
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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No copyright is claimed as to the Federal or Illinois Rules of Evidence themselves, any statute or order of the Supreme Court, or the commentary of the Special Supreme Court Committee on Illinois Evidence.
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
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
# Table of Contents

**Preface to the December 2010 Edition** .................................................. iii
**Preface to the January 1, 2016 Edition** .................................................. v
**Table of Contents** .................................................................................... vii
**September 23, 2010 Order of the Supreme Court of Illinois** ................. xiii

## The Illinois Rules of Evidence

General Commentary by the Special Supreme Court Committee on Illinois Evidence .................................................. 1

### Article I. General Provisions

rule 101. Scope .................................................................................. 11
rule 102. Purpose and Construction .................................................. 14
rule 103. Rulings on Evidence .......................................................... 15
rule 104. Preliminary Questions ........................................................ 33
rule 105. Limited Admissibility .......................................................... 37
rule 106. Remainder of or Related Writings or Recorded Statements .... 39

### Article II. Judicial Notice

rule 201. Judicial Notice of Adjudicative Facts ....................................... 41

### Article III. Presumptions in Civil Actions and Proceedings

rule 301. Presumptions in General in Civil Actions and Proceedings ... 47
[fre 302 not adopted.] ................................................................. 49

### Article IV. Relevancy and Its Limits

rule 401. Definition of “Relevant Evidence” ......................................... 51
rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible .................................................. 53
rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time .................................................. 54
rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes .................................................. 56
rule 405. Methods of Proving Character .............................................. 76
rule 406. Habit; Routine Practice ....................................................... 81
rule 407. Reserved. [Subsequent Remedial Measures] ............................. 83
ARTICLE VII. OPINIONS AND EXPERT WITNESSES

rule 701. Opinion Testimony by Lay Witnesses ............................................. 151
rule 702. Testimony by Experts ................................................................. 157
rule 703. Bases of Opinion Testimony by Experts ..................................... 169
rule 704. Opinion on Ultimate Issue .......................................................... 175
rule 705. Disclosure of Facts or Data Underlying Expert Opinion ............... 176
[fre 706 not adopted.] .............................................................................. 179

ARTICLE VIII. HEARSAY

rule 801. Definitions ..................................................................................... 181
rule 802. Hearsay Rule ................................................................................ 197
rule 803. Hearsay Exceptions; Availability of Declarant Immaterial .......... 198
rule 804. Hearsay Exceptions; Declarant Unavailable ................................ 233
rule 805. Hearsay Within Hearsay ............................................................... 248
rule 806. Attacking and Supporting Credibility of Declarant .................... 249
[fre 807 not adopted.] .............................................................................. 250

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

rule 901. Requirement of Authentication or Identification ....................... 261
rule 902. Self-authentication ...................................................................... 269
rule 903. Subscribing Witness’ Testimony Unnecessary ............................. 276

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

rule 1001. Definitions ................................................................................ 277
rule 1002. Requirement of Original .............................................................. 279
rule 1003. Admissibility of Duplicates ........................................................ 280
rule 1004. Admissibility of Other Evidence of Contents ......................... 281
rule 1005. Public Records .......................................................................... 282
rule 1006. Summaries ................................................................................ 283
rule 1007. Testimony or Written Admission of Party .................................. 284
rule 1008. Functions of Court and Jury ...................................................... 285

ARTICLE XI. MISCELLANEOUS RULES

rule 1101. Applicability of Rules .................................................................. 287
<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1102.</td>
<td>Title</td>
<td>290</td>
</tr>
<tr>
<td>Appendix</td>
<td>ID. Evidence in certain cases.</td>
<td>291</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-7.4. Evidence in domestic violence cases.</td>
<td>292</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-20. Evidence of prior conviction.</td>
<td>293</td>
</tr>
<tr>
<td>Appendix</td>
<td>8-1901. Admission of liability - effect.</td>
<td>294</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-7. Prior sexual activity or reputation as evidence.</td>
<td>295</td>
</tr>
<tr>
<td>Appendix</td>
<td>8-2801. Admissibility of evidence; prior sexual activity or reputation.</td>
<td>296</td>
</tr>
<tr>
<td>Appendix</td>
<td>405/5-150. Admissibility of evidence and adjudications in other proceedings.</td>
<td>297</td>
</tr>
<tr>
<td>Appendix</td>
<td>2-1102. Examination of adverse party or agent.</td>
<td>298</td>
</tr>
<tr>
<td>Appendix</td>
<td>2-1102. Impeachment of witnesses; hostile witnesses.</td>
<td>298</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-10.1. Admissibility of prior inconsistent statements.</td>
<td>299</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-12. Substantive admissibility of prior identification.</td>
<td>300</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-13. hearsay exception; statements by victims of sex offenses to medical personnel.</td>
<td>301</td>
</tr>
<tr>
<td>Appendix</td>
<td>115-5. Business records as evidence.</td>
<td>302</td>
</tr>
<tr>
<td>Appendix</td>
<td>236. Admission of business records in evidence.</td>
<td>303</td>
</tr>
</tbody>
</table>
APPENDIX M

725 ILCS 5/115-5.1. RECORDS OF THE CORONER’S MEDICAL OR LABORATORY EXAMINER AS EVIDENCE. ......................................................... 304

