records. Following are decisions that predate the codification of IRE 902(12), address the requirements for admission of computer-generated business records, and may be relevant to the requirements for the certification of such records.

In *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, the appellate court held that computer-generated records of loan documents and a payoff calculator document were admissible under the business records exception to the hearsay rule. For foundational purposes the court provided these requirements, which it held were satisfied in the case: "(1) the electronic computing equipment is recognized as standard; (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded; and (3) the foundation testimony establishes that the sources of the information, method and time of preparation indicate its trustworthiness and justify its admission." *JPMorgan Chase*, at ¶ 100.

In *People v. Eagletail*, 2014 IL App (1st) 130252, a prosecution for DUI, the appellate court held that there was a sufficient foundation for the admission of a computer-generated copy of the printout from a breath machine to satisfy the business records exception to the hearsay rule.

In ***People v. Nixon***, 2015 IL App (1st) 130132, a conviction for aggravated criminal sexual assault where the central issue was whether the DNA of a man whose photo the victim initially identified as the offender had been tested, the appellate court determined that an inadequate foundation had been laid for the admission of testimony about a computer-generated business record that showed the DNA testing had in fact occurred

and that no association was reported. Although the appellate court ultimately determined that the error was harmless, in its analysis concerning the propriety of the admission of the records, it provided the following foundational requirements for the admission of computer-generated business records:

> "In order to satisfy both [IRE 803(6) and section 115-5 of the Code of Criminal Procedure of 1963], the party seeking to admit a business record has the burden of laying an adequate foundation for it, which includes showing: (1) that the record was made as a memorandum or record of the act; (2) that the record was made in the regular course of business; and (3) that it was the regular course of the business to make such a record at the time of the act or within a reasonable time thereafter. [Citations.]
>
> "In addition to these requirements, Illinois courts have consistently held that, to establish an adequate foundation for a computer-generated record as a business record, the proponent must make a further showing. In the case of computer-generated records, a proper foundation additionally requires a showing that: [4] standard equipment was used; [5] the particular computer generates accurate records when used appropriately; [6] the computer was used appropriately; and [7] the sources of the information, the method of recording utilized, and the time of preparation indicate that the record is trustworthy and should be admitted into evidence. [Citations.]" *People v. Nixon*, 2015 IL App (1st) 130132, ¶¶ 110-111 (Internal quotation marks omitted).

Later, in ***People v. Kent***, 2017 IL App (2d) 140917, where the appellate court reversed and remanded a conviction for first degree murder based on the improper admission in evidence of a Facebook post (see the Facebook discussion of *Kent* in the commentary heading under **IRE 901(b)(4)** *supra*), the court also addressed the "no longer dispositive [issue] of this appeal": the requirements for a computer-generated business record for a phone. *Id.* at ¶ 126. Adopting and applying all of Nixon's requirements for a computer-generated business record, the court held they were not satisfied in this case. *Id.* at ¶ 129.

Recently, ***People v. Brown***, 2021 IL App (3rd) 170621, an appeal from defendant's conviction for first degree murder and aggravated battery, focused on whether foundational requirements had been satisfied to admit defendant's computer-generated cell phone records, which were kept in the course of regularly conducted business.

In *Brown*, the State presented evidence that an armed intruder invaded a drug house, demanding money and drugs. The owner of the house, a drug dealer who was packaging cocaine in his kitchen at the time, struggled with the intruder in his kitchen and was shot under his chin at close range, causing his immediate death. The intruder also shot the victim's uncle in the stomach and leg. The uncle testified at trial that defendant was the intruder who shot both him and the murder victim. Present in the kitchen during the offenses was a man with the surname of Wilson. He testified at trial that he did not know defendant and could not identify him in court as the intruder.

As a rebuttal witness, a police officer testified about defendant's phone records from information he received from Sprint. His testimony established that, before and after the shootings, Wilson and defendant exchanged numerous phone calls just before and after the home invasion and shootings.

The State also produced evidence that two pieces of dreadlocked hair were found on the murder victim's kitchen floor. They contained DNA that matched defendant and showed that at least one of the hairs had a "stretched" appearance, which indicated that the hair had been pulled out of a person's head and did not just fall out. At trial, defendant conceded he had dreadlocks on the day of the offenses but explained that he had been at the "cocaine house" (which he did not know to be the victim's home) before the date of the shootings to purchase crack cocaine (*Brown*, at ¶ 15), and that "big clumps of his hair would fall out on their own because he was not taking care of his dreadlocks." *Id.* at ¶ 17.

The sole issue on appeal was the propriety of the police officer's testimony about the computer-generated phone records he received from Sprint, records that documented phone calls between Wilson and defendant, and which thus contradicted both their testimony that they did not know each other and Wilson's claim that he had not made the phone calls.

Although the record on appeal contained a certification pursuant to Federal Rules of Evidence 803(6) and 902(11) from Sprint's keeper of records (and FRE 902(11) is substantively identical to IRE 902(12), which had not been codified at the time), the appellate court found "there is no clear indication that the records were ever formally admitted into evidence." *Id.* at ¶ 22. Defendant objected to the officer's testimony about the phone records based on a lack of sufficient foundation, contending that "even if the custodian's certificate had been admitted, the foundation for admission was still insufficient because the custodian's certificate was missing the second set of foundational elements that was required under the law for a computer-generated record to be admitted into evidence as a business record" under the holdings in *Nixon* and *Kent*. *Id.* at ¶ 30. (For clarification, note that "the second set of foundational elements" referred to are those provided in the bracketed numbers [4] to [7] given by *Nixon* and provided *supra* and also provided by *Brown infra* as elements (1) to (4).) The State responded that the phone records were properly admitted "as provided for in the amended version of Illinois Rule of Evidence 902, which, according to the State, eliminated the second set of foundational requirements for a computer-generated record." *Id.* at ¶ 31.

With one justice dissenting based on his belief that error did not occur in this case and, if it did, it was harmless, the majority of the appellate court panel noted that IRE 902(12) was adopted after the trial in this case and, citing *People v. Hunter,* 2017 IL 121306, ¶¶ 36-37, it therefore rejected the State's contention that the rule applied, reasoning that even though IRE 902(12) is a procedural rule, it could not be retroactively applied.

Stressing the high relevance of the admitted phone evidence in negatively affecting the credibility of Wilson and defendant, both of whom denied they knew each other, on the central issue of whether defendant was the offender, the majority concluded that, where computer-generated business records are involved (such as "information that was generated instantaneously by a computer when telephone calls were made to or from defendant's cell phone") (*Brown*, at ¶ 34), the two sets of foundational requirements provided by *Nixon* and *Kent* must be established by the proponent of the evidence.