APPENDIX N

725 ILCS 5/115-10.6. HEARSAY EXCEPTION FOR INTENTIONAL MURDER OF A WITNESS. [REPEALED] ......................................................... 305

725 ILCS 5/115-10.7. ADMISSIBILITY OF PRIOR STATEMENTS OF AN UNAVAILABLE WITNESS WHOSE ABSENCE WAS WRONGFULLY PROCURED. [REPEALED] ................................................................. 305

APPENDIX O

725 ILCS 5/115-10.2. ADMISSIBILITY OF PRIOR STATEMENTS WHEN WITNESS REFUSED TO TESTIFY DESPITE A COURT ORDER TO TESTIFY. ... 307

APPENDIX P

725 ILCS 5/115-10.2a. ADMISSIBILITY OF PRIOR STATEMENTS IN DOMESTIC VIOLENCE PROSECUTIONS WHEN THE WITNESS IS UNAVAILABLE TO TESTIFY. ......................................................... 308

APPENDIX Q

725 ILCS 5/115-10.3. HEARSAY EXCEPTION REGARDING ELDER ADULTS. ...... 309

APPENDIX R

725 ILCS 5/115-10.4. ADMISSIBILITY OF PRIOR STATEMENTS WHEN WITNESS IS DECEASED. ................................................................. 310

APPENDIX S

735 ILCS 5/8-2701. ADMISSIBILITY OF EVIDENCE; OUT-OF-COURT STATEMENTS; ELDER ABUSE. ................................................................. 311

APPENDIX T

735 ILCS 5/8-2601. ADMISSIBILITY OF EVIDENCE; OUT-OF-COURT STATEMENTS; CHILD ABUSE. ................................................................. 312

APPENDIX U

725 ILCS 5/115-10. CERTAIN HEARSAY EXCEPTIONS. ................................. 313
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

FILED
SEP 27 2010
SUPREME COURT CLERK
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.

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.


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.


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 IM MATERIAL

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.


(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,

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Article I. General Provisions

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.

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.

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 proceeding (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
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. Rolflingsmeyer, 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 2465, 475 (1988).

¶ 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.

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 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 deleted the reference in the Committee Comment concerning the 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 the Dead-Man’s 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 specific examples 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 8/2801, 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 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 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”).

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.

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. R. 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 a recent example of the application of FRE 103(b)’s definitive ruling requirement, see United States v. Bradford, ___ F.3d ___, No. 17-1080 (7th Cir. September 19, 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 a recent 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. Landver, 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 66.
rule 103 Article i. General Provisions

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 refused); 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 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. Gibbs, 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.

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), and that 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.

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).

**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)).

**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 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 v. Highland Body Shop, Inc.*, 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 CONTEMPOANEOUS 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

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. 104(e). 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 an appellate court decision 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).

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) designa-
tion 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 pro-
posed 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-designa-
tion 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.
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.” Jimenez 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).

**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 its recent decision in Rosales-Mireles v. United States, ___ U.S. ___, 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, slip op. at 5.

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.*, slip op. at 8.

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 slip op 13), 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.” *Rosales-Mireles*, slip op. at 15.

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. ___, 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-Mireles*, the final guideline range for sentencing calculated by the trial court was correct); *United States v. Seifer*, 200
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-desig-

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

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 requirement listed above, 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 error itself had substantial influence.”); 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.”).
nation of IRE 103(d) as IRE 103(e), the same 103(e) designation as its federal counterpart.

**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).

**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).”

*People v. McDonald*, 2016 IL 118882, ¶ 48.

**TEST FOR SECOND PRONG OF PLAIN ERROR**

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 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). Moreover, as the supreme court noted in People v. Clark, 2016 IL 118845, ¶ 25, in In re Samantha V., 234 Ill. 2d 359, 378-79 (2009), the failure to apply the one-act, one-crime rule constituted second-prong plain error; and in People v. Walker, 232 Ill. 2d 113, 131 (2009), the failure to exercise discretion in denying a request for a continuance constituted second-prong plain error, given the egregious facts of that case. In Clark, the court pointed out that, “[a]s the language of the rule [as articulated in Piatkowski and its progeny] indicates, remedial application of the plain error doctrine is discretionary.” People v. Clark, 2016 IL 118845, ¶ 42.

The imposition of an unauthorized sentence affects substantial rights and thus triggers second-prong plain error (People v. Hicks, 181 Ill. 2d 541, 545 (1998)). The imposition of a fine that contravenes a statute also triggers second-prong plain error (People v. Lewis, 234 Ill.2d 32, 48-49 (2009)), as does the imposition of a statutorily prohibited adult sentence on a juvenile (People v. Fort, 2017 IL 118966, ¶ 19).

RELEVANT DECISIONS ON 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).

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 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)).

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 “commonsense 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 recent 4-to-3 decision in People v. Sebby, 2017 IL 119445, the supreme court held that a Rule 431(b) error 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 Sebby, 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 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.

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 doctrine (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 would 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.

The distinction between waiver and forfeiture (which, as the above quote indicates, 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. Also, forfei-
ture “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 deci-
sion 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 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 stated 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 respondent 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 it relates to the admissibility of lay opinion testimony, see the Author’s Commentary on Ill. R. Evid. 701.

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 the subsequent production of evidence that establishes 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)).

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.

FEDERAL RULES OF 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.

ILLINOIS RULES OF EVIDENCE

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.

 Commentaries

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.