As indicated in the discussion of *Nixon* and *Kent* above, the first set of foundational requirements are those provided in the business-records rules in both IRE 803(6) and IRE 902(11) ("(1) that the record was made as a memorandum or record of the act, (2) that the record was made in the regular course of business, and (3) that it was the regular course of the business to make such a record at the time of the act or within a reasonable time thereafter.") *Brown*, at ¶ 34. The second set of requirements are: "(1) that standard equipment was used; (2) that the particular computer generates accurate records when used appropriately; (3) that the computer was used appropriately; and (4) that the sources of the information, the method of recording, and the time of preparation indicate that the record is trustworthy and should be admitted into evidence." *Id.*

The *Brown* court noted that the cell phone records had been admitted through the testimony of the police officer without "the second set of foundational elements that are required for the admission of a computer-generated record into evidence under the business-records exception to the hearsay rule." *Id.* at 35. This, the court held, resulted in the trial court's committing "an abuse of discretion by allowing the State to present the testimony of [the police officer] regarding the content of the phone records because the State failed to establish a sufficient foundation for the admission of the phone records into evidence." *Id.* It therefore reversed defendant's convictions and remanded the case to the circuit court for trial.

Note that the two sets of foundational requirements provided in *Nixon*, *Kent*, and now *Brown*, predate Illinois' codification of IRE 902(12). (In *Brown*, that is so because the appellate court rejected the State's contention that Rule 902(12) could be retroactively invoked, without determining whether the rule would have had an effect on its holding.) Whether the addition of IRE 902(12) alters the requirements provided by the three cases arguably remains an open question. But until an Illinois reviewing court construing IRE 902(12) states otherwise, these are the takeaways that should be drawn from the three cases:

- Where a witness with knowledge provides testimony at trial about business records solely under IRE 803(6), only the three requirements of that rule must be satisfied.

- Where a certification of business records not connected to computer-generated records is provided at trial under IRE 902(11), only the three requirements of that rule must be satisfied.
- Where computer-generated business records are involved, the prudent course is to provide both the first set of requirements established by IREs 803(6) and 902(11), as well as the second set of requirements established by the three cases discussed above.
- Where any computer-generated records (other than business records) are involved under IRE 902(12), the prudent course is to provide the second set of requirements established by the three cases.

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

COMMENTARY

Author's Commentary on Ill. R. Evid. 903

IRE 903 is identical to the federal rule before the latter's amendment solely for stylistic purposes effective December 1, 2011. Relevant Illinois statutes include 735 ILCS 5/8-1601 (related to execution of a deed); 755 ILCS 5/6-4 (related to admission of a will to probate).

FEDERAL RULES OF EVIDENCE

Rule 1001. Definitions That Apply to This Article

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

ILLINOIS RULES OF EVIDENCE

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and Recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, motion pictures and similar or other products or processes which produce recorded images.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1001

Note that the four subdivisions of pre-amended FRE 1001, which had been numbered (1) through (4), now are designated in FRE 1001 by letters of the alphabet from (a) to (e).

Except for the addition of the word "sounds" in the Illinois rule, **IRE 1001(1)** is identical to what was FRE 1001(1) before the latter's amendment solely for stylistic purposes effective December 1, 2011. Note that the amendment to the federal

rule resulted in what is now FRE 1001(a) and (b), which replaced what was formerly designated as FRE 1001(1).

Except for the addition of the phrase "and similar or other products or processes which produce images" at the end of **IRE 1001(2)**, the rule is identical to what was FRE 1001(2) before the latter's amendment solely for stylistic purposes effective December 1, 2011. That amendment has resulted in what is now FRE 1001(c). For a relevant Illinois case, see *People v. Taylor,* 2011 IL 110067, ¶¶ 42–43 (citing IRE 1001(2), in holding that a VHS videotape of a DVR recording qualifies as an "original" recording).

IRE 1001(3) is identical to what was FRE 1001(3) before the latter's amendment solely for stylistic purposes effective December 1, 2011. That amendment resulted in what is now FRE 1001(d). In *Taylor*, at ¶¶ 42-43, though employing language in IRE 1001(3) without specifically citing it, the supreme court held that a VHS videotape of a DVR recording qualifies as an "original" recording.

IRE 1001(4) is identical to what was FRE 1001(4) before the latter's amendment solely for stylistic purposes effective December 1, 2011. That amendment resulted in what is now FRE 1001(e).

People v. Smith, 2022 IL 127946, applied IRE 1001(4) in determining the propriety of admitting in evidence duplicates of video clips. *Smith* is fully discussed in the *Author's Commentary on Ill. R. Evid. 1003*, *infra*.

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1002

IRE 1002 is identical to FRE 1002 before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the modification that distinguishes it from the federal system.

In *People v. Davis*, 2014 IL App (4th) 121040, the defendant contended that a detective's testimony about a text message sent to the defendant that stated "Can you meet me for a 30 or 40?" (which was interpreted by the detective to mean a purchase of $30 or $40 worth of cocaine) violated the best evidence rule. Citing IRE 1002, the appellate court rejected that contention, holding:

> "The best evidence rule did not apply because the State did not seek to prove the content or terms of the text message—it sought to prove defendant intended to deliver the crack cocaine and used the text message as circumstantial evidence of this intent. The actual contents or terms of the text message did not matter. What mattered is the time it was received—soon after defendant was found in possession of 2.1 grams of cocaine—and what it requested." *Davis*, at ¶ 20.

In *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 467 F.3d 641 (7th Cir. 2006), a breach of contract action involving a patent agreement, in support of its motion for summary judgment, defendant submitted an affidavit of a witness, an employee of defendant who had responsibility concerning a settlement agreement with a third company. The affidavit asserted that defendant had never licensed its patent to the third company and thus could not have violated the "favored nation" provision of its patent agreement with plaintiff, and further averred that a settlement agreement with the third company, based on infringement of the patent, in any event had been finalized after defendant's patent had lapsed. Plaintiff contended that the best evidence rule had been violated because the district court did not require the summary judgment record to contain the original or a copy or the (confidential) settlement agreement with the third company. Pointing out that the "Best Evidence Rule provides that 'the production of the original documents is required to prove the contents of a writing,'" the court held that "If a witness's testimony is based on his first-hand knowledge of an event as opposed to his knowledge of the document, however, then Rule 1002 does not apply." *Waterloo Furniture*, 467 F.3d at 648. Because the statements in the affidavit were based on the witness's personal knowledge of the negotiations between defendant and the third company, not on his knowledge of the agreement between defendant and the third company, the best evidence rule did not apply to the witness's affidavit testimony.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1003

IRE 1003 is identical to FRE 1003 before the latter's amendment solely for stylistic purposes effective December 1, 2011. See *Law Offices of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App (1st) 101849, where, in upholding the admission of a photocopy of a settlement agreement, the appellate court recognized the adoption of the codified rule in stating that "this court long ago adopted the Federal Rule of Evidence on the issue," citing *People v. Bowman*, 95 Ill. App. 3d 1137 (1981) to justify the statement. See also the pre-codification supreme court decision in *People v. Carter*, 39 Ill. 2d 31 (1968) (upholding admission of a copy of the defendant's confession where the original had been destroyed).

In *People v. Smith*, 2022 IL 127946, the issue in this residential burglary prosecution concerned a surveillance videotape recording of the front door of a burglarized apartment. The owner of the building in which the burglarized apartment was located reviewed an approximate 20-minute videotape of the burglarized apartment, before the videotape was automatically erased.

Before its automatic erasure, however, the owner's wife recorded two 20-to-30 second clips of that videotape on her iPhone. The first recorded clip showed defendant approaching the door of the burglarized apartment; the second clip showed defendant exiting that apartment while carrying a white bag. The owner of the building testified about the entire videotape and the two clips captured from that videotape on his wife's iPhone. He testified that his view of the no-longer-available videotape showed no one else around or near the burglarized apartment door; and he explained how the two clips, which were shown to the jury, were created by his wife's iPhone. The resident of the apartment testified about the loss of loose change, jewelry, and 40 to 50 prescription hydrocodone pills. He also testified that the door to his apartment had been locked, that he had not given permission to anyone to enter his apartment, and that a window in a separate part of the apartment had been broken and was pushed off its tracks.

In an interesting three-way split opinion, the appellate court affirmed the defendant's conviction for residential burglary. On further appeal to the supreme court, the defendant contended, *inter alia*, that the trial court erred in admitting the cell phone video clips, arguing they were inadmissible under IREs 1003 and 1004, or were inadmissible under the common-law best evidence rule.

Rejecting those arguments, the supreme court relied on IRE 1001—which provides definitions for the contents of writings, recordings, and photographs—and IRE 1003—which addresses the admissibility of duplicates. The court determined that considering the other-evidence exception contained within IRE 1004 was unnecessary, because IRE 1003 adequately resolved the issues. Applying IRE 1001(4), which defines a "duplicate" and does not require a duplication of the entirety of an original, the court reasoned that reading the requirement of the entirety of an original into IRE 1003 would be improper. That was especially true, the court reasoned, because there was no dispute about the accuracy of the video clips. The court further held that there was no reason for concluding, under IRE 1003(2), that there was unfairness in admitting the cell phone video clips in lieu of the entire original.

As for defendant's contention that the common-law best evidence rule still applied in Illinois, the court noted that "the Illinois Rules of Evidence codified—and therefore abrogated—the common-law rules of evidence in Illinois." *Smith*, at ¶ 57. The supreme court therefore rejected "the then-current understanding of the best evidence rule as it existed in the common law" and "reaffirm[ed] that the Illinois Rules of Evidence control on these issues." *Id.*

Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or

(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1004

IRE 1004 is identical to FRE 1004 before the latter's amendment solely for stylistic purposes effective December 1, 2011. IRE 1004 (including the subdivisions that follow) eases Illinois' recognition of degrees of secondary evidence and provides the same circumstances as do the federal rules under which the requirement of the original of a document is relaxed. See also the Committee's general commentary in section (13) under the "Modernization" discussion on page 4 of this guide. Note that the four subdivisions of pre-amended FRE 1004, which were numbered (1) through (4), now are designated in FRE 1004 by letters of the alphabet from (a) to (d).

IRE 1004(1) is identical to FRE 1004(1) before the latter's amendment solely for stylistic purposes effective December 1, 2011. That amendment has resulted in what is now FRE 1004(a). See *People v. Carter*, cited *supra* in the *Author's Commentary on Ill. R. Evid. 1003*. See also *People v. Baptist*, 76 Ill. 2d 19 (1979) (approving and addressing parole evidence concerning contents of a letter destroyed in a house fire).

IRE 1004(2) is identical to FRE 1004(2) before the latter's amendment solely for stylistic purposes effective December 1, 2011. The amendment of the federal rule resulted in what is now FRE 1004(b).

IRE 1004(3) is identical to FRE 1004(3) before the latter's amendment solely for stylistic purposes effective December 1, 2011, except that the Illinois rule deleted as unnecessary the last portion of what was then FRE 1004(3) (and is now designated FRE 1004(c)), which requires the failure of the opposing party to produce the original, it being assumed that the opposing party has failed to produce the original. The amendment to the federal rule resulted in what is now FRE 1004(c).

IRE 1004(4) is identical to FRE 1004(4) before the latter's amendment solely for stylistic purposes effective December 1, 2011. That amendment results in current FRE 1004(d).

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1005

IRE 1005 is identical to FRE 1005 before the latter's amendment solely for stylistic purposes effective December 1, 2011. The rule should be considered in conjunction with IRE 803(8), which provides the hearsay exception for the admission of public records and reports. Another relevant rule is Illinois Supreme Court Rule 216(d), which in its entirety reads:

> "If any public records are to be used as evidence, the party intending to use them may prepare a copy of them insofar as they are to be used, and may seasonably present the copy to the adverse party by notice in writing, and the copy shall thereupon be admissible in evidence as admitted facts in the case if otherwise admissible, except insofar as its inaccuracy is pointed out under oath by the adverse party in an affidavit filed and served within 28 days after service of the notice."

Relevant statues are 735 ILCS 5/8-1202 (related to the process for admitting court records); 735 ILCS 5/8-1206 (proof may be made by "copies examined and sworn to by credible witnesses"). For statutes related to the admission of statutes and reports generally, see 735 ILCS 5/8-1101 *et seq.*, and for statutes related to the admission of records and patents generally, see 735 ILCS 5/8-1201 *et seq*.

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1006

IRE 1006 is identical to FRE 1006 before the latter's amendment solely for stylistic purposes effective December 1, 2011. Examples of cases approving of admission of summaries, well before the codification of Illinois evidence rules, include *People v. Moone*, 334 Ill. 590 (1929); and *People v. Sawhill*, 299 Ill. 393 (1921), which held that:

> "where the originals consist of numerous documents, books, papers, or records which cannot conveniently be examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation***It has therefore been held that it is in the discretion of the court to admit such statements or schedules of figures or the results of the examination of numerous documents or account books to be introduced in evidence, such statements, schedules, or results to be verified by the testimony of the witness by whom they were prepared, allowing the adverse party an opportunity to examine them before they are admitted in evidence and to cross-examine the witness from the original books, where such books are accessible." *Sawhill*, 299 Ill. at 403.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1007

IRE 1007 is identical to FRE 1007 before the latter's amendment solely for stylistic purposes effective December 1, 2011. See also the Committee's general commentary in section (14) under the "Modernization" discussion on page 4 of this guide, which indicates that, based on an 1839 supreme court opinion, the codified rule may represent a substantive change in Illinois.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104(a). However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1008

IRE 1008 is identical to FRE 1008 before the latter's amendment solely for stylistic purposes effective December 1, 2011, except for the substitution of "Rule 104(a)" for "rule 104," without intending a substantive change. Note, however, that the December 1, 2011 amendment of FRE 1008 changed the "rule 104" reference to "Rule 104(b)," and clarified that the rule has relevance to the provisions of Rule 1004 ("Admissibility of Other Evidence of Contents") and Rule 1005 ("Public Records"). The Illinois rule's reference to Rule 104(a) is consistent with the amended federal rule because IRE Rule 104(a) specifically makes it subject to the provisions of Rule 104(b).