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.
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.

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 conversations. 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 exculpatory 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_, 2013 IL App (2d) 111300, ¶ 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.

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 court was whether a videotaped exculpatory statement made by the defendant’s wife to police, just before her incriminating statement, should have been admitted with the incriminating 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, it would have been preferable to have admitted the unfavorable portion during the State’s rebuttal case. However, 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.
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 as to the propriety of taking judicial notice and the nature of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(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.

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.
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.

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 stated:

“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.

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, 47 Ill. 2d at 13.

In the pre-codification decision of the appellate court 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.

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 an opinion of the appellate court that had reversed the judgment of the circuit court that terminated 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 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 always 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 recourse to judicial notice is necessary.

**Recent Decisions Disallowing Judicial Notice**

For a case that cites this 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 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).

In In the Matter of Steven Robert Lisse, ___F.3d ___, Nos 18-1866 & 18-1889 (7th Cir. September 28, 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.

Judicial Notice Based On Internet Searches

In a decision that predates the Illinois Rules of Evidence, the appellate court cited the two requirements in subdivisions (1) and (2) that are incorporated into IRE 201(b), 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 that 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.

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." Gocmen, 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. 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. R. 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).

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).

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).
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.

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, house trailer, 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 leap 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.”).

**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 grantor 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).
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.

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 example of an 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).
Article iv. relevancy and its limits

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. See People v. Monroe, 66 Ill. 2d 317 (1977), where, in adopting FRE 401, the supreme court discussed and applied the federal rule’s definition of relevant evidence. 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.

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.”

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 IRE 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. Although, during trial, the defendants repeatedly informed the jury that the video was not a re-creation, the appellate court held that the video did not satisfy the foundational requirement for establishing that the essential conditions regarding the line of sight were substantially similar. Holding that the video had the potential for confusing and misleading the jury, the appellate court 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.

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

IRE 402 is identical to the federal rule before the latter’s amendment solely for stylistic purposes effective December 1, 2011, except for the deletion from FRE 402 of the enumeration of all the bases for the exception. The deleted bases are encompassed in IRE 402 simply by adding the word “law” at the end of the phrase that now reads “except as otherwise provided by law” in its first sentence.

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.

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. 

**Defining “Unfair Prejudice”**

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).”

Parsing a term within the rule, 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.

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.”

**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 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 Court held that where the man with whom the alleged victim of a rape was cohabiting saw her exit the co-defendant’s car, 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 by the Seventh Circuit, see Rhodes v. Dittmann, ___ F.3d ___, No. 17-2223 (7th Cir. September 10, 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) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other 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; Notice in a Criminal Case. 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. On request by a defendant 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 the general nature of any such evidence that the prosecutor intends to offer at trial; and
(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

**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 addressed 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. Under the federal rule, in contrast, when the defendant attacks the character of an alleged victim, the door is opened to an attack on the same character trait of the defendant.

Decisions Applying IRE 404(a)(1)

IRE 404(a)(1) and cases interpreting it demonstrate the difference described above from the federal rule. 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 also 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 contendted 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.

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”); *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 girlfriend 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 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 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 its recent decision 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).

**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; and

(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 offered 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)

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 for propensity purposes, but only for proving 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.


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.”

Gomez, 763 F.3d 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. 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).

**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 Circ. 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 unchanged 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.

DISCUSSING 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.

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

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 prior 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 specified other-crimes evidence for propensity purposes. But note that FRE 413 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.

Statutes Cited in IRE 404(b)

Regarding the subject matter of the statutes in the Code of Criminal Procedure of 1963 that IRE 404(b) cites,

- section 115-7.3 (725 ILCS 5/115-7.3) allows evidence of certain sex offenses in prosecutions for specified sex-related offenses;

- section 115-7.4 (725 ILCS 5/115-7.4) allows evidence of domestic violence offenses in prosecutions for domestic violence offenses; and

- section 115-20 (725 ILCS 5/115-20) allows evidence of prior convictions in prosecutions for any of the type of offenses it lists.

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.

 Construing Section 115-20

Regarding section 115-20, see 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.

See also People v. Chapman, 2012 IL 111896, where 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 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, “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.

See also 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 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.”

**Applying Sections 115-7.3 and 115-7.4**

For samplings of appellate court opinions applying section 115-7.4 (see Appendix B), in approving the admission of evidence of prior acts related to domestic violence, see:

- 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.); and 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 occur-
ring about a year and a half before and the other five weeks before the charged offenses).

For a sampling of appellate court opinions applying section 115-7.3 (see Appendix A), in approving the admission of evidence of prior and subsequent sexual offenses, see:

- **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 in the fact that 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, for another example of an appellate court decision 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.

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

In addition to the decisions provided by Dabbs in the quote under the heading People v. Dabbs: Blueprint for Understanding IRE 404(b) 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).

**Principles Related to the Admission of Other-Crime Evidence under 404(b) and under Certain 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).

**Application of Ordinary Principles of Relevancy**

It should be noted that, in addition to what is stated in items (1) to (4) 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 these 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).

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 “[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.

*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.” People v. Pikes, 2013 IL 115171, ¶ 20.

Appellate Court Decisions Applying Pikes

The appellate court’s recent 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 the other person, 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.