FEDERAL RULES OF EVIDENCE

Rule 1101. Applicability of the Rules

(a) To Courts and Judges. These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) To Cases and Proceedings. These rules apply in:

- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.

(d) Exceptions. These rules—except for those on privilege—do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand-jury proceedings; and

(3) miscellaneous proceedings such as:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examination in a criminal case;
- sentencing;
- granting or revoking probation or supervised release; and
- considering whether to release on bail or otherwise.

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for

ILLINOIS RULES OF EVIDENCE

Rule 1101. Applicability of Rules

(a) Except as otherwise provided in paragraphs (b) and (c), these rules govern proceedings in the courts of Illinois.

(b) Rules Inapplicable. These rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand Jury. Proceedings before grand juries.

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing; postconviction hearings; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, and contempt proceedings in which the court may act summarily.

(c) Small Claims Actions. These rules apply to small claims actions, subject to the application of Supreme Court Rule 286(b).

admitting or excluding evidence independently from these rules.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1101(a)

IRE 1101(a) is adjusted to distinguish it from the federal system and to provide that the rules of evidence govern in all court proceedings, except as provided in IRE 1101(b) and (c).

Author's Commentary on Ill. R. Evid. 1101(b)

IRE 1101(b) lists proceedings where the evidence rules do not apply. Because IRE 1101(a) provides that these rules apply in all proceedings in Illinois courts, except for those provided in IRE 1101(b) and (c), it was unnecessary to provide a counterpart to **FRE** 1101(b) which, since its amendment effective December 1, 2011, separately details federal proceedings where the rules apply. FRE 1101(d), before its amendment solely for stylistic purposes effective December 1, 2011 (and which, before its amendment, bore the same title as IRE 1101(b)), is the federal rule that provides the exceptions where the rules are not applicable and that closely parallels IRE 1101(b). The provisions of IRE 1101(b)(1) and (2) and the parallel pre-amended FRE 1101(d)(1) and (2) are identical. The provisions in IRE 1101(b)(3) and FRE 1101(d)(3) are similar, except for two additions in IRE 1101(b)(3): (1) the addition of "postconviction hearings," which was added by the supreme court by amendment on April 8, 2013, effective as of that date; and (2) the inclusion of "contempt proceedings in which the court may act summarily," which nevertheless is identical to the third bullet point in FRE 1101(b).

Note that IRE 1101(b)(1), like its federal counterpart in FRE 1101(d)(1), reinforces the principle provided in IRE 104(a) (as well as in FRE 104(a)) that, in making its determination of questions of fact preliminary to admissibility of evidence, "the court is not bound by the rules of evidence except those with respect to privileges."

Addition of "Postconviction Hearings" in IRE 1101(b)(3) and Its Significance

The addition by the supreme court of "postconviction hearings" in IRE 1101(b)(3), effective April 8, 2013, was made to be consistent with section 122-6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-6), a section of Article 122, which is the Post-Conviction Hearing Act. The relevant portion of section 122-6 reads: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence." Thus, that section grants discretion to the trial court to accept, in Post-Conviction Hearing Act hearings, testimony that does not comply with the codified rules of evidence.

See *People v. Robinson*, 2020 IL 123849 ("At the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true. [Citations.] In deciding the legal sufficiency of a postconviction petition, the court is precluded from making factual and credibility determinations" (*id.* at ¶ 45); and further holding "that credibility determinations are made at a third-stage evidentiary hearing," not at the second stage. (*id.* at ¶ 81)); (*People v. Simmons*, 2020 IL App (1st) 170650, ¶ 36 (noting the 2013 amendment to the rule and considering the contents of an affidavit even though it contained hearsay); *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 119 (finding that hearsay affidavits indicating that a gang member had bragged to one of the affiants about shooting the victim were admissible under the rule and must be taken as true at the second stage of postconviction proceedings).

Recently, in *People v. Brooks*, 2021 IL App (4th) 200573, the appellate court quoted this Commentary's first paragraph (see *Brooks*, at ¶ 57), in further support of its holding that the Illinois Rules of Evidence do not apply to second and third-stage postconviction proceedings. The ultimate result in *Brooks*

was the reversal and remand of the trial court's dismissal of second-stage proceedings, which alleged attorney ineffectiveness for the attorney's failure to investigate a claim of a woman who claimed to have received a text message from another person who claimed that he had killed the victim. Reasoning that the text message was admissible in the postconviction proceedings despite its hearsay nature, the appellate court held that the trial court erred in failing to accept as true those hearsay allegations, which were provided by affidavits from the attorney's investigator as well as the defendant. The appellate court's reversal was based on the principles that the rules of evidence do not apply in postconviction proceedings and that hearsay evidence in second-stage proceedings should be accepted as true if the petitioner shows a constitutional violation, unless the petitioner's allegations are affirmatively rebutted by the record. However, regarding the evidentiary hearing in third-stage procedures, *Brooks* clarified that, unlike in first and second-stage proceeding, at a third-stage hearing, "the trial court acts as a fact-finder, making credibility determinations and weighing the evidence." *Id.* at ¶ 47. Accordingly, the appellate court concluded:

> "[t]he court may admit the evidence in question and then mostly—or perhaps even entirely—disregard it, deeming it unreliable or simply not believable. And in making that determination, the trial court is free to consider all of the other evidence presented at the third-stage proceeding, including all of the evidence that was originally presented at the defendant's trial at which he was convicted." *Id.* at ¶ 56.

Brooks went on to emphatically state that, though the evidence rules do not apply to third-stage evidentiary proceedings, the "part of a trial court's discretion at a third-stage evidentiary hearing includes the authority to *admit* questionable evidence and then to *disregard* it because, in the court's judgment, it is unreliable." *Id.* at ¶ 58. (Emphasis in original).

It should be noted that, just before the publication of *Brooks*, in *People v. Carter*, 2021 IL App (4th)180581, the appellate court had similarly held that "[a]t a third-stage hearing,'the trial court acts as a fact-finder, making credibility determinations and weighing the evidence.'" *Id.* at ¶ 58. In *Carter*, the appellate court held that the trial court's findings, based on evidence presented at third stage proceedings, were not against the weight of the evidence in denying the defendant's claim of actual innocence in the postconviction proceeding.

Note that in *People v. Gibson*, 2018 IL App (1st) 162177, ¶¶ 127-140, the appellate court equated the hearings required by the Post-Conviction Act with the circuit court hearing required by the Illinois Torture Inquiry and Relief Commission Act (TIRC, *see* 775 ILCS 40/1, *et seq*.). It thus concluded that the rules of evidence do not apply at an evidentiary hearing on a claim referred from the TIRC. Referring to section 50 of the TIRC Act (775 ILCS 40/50) "as a new species of postconviction proceeding" (*Gibson*, at ¶ 135), the appellate court held that the Illinois Rules of Evidence do not apply to TIRC, and the circuit court had thus erred in rejecting the defendant's proffered hearsay evidence on that court's stated basis that the defendant needed to show that the evidence fell within a recognized exception to the hearsay rule.

Amendments Deleting Portions of IRE 1101(b)(3)

As originally codified, IRE 1101(b)(3) included as an exception to the application of the rules of evidence "sentencing, or granting or revoking probation, conditional discharge or supervision." The exception that related to "granting or revoking probation" was stricken by the supreme court effective January 6, 2015. That was done for two reasons. First, the word "granting" was unnecessary as it was preceded by the word "sentencing," a word that encompasses the grant of probation and it thus was redundant. That January 6, 2015 amendment, however, resulted in the unintentional retention of the phrase "sentencing, conditional discharge or supervision." Effective September 17, 2019, the supreme court struck the words following "sentencing." As in the case of the earlier amendment, that amendment occurred because the dispositions of conditional discharge and supervision are incorporated in the concept of sentencing, thus rendering those words redundant and therefore superfluous.

The second reason for the January 6, 2015 amendment, which deleted the exception for the rules of evidence for probation revocation proceedings, was that the exception

likely would have represented a substantive change in Illinois law. See, for example, *People v. Renner*, 321 Ill. App. 3d 1022 (2001), where the appellate court denied the State's appeal from a trial court ruling that granted a probationer's motion *in limine* to exclude a certified laboratory report of results of the probationer's urine test at her probation revocation hearing. The appellate court stated that "hearsay evidence is not competent evidence in probation revocation proceedings; therefore, hearsay testimony is not competent to sustain the State's burden of proof...." *Renner*, 321 Ill. App. 3d, at 1026.

Note, however, that **FRE** 1101(d)(3), both before its amendment effective December 1, 2011 and since, provides that the Federal Rules of Evidence do not apply in probation revocation proceedings; and that the current version of FRE 1101(d)(3) (effective as of December 1, 2011) adds revocation of "supervised release." Thus, in federal proceedings, reliable hearsay evidence is admissible. *See, e.g., U.S. v. Pratt*, 52 F.3d 671, 675 (7th Cir. 1995) (citing FRE 1103(d)(3) in allowing hearsay testimony that satisfied the reliability requirement).

Note also that section 115-5(c)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(c)(2)) allows admissibility of investigative records (pursuant to the business records exception to the hearsay rule) for "technical violations" of probation and supervision (and presumably of conditional discharge). It defines a "technical violation" as "a breach of a sentencing order but does not include an allegation of a subsequent criminal act asserted in a formal criminal charge." Most likely, in cases involving technical violations, the statute will be invoked, while, in cases involving revocation based on criminal conduct, the State will be required to abide by evidence rules, presenting witnesses with first-hand knowledge rather than relying on hearsay to satisfy its burden of proof. As in federal proceedings, for technical violations of probation, conditional discharge, and supervision, "reliability" of information should be the standard in Illinois.

Examples of Statutory Exceptions from the Rules of Evidence

Regarding IRE 1101(b)(3)'s provision that the rules of evidence do not apply to "proceedings with respect to release on bail or otherwise," see section 110-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-5(a)), which provides that "[a]ll evidence shall be admissible if it is relevant and reliable regardless of whether it would be admissible under the rules of evidence applicable at criminal trials." See also *People v. Simmons*, 2019 IL App (1st) 191253, ¶12 (citing the statute and holding that "hearsay evidence is liberally permitted" when a court determines the amount of bail and conditions of release).

Though IRE 1101(b) does not address it, in a "discharge hearing" (a hearing to determine the sufficiency of the evidence that is demanded by an unfit defendant in a criminal proceeding or one that is held for a defendant who cannot become fit to stand trial), section 104-25(a) of the Criminal Code of Procedure of 1963 allows hearsay evidence for proof of "secondary matters":

> "The court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court and business records, and public documents." 725 ILCS 5/104-25(a).

Author's Commentary on Ill. R. Evid. 1101(c)

IRE 1101(c), which provides that the rules of evidence apply in small claims actions "subject to the application of Supreme Court Rule 286(b)," differs from both the amended and current versions of FRE 1101(c). The federal rule provides that the "rules on privilege apply to all stages of a case or proceeding." The Illinois rules do the same by providing for privilege through the incorporation of that protection in the parenthetical in the first sentence of IRE 1101(b). There is no federal counterpart to IRE 1101(c) because there are no federal small claims proceedings.

Illinois Supreme Court Rule 286(b), which is referenced in IRE 1101(c), permits the trial court to "adjudicate the dispute at an informal hearing" in small claims cases. It allows the court to relax the rules of procedure and the rules of evidence, and it also allows the court to "conduct or participate in direct and cross-examination of any witness or party." Rule 286(b) in its entirety reads as follows:

> "In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal

hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties."

Author's Commentary on Non-Adoption of Fed. R. Evid. 1101(d)

There is no separate IRE 1101(d). As pointed out above in the *Author's Commentary on IRE 1101(b)*, the provisions of FRE 1101(d) are incorporated into and are nearly identical to IRE 1101(b).

Author's Commentary on Non-Adoption of Fed. R. Evid. 1101(e)

FRE 1101(e), in its amended form effective December 1, 2011, deleted the specific references to numerous statutes and rules that were provided in its predecessor version. When the Illinois rules were adopted, the federal rule was not adopted because it applied specifically to federal proceedings. The topic addressed by current FRE 1101(e) (that a statue or a supreme court rule may supply a rule of evidence), is addressed in IRE 101.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
Rule 1102. Amendments These rules may be amended as provided in 28 U.S.C. § 2072.	**[FRE 1102 NOT ADOPTED.]**

COMMENTARY

Author's Commentary on Non-Adoption of Fed. R. Evid. 1102

The Illinois rules do not provide for an explicit and separate rule for amendments as does FRE 1102. It is clear, however, that the Illinois Supreme Court has authority to make amendments (and has done so), and also that IRE 101 recognizes the ability of the General Assembly to provide statutory rules of evidence.

FEDERAL RULES OF EVIDENCE	ILLINOIS RULES OF EVIDENCE
Rule 1103. Title These rules may be cited as the Federal Rules of Evidence.	**Rule 1102. Title** These rules may be known and cited as the Illinois Rules of Evidence.

COMMENTARY

Author's Commentary on Ill. R. Evid. 1102

IRE 1102 is the Illinois counterpart to FRE 1103.

APPENDIX A

725 ILCS 5/115-7.3. Evidence in certain cases.

Sec. 115-7.3. Evidence in certain cases.

(a) This Section applies to criminal cases in which:

(1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, criminal transmission of HIV, or child abduction as defined in paragraph (10) of subsection (b) of Section 10-5 of the Criminal Code of 1961 or the Criminal Code of 2012;

(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 11-0.1 of the Criminal Code of 2012; or

(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(f) In prosecutions for a violation of Section 10-2, 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.05, 12-4, 12-13, 12-14, 12-14.1, 12-15, 12-16, or 18-5 of the Criminal Code of 1961 or the Criminal Code of 2012, involving the involuntary delivery of a controlled substance to a victim, no inference may be made about the fact that a victim did not consent to a test for the presence of controlled substances.