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 intertwined doctrine, finding that ‘because 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. August 18, 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).
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.
Application of the Rule's Common-Law Exceptions

People v. Clark, 2015 IL App (1st) 131678, provides an analysis of the application of IRE 404(b)'s common-law exceptions of intent and identity. In that case, the appellate court held that it was improper 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. The court held that the prior theft was not probative of either intent or identity as the trial court had ruled, but rather improperly demonstrated propensity. Nevertheless, because of the other overwhelming evidence of guilt in the case, the court held that the admission of the evidence of the prior theft constituted harmless error.

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’s 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.

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).

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
74
article iv. relevancy and its limits

rule 404 (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, ¶ 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. (Emphasis in original).

Decisions Relevant to Admission of Evidence Containing 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.

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)

There is no FRE 404(c). IRE 404(c), like the last part of pre-amended FRE 404(b)—which is now FRE 404(b)(2)(A) and (B) through the amendment solely for stylistic purposes effective December 1, 2011—provides a notice requirement concerning the prosecutor’s intent to offer evidence under IRE 404(b). Unlike its federal counterpart, the Illinois rule requires notice even if not requested by the accused and it more specifically provides what is to be disclosed—consistent with and substantially identical to 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).

**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.

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.
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.


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.” * ld. 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.” * ld. at ¶ 32. The appellate court thus determined that, even if error had occurred, it was harmless error. * ld. 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), in 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. Moreover, 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 “previous good character” or “conduct,” nor with her commission of the charged crime.

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, perhaps under IRE 704, and not as inadmissible “character” evidence under IRE 404 or IRE 405(a).

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, and therefore such character evidence was not admissible under the rule. Collins, 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), for an explanation of the common-law rule.
**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.

**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. 70, 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 (¶¶ 116-128), 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 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, 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.

COMMMENTARY

Author's Commentary on Reserved Ill. R. Evid. 407

Appellate Court Conflict Regarding Products Liability Cases

I.R. 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.

**Recent 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 the application not of a codified evidence rule but of 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, barring evidence, based on the principle of subsequent remedial measures, 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,” holding 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.

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)
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 has relevance. 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 subparagraphs (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 the addition of the first sentence, to make it clear that evidence otherwise admissible is not excluded merely because it was used in settlement 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 propriety of admitting into evidence, on remand, 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.”
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.

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. That 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.

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,
Determined 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

The most recent supreme court case to apply the test is People v. Rivera, 2013 IL 112467, where, 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 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, 2013 IL 112467, ¶ 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.

**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 contrasting 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.

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 statutes 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. Through section 115-7’s reference to section 115-7.3, “corroborating witness” refers to a 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 an 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 of the victim’s two consensual partners, which were found on the victim’s clothing, 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 anal 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.

**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.
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.”

Author’s Commentary on Ill. R. Evid. 413

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, 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 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).

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 before it, where in the case at bar 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).
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.

COMMENTARY

Author’s Commentary on Non-Adoption of Fed. R. Evid. 415
Illinois has no counterpart to FRE 415 in civil cases.
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.

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 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.

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 Statutory Privileges

There are numerous 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 below);
• 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) (for a case that addresses this privilege in the context of an appeal from the dismissal of a postconviction petition and which will be reviewed by the supreme court, see People v. Thomas, 2014 IL App (2d) 121001, petition for leave to appeal allowed on May 27, 2015, No. 118589; see also 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);
• therapist-patient privilege (740 ILCS 110/10) (for an appellate court decision 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);
• 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).

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).

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.

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 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 two relevant appellate court decisions that provide discussions concerning that privilege: Scarpelli v. McDermott Will & Emory LLP, 2018...
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 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) (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). See also The Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc., 2018 IL App (2d) 170939, appeal allowed 11/28/18, No. 123936 (applying Waste Management, in holding that, under the common-interest doctrine, an insurance procurer, which stands in the place of an insurer and thus had interests identical to that of an insurer, cannot be barred from discovering otherwise attorney-client-protected information of the insured in a later dispute concerning insurance coverage). As noted, on November 28, 2018, the supreme court granted leave to appeal in this case, No. 123936, so it will have the final word concerning this exception to attorney-client privilege.

Another exception 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 crime-fraud exception and why it applies:

“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).

**SECRET-SURVEILLANCE-LOCATION PRIVILEGE**

Another example of a common-law privilege, in the context of a criminal case, is the secret surveillance location privilege. 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).

**MARRITAL 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.

**DECISIONS ON MARRITAL-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. Cliniewicz, 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 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 the propriety of the imposed contempt, *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.

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 holding, in applying the exception to the physician-patient privilege in section 8-802(9) of the Code of Civil Procedure, 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).
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
2. is not a waiver under the law of the state where the disclosure occurred.
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.

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:
Article V. Privileges

115

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.

Rule 502(a) addresses subject-matter waiver. It provides that, in an Illinois proceeding, the disclosure of privileged or protected 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 Commentary (Continued)
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.

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.”

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 materials after information is produced, including agreements reached under Federal Rule of Evidence 502.”

Note also that under Federal Rule 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 subject-matter-waiver doctrine, 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.’ In 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.
Article vi. Witnesses

The Illinois and Federal Rules of Evidence

Illinois Rules of Evidence

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 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—could not be eliminated).

See also 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, too, *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.

**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 a recent 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).
### 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's own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

### 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.

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 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.
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.

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.

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.

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.” 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
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 influ-
ences,” 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 Court of Appeals 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 con-
done 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) 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.