(Source: P.A. 95-892, eff. 1-1-09; P.A. 96-1551, Art. 1, § 965, eff. 7-1-11; P.A. 97-1109, § 15-60, eff. 1-1-13; P.A. 97-1150, § 635, eff. 1-25-13; P.A. 98-160, § 5, eff. 1-1-14.)

APPENDIX B

725 ILCS 5/115-7.4. Evidence in domestic violence cases.

Sec. 115-7.4. Evidence in domestic violence cases.

(a) In a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, or first degree murder or second degree murder when the commission of the offense involves domestic violence, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(c) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(Source: P.A. 95-360, eff. 8-23-07; P.A. 97-1036, § 5, eff. 8-20-12.)

750 ILCS 60/103. Definitions.

Sec. 103. Definitions. For the purposes of this Act, the following terms shall have the following meanings:

(1) "Abuse" means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis.

* * *

(3) "Domestic violence" means abuse as defined in paragraph (1).

* * *

APPENDIX C

725 ILCS 5/115-20. Evidence of prior conviction.

Sec. 115-20. Evidence of prior conviction.

(a) Evidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member as defined in Section 112A-3, stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant.

(b) If the defendant is accused of an offense set forth in subsection (a) or the defendant is tried or retried for any of the offenses set forth in subsection (a), evidence of the defendant's conviction for another offense or offenses set forth in subsection (a) may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant if the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct as evidenced by proof of conviction, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(Source: P.A. 90-387, eff. 1-1-98.)

Appendix D

735 ILCS 5/8-1901. Admission of liability - Effect.

Sec. 8-1901. Admission of liability - Effect. The providing of, or payment for, medical, surgical, hospital, or rehabilitation services, facilities, or equipment by or on behalf of any person, or the offer to provide, or pay for, any one or more of the foregoing, shall not be construed as an admission of any liability by such person or persons. Testimony, writings, records, reports or information with respect to the foregoing shall not be admissible in evidence as an admission of any liability in any action of any kind in any court or before any commission, administrative agency, or other tribunal in this State, except at the instance of the person or persons so making any such provision, payment or offer.

(Source: P.A. 82-280, § 8-1901, eff. 7-1-82; P.A. 94-677, § 330, eff. 8-25-05 (held unconstitutional); reenacted by P.A. 97-1145, § 5, eff. 1-18-13.)

Appendix E

725 ILCS 5/115-7. Prior sexual activity or reputation as evidence.

Sec. 115-7. Prior sexual activity or reputation as evidence.

a. In prosecutions for predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV; and in prosecutions for battery and aggravated battery, when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 11-0.1 of the Criminal Code of 2012;1 and with the trial or retrial of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, and aggravated indecent liberties with a child, the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this Code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.

b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. The court shall not admit evidence under this Section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence that may be admitted and areas with respect to which the alleged victim or corroborating witness under Section 115-7.3 of this Code may be examined or cross examined.

(Source: P.A. 89-428, eff. 12-13-95; 89-462, eff. 5-29-96; 90-132, eff. 1-1-98., P.A. 96-1551, eff. 7-1-11; P.A. 97-1150, eff. 1-25-13.)

Appendix F

735 ILCS 5/8-2801. Admissibility of evidence; prior sexual activity or reputation.

Sec. 8-2801. Admissibility of evidence; prior sexual activity or reputation.

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil proceeding except as provided in subsections (b) and (c):

(1) evidence offered to prove that any victim engaged in other sexual behavior; or

(2) evidence offered to prove any victim's sexual predisposition.

(b) Exceptions.

(1) In a civil case, the following evidence is admissible, if otherwise admissible under this Act:

(A) evidence of specific instances of sexual behavior by the victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; and

(B) evidence of specific instances of sexual behavior by the victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent by the victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subsection (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the victim or, when appropriate, the victim's guardian or representative.

(2) Before admitting evidence under this Section the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(Source: P.A. 96-307, eff. 1-1-10.)

Appendix G

705 ILCS 405/5-150. Admissibility of evidence and adjudications in other proceedings.

Sec. 5-150. Admissibility of evidence and adjudications in other proceedings.

(1) Evidence and adjudications in proceedings under this Act shall be admissible:

(a) in subsequent proceedings under this Act concerning the same minor; or

(b) in criminal proceedings when the court is to determine the amount of bail, fitness of the defendant or in sentencing under the Unified Code of Corrections; or

(c) in proceedings under this Act or in criminal proceedings in which anyone who has been adjudicated delinquent under Section 5-105 is to be a witness including the minor or defendant if he or she testifies, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials; or

(d) in civil proceedings concerning causes of action arising out of the incident or incidents which initially gave rise to the proceedings under this Act.

(2) No adjudication or disposition under this Act shall operate to disqualify a minor from subsequently holding public office nor shall operate as a forfeiture of any right, privilege or right to receive any license granted by public authority.

(3) The court which adjudicated that a minor has committed any offense relating to motor vehicles prescribed in Sections 4-102 and 4-103 of the Illinois Vehicle Code shall notify the Secretary of State of that adjudication and the notice shall constitute sufficient grounds for revoking that minor's driver's license or permit as provided in Section 6-205 of the Illinois Vehicle Code; no minor shall be considered a criminal by reason thereof, nor shall any such adjudication be considered a conviction.

(Source: P.A. 90-590, eff. 1-1-99.)

Appendix H

735 ILCS 5/2-1102. Examination of adverse party or agent.

Sec. 2-1102. Examination of adverse party or agent. Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

(Source: P.A. 82-280, eff. 7-1-82.)

Supreme Court Rule 238. Impeachment of Witnesses; Hostile Witnesses.

Rule 238. Impeachment of Witnesses; Hostile Witnesses.

(a) The credibility of a witness may be attacked by any party, including the party calling the witness.

(b) If the court determines that a witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross-examination.

Amended February 19, 1982, effective April 1, 1982; amended April 11, 2001, effective immediately.

APPENDIX I

725 ILCS 5/115-10.1. Admissibility of Prior Inconsistent Statements.

Sec. 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement--

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

(Source: P.A. 83-1042, eff. 7-1-84.)

Appendix J

725 ILCS 5/115-12. Substantive Admissibility of Prior Identification.

Sec. 115-12. Substantive Admissibility of Prior Identification. A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him.

(Source: P.A. 83-367, eff. 1-1-84.)

APPENDIX K

725 ILCS 5/115-13. Hearsay exception; statements by victims of sex offenses to medical personnel.

[Effective prior to July 1, 2011:]

Sec. 115-13. Hearsay exception; statements by victims of sex offenses to medical personnel. In a prosecution for violation of Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the "Criminal Code of 1961", statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

[Effective July 1, 2011 and as amended January 25, 2013 (with portions added on July 1, 2011 underlined):]

Sec. 115-13. Hearsay exception; statements by victims of sex offenses to medical personnel. In a prosecution for violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

(Source: P.A. 89-428, eff. 12-13-95; 89-462, eff. 5-29-96; P.A. 96-1551, eff. 7-1-11; P.A. 97-1150, § 635, eff. 1-25-13.)

Appendix L

725 ILCS 5/115-5. Business records as evidence.

Sec. 115-5. Business records as evidence.

(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this Section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, optical imaging, or other process which accurately reproduces or forms a medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This Section shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

(c) No writing or record made in the regular course of any business shall become admissible as evidence by the application of this Section if:

(1) Such writing or record has been made by anyone in the regular course of any form of hospital or medical business; or

(2) Such writing or record has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind, except during a hearing to revoke a sentence of probation or conditional discharge or an order of court supervision that is based on a technical violation of a sentencing order when the hearing involves a probationer or defendant who has transferred or moved from the county having jurisdiction over the original charge or sentence. For the purposes of this subsection (c), "technical violation" means a breach of a sentencing order but does not include an allegation of a subsequent criminal act asserted in a formal criminal charge.

(d) Upon request of the moving party and with reasonable notice given to the opposing party, in a

criminal prosecution in which the defendant is accused of an offense under Article 16 or 17 of the Criminal Code of 1961 or the Criminal Code of 2012, the court may, after a hearing, for good cause and upon appropriate safeguards, permit live foundational testimony business records as evidence, subject to cross-examination, in open court by means of a contemporaneous audio and video transmission from outside of this State.

(Source: P.A. 91-548, eff. 1-1-00; P.A. 98-579, eff. 1-1-14.)

Supreme Court Rule 236. Admission of Business Records in Evidence.

Rule 236. Admission of Business Records in Evidence

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) Although police accident reports may otherwise be admissible in evidence under the law, subsection (a) of this rule does not allow such writings to be admitted as a record or memorandum made in the regular course of business.

Amended August 9, 1983, effective October 1, 1983; amended April 1, 1992, effective August 1, 1992.

Appendix M

725 ILCS 5/115-5.1. Records of the coroner's medical or laboratory examiner as evidence.

Sec. 115-5.1. Records of the coroner's medical or laboratory examiner as evidence. In any civil or criminal action the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section. These reports, specifically including but not limited to the pathologist's protocol, autopsy reports and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions stated therein.

A duly certified coroner's protocol or autopsy report, or both, complying with the requirements of this Section may be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. The records referred to in this Section shall be limited to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.

Persons who prepare reports or records offered in evidence hereunder may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause. However, if such person is dead, the county coroner or a duly authorized official of the coroner's office may testify to the fact that the examining pathologist, toxicologist or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical report or record was prepared in the ordinary and usual course of the deceased person's duty or employment in conformity with the provisions of this Section.

(Source: P.A. 82-783, eff. 7-13-82.)

Appendix N

725 ILCS 5/115-10.6. Hearsay exception for intentional murder of a witness. [Repealed]

Sec. 115-10.6. Hearsay exception for intentional murder of a witness. [Repealed]

(a) A statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed the declarant in violation of clauses (a)(1) and (a)(2) of Section 9-1 of the Criminal Code of 1961 intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding.

(b) While intent to procure the unavailability of the witness is a necessary element for the introduction of the statements, it need not be the sole motivation behind the murder which procured the unavailability of the declarant as a witness.

(c) The murder of the declarant may, but need not, be the subject of the trial at which the statement is being offered. If the murder of the declarant is not the subject of the trial at which the statement is being offered, the murder need not have ever been prosecuted.

(d) The proponent of the statements shall give the adverse party reasonable written notice of its intention to offer the statements and the substance of the particulars of each statement of the declarant. For purposes of this Section, identifying the location of the statements in tendered discovery shall be sufficient to satisfy the substance of the particulars of the statement.

(e) The admissibility of the statements shall be determined by the court at a pretrial hearing. At the hearing, the proponent of the statement bears the burden of establishing 3 criteria by a preponderance of the evidence:

(1) first, that the adverse party murdered the declarant and that the murder was intended to cause the unavailability of the declarant as a witness;

(2) second, that the time, content, and circumstances of the statements provide sufficient safeguards of reliability;

(3) third, the interests of justice will best be served by admission of the statement into evidence.

(f) The court shall make specific findings as to each of these criteria on the record before ruling on the admissibility of said statements.

(g) This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.

(Source: P.A. 95-1004, eff. 12-8-08; repealed by P.A. 99-243, eff. 8-3-15.)

725 ILCS 5/115-10.7. Admissibility of prior statements of an unavailable witness whose absence was wrongfully procured. [Repealed]

Sec. 115-10.7. Admissibility of prior statements of an unavailable witness whose absence was wrongfully procured. [Repealed]

(a) Legislative intent. The Illinois General Assembly finds that no party to a criminal case who wrongfully procures the unavailability of a witness should be allowed to benefit from such wrongdoing by depriving the trier of fact of relevant testimony.

(b) A statement of a witness is not excluded at the trial or hearing of any defendant by the hearsay rule or as a violation of any right to confront witnesses if the witness was killed, bribed, kidnapped, secreted,

intimidated, or otherwise induced by a party, or one for whose conduct such party is legally responsible, to prevent the witness from being available to testify at such trial or hearing.

(c) The party seeking to introduce the statement shall disclose the statement sufficiently in advance of trial or hearing to provide the opposing party with a fair opportunity to meet it. The disclosure shall include notice of an intent to offer the statement, including the identity of the declarant.

(d) Prior to ruling on the admissibility of a statement under this Section, the court shall conduct a hearing outside the presence of the jury. During the course of the hearing the court may allow the parties to proceed by way of proffer. Except in cases where a preponderance of the evidence establishes that the defendant killed the declarant, the party seeking to introduce the statement shall be required to show by a preponderance of the evidence that the party who caused the unavailability of the witness did so with the intent or motive that the witness be unavailable for trial or hearing. The court is not required to find that the conduct or wrongdoing amounts to a criminal act.

(e) Nothing in this Section shall be construed to prevent the admissibility of statements under existing hearsay exceptions.

(Source: P.A. 96-337, eff. 8-11-09; repealed by P.A 99-243, eff. 8-3-15.)

APPENDIX O

725 ILCS 5/115-10.2. Admissibility of prior statements when witness refused to testify despite a court order to testify.

Sec. 115-10.2. Admissibility of prior statements when witness refused to testify despite a court order to testify.

(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:

(1) the statement is offered as evidence of a material fact; and

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

(f) Prior statements are admissible under this Section only if the statements were made under oath and were subject to cross-examination by the adverse party in a prior trial, hearing, or other proceeding.

(Source: P.A. 93-413, eff. 8-5-03; 93-443, eff. 8-5-03; 94-53, eff. 6-17-05.)

Appendix P

725 ILCS 5/115-10.2a. Admissibility of prior statements in domestic violence prosecutions when the witness is unavailable to testify.

Sec. 115-10.2a. Admissibility of prior statements in domestic violence prosecutions when the witness is unavailable to testify.