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. Habley, 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).

In Pena-Rodriguez v. Colorado, __ 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.

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.
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 of showing 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 he disavowed his prior signed statement and grand jury testimony which identified defendant and another as the offenders, and claimed that the prior signed statement was a forgery).

**Lack of Memory Does Not Constitute “Affirmative Damage”**

Note that 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.”
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.

Author’s Commentary on Ill. R. Evid. 608

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.” As noted, however, FRE 608(b), which allows cross-examination on a witness’s “specific instances of conduct,” has not been adopted in Illinois. IRE 608, 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 trueful-
ness or untruthfulness of another witness. 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).

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, 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.

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., disallowing questions about a 15-year-old perjury conviction, but allowing questions about the witness having lied under oath).

**U.S. v Abair: Opposing Views on Application of FRE 608(b)**

*U.S. 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 Non-Adoption of Fed. R. Evid. 608(b)

FRE 608(b) (known as the impeachment by “prior bad acts rule” to distinguish it from FRE 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”).

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).

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 paragraph 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

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(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.

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(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 for nearly opposite 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-
tunguishing between a mere witness and a witness who is the accused, and without regard for whether the prior conviction was for a felony offense or an offense involving dishonesty or false statement.

**RELATED CIVIL STATUTE**

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 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. 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 the former governor of Illinois: “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.

**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 the nature of the prior conviction is relevant to the jury’s credibility determination and the “mere fact” method inevitably invites the jury to speculate about the prior offense.

**Admissibility of Conviction for Same Offense**

In *Atkinson* and in *Mullins*, the supreme court held that, where the proper balancing test has been applied by the trial court, the defendant’s prior conviction 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.
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 Conflict with Statute**

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 ques-
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.

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 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 witness's credibility. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Author's Commentary on Ill. R. Evid. 611(a)

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 the addition at the end of the first sentence of 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 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.’” 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.

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 court must strike the witness's testimony or—if justice so requires—declare 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 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.
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).

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. 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.

COMMENTARY

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 recent codification, one that was made effective by the supreme court on January 6, 2015. As discussed in the Author’s Commentary on IRE 801(d)(1), it 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 of recent fabrication or subject to recent influence or motive to testify. IRE 613(c) permits the admission 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.

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. 

People v. Ruback, 2013 IL App (3d) 110256, is an interesting decision that predates the adoption of IRE 613(c). There, the three judges, who wrote separately, had 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.
**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.

**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.

**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).

**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 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.

**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. 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. Or the court may do so on its own. 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.

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 sound discretion of the court. 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).

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."

*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, and noting 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.
The Illinois and Federal Rules of Evidence

Article VII. Opinions and Expert Witnesses

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’s 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’s 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. Goldsberry, 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 outweighs any potential 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 the 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
sizeable 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. Charrett, 2016 IL App (4th) 140315, the appel-
late 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.

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 discus-
sion 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.”

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 hand-
writing-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 cred-
ibility 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.

**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 accessible to ordinary persons,” and therefore fell within Rule 702. *Jones*, 739 F.3d at 369.

The Seventh Circuit’s recent decision in *United States v. Jett*, ___ F.3d ___, Nos. 17-2051, 17-2052, 17-2060 (7th Cir. November 7, 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), also 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* is recommended reading when such dual-role testimony is involved.

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.” *Gocmen*, 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.

**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).

**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 of 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.”
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 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.

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.”


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
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 (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 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 for determining 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 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.

**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, ‘if formal 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.

**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.”

**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 admissibility 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.

**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 Cir. 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). The appellate court also 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 nystagmus (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 nystagmus (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 con-
cerning the foundational requirements for admission of expert
opinion on fingerprint testing, see “Split Decisions Regarding
Foundational Requirements for Fingerprint Evidence, Including
Decisions Addressing Requirements 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.” (¶ 56, citing
People v. Robinson, 2013 IL App (1st) 102476, ¶ 80)).

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, defend-
ant 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 syndrome. The trial court granted plaintiff
a directed verdict on the negligence issue but left the determi-
nation 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 inju-
ries 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 ear-
lier 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 cur-
rent 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 recent decision in Campbell v. Autenrieth, 2018 Ill. 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).

CAUSE AND ORIGIN OF FIRE

In Unitrin Preferred Insurance Co. v. Flaviu George Dobra, d/b/a FGD Construction, 2013 Ill. 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.

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. 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.

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 726-77.

**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. Turner, 709 F.3d 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.”
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.”

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 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.”

See also the recent decision in 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.

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).

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 affirmation 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.

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 Freeing-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, 584-85 (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.

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

Note that, 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.

Cross-Examination on 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) about 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.

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.

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. 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.
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 “[r]eas to 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”).
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;
      (B) was made by the party in an individual or representative capacity;
      (C) is consistent with the declarant’s testimony; and
      (D) was made under oath at a trial, hearing, or other proceeding or in a deposition; or

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).

(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 and taking into account a rule such as Rule 104(a)), supreme court rules, or statutes. Rule 801(d), in turn, excludes 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 an exception to the hearsay rule, but may be properly characterized as an exclusion from the hearsay rule) and are therefore substantively admissible.
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 hearsay rule 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(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).

**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.

**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.”).

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.

**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, 174 (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.”).

**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. Three 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.

In People v. Theis, 2102 Ill 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 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.

Finally, in People v. Whitfield, 2018 Ill 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).
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).

**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).

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).

**Author’s Commentary on Ill. R. Evid. 801(d)(1)**

The 801(d)(1) 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 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.


In criminal cases (but not in civil cases), IRE 801(d)(1)(A)(1), like FRE 801(d)(1)(A), allows substantive admissibility
**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 extension, 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).

There are appellate court decisions that 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 cases that allowed substantive admissibility of prior inconsistent grand jury testimony—where the prior inconsistent statement made under oath was based on what the witness was told by the defendant rather than on what the witness personally perceived—see People v. Wilson, 2012 IL App (1st) 101038 (witness’s entire prior inconsistent statement made under oath was based on what the witness was told by the defendant rather than on what the witness personally perceived); People v. Harvey, 366 Ill. App. 3d 910, 921-24 (2006) (same rulings concerning witnesses’ grand jury testimony and their written statements).

But 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 related statements told to the witness about what defendant had told him, 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 “AckerNOWLEDGED” 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. The 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 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).

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 of 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*, the decision is 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-vid-
Article viii. Hearsay

The taped 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.

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.

2014 Amendment of FRE 801(d)(1)(B) and Its Non-Adoption in Illinois

Note that FRE 801(d)(1)(B), has been amended, effective December 1, 2014. That federal rule now has two subdivisions:

1. FRE 801(d)(1)(B) 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 above, 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, judgment affirmed 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 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 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.

_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 that 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 newly added 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.

“NOT HEARSAY”

Note also that, 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, judgment affirmed 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. Some of the issues addressed in Denson concerned whether certain statements made by coconspirators 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. Aguilar, 265 Ill. App. 3d 105 (1994), 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]dmisible 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.

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).

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.

**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.

**Commentary**

The present sense impression exception to the hearsay rule, which is provided for in FRE 803(1), 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-adoptions 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 ISPEN 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.
Article VIII. Hearsay

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 generally has been referred to in Illinois cases as the “spontaneous declaration” exception. 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).

For a case applying this exception, see *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).

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.”

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.

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 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.”
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.

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). 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.

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, “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, ¶ 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 pages 5 through 7 of this guide.
(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.

COMMENTS

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,
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), 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 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 the factual circumstances in the case.

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.

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 are substantively admissible.

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 a codification of the common-law rule that admits statements concerning medical treatment, but which does not distinguish between treatment and diagnosis, 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, where the statement was relevant to the medical treater's opinion regarding whether the victim had been sexually abused.

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...
treated the victim. But even if it were hearsay, the court held, it was admissible under section 115-13 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 is discussed in the Author’s Commentary on Ill. R. Evid. 412), which denies admissibility. The court held that the statement 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 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. Drake*, 2017 IL App (1st) 142882, appeal allowed on September 26, 2018, No. 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 being in the hospital for more than a week, 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, and it reversed the defendant’s conviction for aggravated battery. Concurring in part but dissenting solely on the majority’s decision that the reversal of the conviction triggered double jeopardy, the dissenting judge raised interesting questions as to the standard of review that should have been applied and an issue not addressed by the majority as to whether Falaster’s allowance of the identification of the perpetrator applied only where a sex offense is involved, thus suggesting the possibility of invalidating the boy’s statement of identification on that basis as well. As noted, the supreme court has allowed leave to appeal in *Drake*, so it should address important issues related to IRE 103(4)(B).

As a follow-up to Falaster and *Drake*, the recent Seventh Circuit case of *Lovelace v. McKenna*, ___ F.3d ___, No. 17-1393 (7th Cir. July 3, 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 incident, 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.
(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.

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.

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, 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 deletion of the reference to “FRE 902(12)” (which is also present in subdivision (D) of the current federal rule), because that rule was incorporated into IRE 902(11) and it therefore was not separately adopted. Another difference from the federal rule is that, as is clear from the first phrase in the Illinois rule, medical records in criminal cases are excluded from this hearsay exception because they also are excluded by section 115-5(c)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(c)(1)). Note, however, the two appellate court decisions addressed just below, where hospital records were admitted in a criminal case under the business records exception to the hearsay rule based on a statute that was determined not to be inconsistent with the evidence rule.

Decisions Allowing Admission of Hospital Records

In People v. Hutchison, 2013 IL App (1st) 102332, the appellate court addressed the foundational requirements for admission of a hospital lab report on blood alcohol level. In an opinion citing relevant Illinois cases and statutes, the court approved the admission of a lab report as a business record exception to the hearsay rule. It reasoned that, although section 115-5(c)(1) of the Criminal Code of Procedure (725 ILCS 5/115-5(c)) and IRE 801(6) normally prohibit medical records as business records, section 11-501.4 of the Illinois Vehicle Code (625 ILCS 5/11-501.4) specifically provides for the results of blood tests performed for the purpose of determining the
content of alcohol, and “that the statutory provision allowing the introduction of medical records in the prosecution of DUI cases promulgated in section 11-501.4 survives the enactment of the Illinois Rules of Evidence and is not affected or modified thereby.” *Hutchison*, at ¶ 24. In approving the testimony of the nurse who drew the defendant’s blood, the court noted that, to lay a proper foundation for the admission of business records generally, it is not necessary for the maker of the records or the custodian of the records to testify, and it pointed out that, in a case such as this, chain-of-evidence testimony is related to the weight of testimony rather than admissibility.