(a) In a domestic violence prosecution, a statement, made by an individual identified in Section 201 of the Illinois Domestic Violence Act of 1986 as a person protected by that Act, that is not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is identified as unavailable as defined in subsection (c) and if the court determines that:

(1) the statement is offered as evidence of a material fact; and

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness includes circumstances in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means; or

(6) is a crime victim as defined in Section 3 of the Rights of Crime Victims and Witnesses Act and the failure of the declarant to testify is caused by the defendant's intimidation of the declarant as defined in Section 12-6 of the Criminal Code of 2012.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

(Source: P.A. 93-443, eff. 8-5-03; P.A. 97-1150, § 635, eff. Jan. 25, 2013.)

Appendix Q

725 ILCS 5/115-10.3. Hearsay exception regarding elder adults.

Sec. 115-10.3. Hearsay exception regarding elder adults.

(a) In a prosecution for a physical act, abuse, neglect, or financial exploitation perpetrated upon or against an eligible adult, as defined in the Adult Protective Services Act, who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental incapacity or (ii) any physical infirmity, including but not limited to prosecutions for violations of Sections 10-1, 10-2, 10-3, 10-3.1, 10-4, 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-11, 12-1, 12-2, 12-3, 12-3.05, 12-3.2, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.5, 12-4.6, 12-4.7, 12-5, 12-6, 12-7.3, 12-7.4, 12-11, 12-11.1, 12-13, 12-14, 12-15, 12-16, 12-21, 16-1, 16-1.3, 17-1, 17-3, 17-56, 18-1, 18-2, 18-3, 18-4, 18-5, 18-6, 19-6, 20-1.1, 24-1.2, and 33A-2, or subsection (b) of Section 12-4.4a of the Criminal Code of 2012, the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by an eligible adult, of an out of court statement made by the eligible adult, that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the eligible adult, describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a physical act, abuse, neglect, or financial exploitation perpetrated upon or against the eligible adult.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The eligible adult either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the condition of the eligible adult, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his or her intention to offer the statement and the particulars of the statement.

(Source: P.A. 96-1551, Article 1, Section 965, eff. 7-1-11; 96-1551, Article 2, Section 1040, eff. 7-1-11; 96-1551, Article 10, Section 10-145, eff. 7-1-11; 97-1108, eff. 1-1-13; 97-1109, eff. 1-1-13; P.A. 98-49, § 105, eff. 7-1-13.)

APPENDIX R

725 ILCS 5/115-10.4. Admissibility of prior statements when witness is deceased.

Sec. 115-10.4. Admissibility of prior statements when witness is deceased.

(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the declarant is deceased and if the court determines that:

(1) the statement is offered as evidence of a material fact; and

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name of the declarant.

(c) Unavailability as a witness under this Section is limited to the situation in which the declarant is deceased.

(d) Any prior statement that is sought to be admitted under this Section must have been made by the declarant under oath at a trial, hearing, or other proceeding and been subject to cross-examination by the adverse party.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

(Source: P.A. 94-53, eff. 6-17-05.)

APPENDIX S

735 ILCS 5/8-2701. Admissibility of evidence; out of court statements; elder abuse.

Sec. 8-2701. Admissibility of evidence; out of court statements; elder abuse.

(a) An out of court statement made by an eligible adult, as defined in the Adult Protective Services Act, who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental incapacity or (ii) any physical infirmity which prevents the eligible adult's appearance in court, describing any act of elder abuse, neglect, or financial exploitation, or testimony by an eligible adult of an out of court statement made by the eligible adult that he or she complained of such acts to another, is admissible in any civil proceeding, if:

(1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) the eligible adult either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(b) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that, in making its determination, it shall consider the condition of the eligible adult, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

(c) The proponent of the statement shall give the adverse party reasonable notice of an intention to offer the statement and the particulars of the statement.

(Source: P.A. 90-628, eff. 1-1-99; P.A. 98-49, § 110, eff. 7-1-13.)

Appendix T

735 ILCS 5/8-2601. Admissibility of evidence; out-of-court statements; child abuse.

Sec. 8-2601. Admissibility of evidence; out-of-court statements; child abuse.

(a) An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(b) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that, in making its determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

(c) The proponent of the statement shall give the adverse party reasonable notice of an intention to offer the statement and the particulars of the statement.

(Source: P.A. 85-1440, eff. 2-1-89.)

Appendix U

725 ILCS 5/115-10. Certain hearsay exceptions.

Sec. 115-10. Certain hearsay exceptions.

(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, or a person who was a person with a moderate, severe, or profound intellectual disability as defined in this Code and in Section 2-10.1 of the Criminal Code of 1961 or the Criminal Code of 2012 at the time the act was committed, including but not limited to prosecutions for violations of Sections 11-1.20 through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 and prosecutions for violations of Sections 10-1 (kidnapping), 10-2 (aggravated kidnapping), 10-3 (unlawful restraint), 10-3.1 (aggravated unlawful restraint), 10-4 (forcible detention), 10-5 (child abduction), 10-6 (harboring a runaway), 10-7 (aiding or abetting child abduction), 11-9 (public indecency), 11-11 (sexual relations within families), 11-21 (harmful material), 12-1 (assault), 12-2 (aggravated assault), 12-3 (battery), 12-3.2 (domestic battery), 12-3.3 (aggravated domestic battery), 12-3.05 or 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.7 (drug induced infliction of great bodily harm), 12-5 (reckless conduct), 12-6 (intimidation), 12-6.1 or 12-6.5 (compelling organization membership of persons), 12-7.1 (hate crime), 12-7.3 (stalking), 12-7.4 (aggravated stalking), 12-10 or 12C-35 (tattooing the body of a minor), 12-11 or 19-6 (home invasion), 12-21.5 or 12C-10 (child abandonment), 12-21.6 or 12C-5 (endangering the life or health of a child) or 12-32 (ritual mutilation) of the Criminal Code of 1961 or the Criminal Code of 2012 or any sex offense as defined in subsection (B) of Section 2 of the Sex Offender Registration Act, the following evidence shall be admitted as an exception to the hearsay rule

(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child or moderately, severely, or profoundly intellectually disabled person either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

(3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the person with a moderate, severe, or profound intellectual disability, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(e) Statements described in paragraphs (1) and (2) of subsection (a) shall not be excluded on the basis that they were obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board as set forth in subsections (c), (d), and (e) of Section 3 of the Children's Advocacy Center Act or that an interviewer or witness to the interview was or is an employee, agent, or investigator of a State's Attorney's office.

(Source: P.A. 96-710, § 40, eff. 1-1-10; P.A. 96-1551, Art. 1, § 965, eff. 7-1-11; P.A. 96-1551, Art. 2, § 1040, eff. 7-1-11; P.A. 97-227, § 140, eff. 1-1-12; P.A. 97-1108, § 15-30, eff. 1-1-13; P.A. 97-1109, § 10-955, eff. 1-1-13; P.A. 97-1150, § 635, eff. 1-25-13; P.A. 99-143, § 890, eff. 7-27-15.)