Later, in *People v. Turner*, 2018 IL App (1st) 170204, the appellate court applied *Hutchison* in holding that evidence from a hospital blood draw, used to prove the defendant’s blood alcohol serum level, was properly admitted in evidence, despite IRE 803(6)’s exclusion from the business record exception of medical records in criminal cases. The defendant had argued that section 11-501.4 of the Illinois Vehicle Code (625 ILCS 5/11-501.4), which permits admission, under the business record exception to the hearsay rule, of the results of “blood or urine tests performed for the purpose of determining the content of alcohol” when taken in a hospital emergency room, conflicted with and was preempted by the exclusion that applies to criminal cases in IRE 803(6). Citing, as did the *Hutchison* court, the first two sentences in the fourth paragraph of the general Committee Commentary to the Illinois Rules of Evidence (see he fourth paragraph on page 1 of this guide) about the codified rules not intending “to abrogate or supersede any current statutory rules of evidence,” the appellate court held that it could not find “an irreconcilable conflict” between the statute and the evidence rule. *Turner*, at ¶ 72.

**“Business” Defined**

It should be noted that the expression “business records exception” is potentially misleading. That is so because 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), 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, for the sake of clarity, the supreme court moved the phrase “Except for medical records in criminal cases” to the beginning of the rule, rather
than in its former placement at the end of the rule's penultimate sentence.

**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. 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 out 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).

**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 Kozlowski’s [the police officer who administered the Breathalyzer] testimony 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 added 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.
(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.

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(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.)

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 factual 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
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**

For examples of appellate court cases applying IRE 803(8), see 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 CONSTRURING 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 (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.
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.

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 accuracy 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.

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**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.

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**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.

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**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.

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).
(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.

(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.

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.

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.
(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.

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.

(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.

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.
(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.

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

Author’s Commentary on III. 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.

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.”
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 801(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.
(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.

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."

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.

**APPPELLATE 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 of the admission of articles based on of 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 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 to question defense witnesses (the defendant physician and two defense-physician experts) “relatively extensively” about its contents. (id.) 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 to question defense witnesses (the defendant physician and two defense-physician experts) “relatively extensively” about its contents. (id.) 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 to question defense witnesses (the defendant physician and two defense-physician experts) “relatively extensively” about its contents. (id.) 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 to question defense witnesses (the defendant physician and two defense-physician experts) “relatively extensively” about its contents. (id.) 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 to question defense witnesses (the defendant physician and two defense-physician experts) “relatively extensively” about its contents. (id.)
the authoritiveness 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'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 authoritiveness 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.
(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.

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.

(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.

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.
### 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.

### 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.

### 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.

### 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.

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.
(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.

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.” 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, hearsay will be 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); 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); section 115-10-2a, non-hearsay of prior statements in domestic violence prosecutions when the witness is unavailable (725 ILCS 5/115-10.2a); 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); 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).
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).

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 TO EXAMINE PREVIOUSLY

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.

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. 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 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.

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 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.

Seven 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.

(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.

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 this “dying declarations” exception to the hearsay rule was recognized in Crawford v. Washington, 541 U.S. 36 (2004).

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.

The recent decision in 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.
**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 the 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. Caify*, 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 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. 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.

**Seventh Circuit Decision 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 evidence.
(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.

**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 from 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.
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 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 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. 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.

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.
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.

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 (1965), 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.
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.

COMMENTARY

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.

SEVENTH CIRCUIT’S HANDLING OF 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.
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 and the defendant did not have an opportunity to cross-examine the unavailable declarant in a prior proceeding.

Illinois Statutes that Allow Residual Hearsay Exceptions

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 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 115-10.2 (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);
- 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.

Also, note that 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: “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 the statute and discussing 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).

Significance of These Statutes

The statutes that provide hearsay exclusions or exceptions, otherwise not 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” is of common law origin and not of constitutional magnitude, and therefore subject to revision).

In civil cases, absent a substantive due process violation, there is no constitutional bar to creating exclusions or exceptions to the hearsay rule by statute, because the legislature can create and amend evidence rules and because the confrontation clause does not apply to civil cases. In criminal case, however, the confrontation clause does apply, and out-of-court statements deemed to be “testimonial” are barred under Crawford.

Thus, the significance of the statutes that provide exclusions or exceptions to the hearsay rule in criminal cases is that they provide a legitimate basis for the admission of out-of-court statements—without the bar resulting from a hearsay objection, including, when the out-of-court declarant testifies at the proceeding, an objection premised on the obvious basis that the prior statement is a prohibited prior consistent statement—as long as Crawford’s prohibitions related to “testimonial statements” are satisfied.

In sum, in criminal cases, these statutes eliminate the hearsay obstacle, but they still require that the confrontation problem be satisfied.

Crawford and its Progeny

If the statements in the criminal statutes listed above 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. 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 conclusions:

“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.
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.

In *Ohio v. Clark*, 576 U.S.___, 135 S. Ct. 2173 (2015), the U.S. Supreme Court’s most recent 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” (135 S. Ct., at 2180-81), while declining “to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment” (id. at 2181), 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 2182), 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.).

**“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 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 relevant cases, see the discussion 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 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 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, 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., 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, the latest Illinois Supreme Court decision on the issue of testimonial statements, has adopted that position. 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. 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.

Civil Cases Unaffected by Crawford

Note that 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), but the statute is unaffected by Crawford, which does not apply in civil cases. That is so 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.

See also 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).

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 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, 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 vic-
tim 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.

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 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.

Other 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. R. 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

ARTICLE VIII. HEARSAY

257

RULE 807
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 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). See the Author’s Commentary to Ill. R. Evid. 803(8) for references to Melendez-Diaz.

**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). See the Author’s Commentary to Ill. R. Evid. 803(8) for references to Bullcoming.

**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 firsthand 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.
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

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, taken in conjunction with 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 self-identification, show the person answering to be the one called, or (B) in the case of a business, the
(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.

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 submitted to the jury, it 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."

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. The numbered subdivisions that follow IRE 901(b), all of which are identical to their federal counterparts before the December 1, 2011 amendments, 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.

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). Id. 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.” Id. 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)

No evidence rule specifically addresses authentication of electronic communications such as text messages, emails, and social media sites. As a result, Rule 901(b)(4), which provides circumstantial evidence of authenticity based on “distinctive characteristics,” is the go-to rule for a trial judge’s determination of authenticity. For that reason, 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. Catley, 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 decision 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).

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 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 on a Second Circuit Court of Appeals case, United States v. Vayner, 769 F.3d 125 (2d Cir. 2014). Kent, at ¶¶ 88-100. 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 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.” Id. 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.

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
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—along 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.)); People v. Cafley, 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. Ort, 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 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 of the executing or attesting person, or by any foreign official whose certificate of genuineness relates to the execution or attestation or is in a chain of certificates of genuineness relating to the execution 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
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 ownership, control, content, ingredients, or origin.

(8) Acknowledged Documents. A document 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, 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 custo-
Article IX. Authentication

(A) was 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 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 procedural requirements for Rule 902(11), certification. 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 procedural requirements for Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).
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 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).


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 identical to the federal rule before the latter’s amendment solely for stylistic purposes effective December 1, 2011, except (1) the word “domestic” is deleted in the title and in the first part of the first sentence; (2) “declaration” is replaced by the word “certification” to correspond to the term used in IRE 803(6); (3) as adjusted to distinguish from federal proceedings; and (4) in the first sentence of the last paragraph, “certification” is defined. Also, 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 rules for domestic and foreign records.

For a relevant case on a declaration for certification of records in a foreign country, see In re Erisch’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.

Although the keeper of the records or other qualified person may still provide testimony to provide the foundational requirements for admission of business records, by permitting the foundational requirement to be furnished by certification, as this rule does, the rule abrogates Illinois’ former requirement of a witness being called to establish the foundation for admission, thus representing 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.

**Confronting the Confrontation Clause**

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 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 does 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 such a defendant 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 a civil case, there is no confrontation issue.

**Aliano: Need for Original Documents in Computer-Store Records**

For an appellate court decision that does not cite IRE 902(11) and is not based on certification, but nevertheless has significant effect on the rule’s application, 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 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.

**Computer-Generated Business Records**

As indicated in the Author's Commentary just below, effective December 1, 2017 there are two new federal rules and, effective September 28, 2018, two new Illinois rules that are substantially identical, one addressing computer-generated records and the other computer-stored records. Both allow admission into evidence by certification, which requires the same foundational requirements that a testifying witness would provide. Though Illinois has just adopted codified rules dealing explicitly with certification of computerized records, there have been Illinois decisions that have addressed the fundamental issue related to the admissibility of such records. Following are three decisions that address the requirements for admission of computer-generated business records, and are therefore relevant to the requirements for 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 computer-generated records of a blood test were admissible under the business records exception to the hearsay rule. In People v. Nixon, 2015 IL App (1st) 130132, the appellate court 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).

As indicated above, adoption of *FRE 902(12)* was unnecessary because it addresses the same subject matter as *IRE 902(11)*, which, by striking the term “domestic” in its title and in its body, incorporates the provisions of *FRE 902(12)*, which address “foreign records.”

**Author's Commentary on Ill. Rs. Evid 902(12) and (13) and Fed. Rs. Evid. 902(13) and (14)**

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 the 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)**. The rule 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, it must be stressed that these Illinois and federal rules are substantially identical.

The recently 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 **FRE 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.
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.

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).
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.

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.

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” to 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 the rule, IRE 1001(2) 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). For a relevant case, see People v. Taylor, 2011 IL 110067, ¶¶ 42–43 (though employing language in the rule without specifically citing it, holding 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).
**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.

**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 (in upholding the admission of a photocopy of a settlement agreement, recognizing the adoption of the codified rule and stating that “this court long ago adopted the Federal Rule of Evidence on the issue,” and citing People v. Bowman, 95 Ill. App. 3d 1137 (1981) to justify the statement). See also People v. Carter, 39 Ill. 2d 31 (1968) (upholding admission of a copy of the defendant’s confession where the original had been destroyed).
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
(d) the writing, recording, or photograph is not closely related to a controlling issue.

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.

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 statutes 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.

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**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.

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**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), holding 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.

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).
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:
      - extraditions or renditions;
      - issuing an arrest warrant, criminal summonses, or search warrants;
      - 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
admitting or excluding evidence independently from these rules.

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 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 the following additions in IRE 1101(b)(3): (1) the addition of “conditional discharge or supervision,” which are not authorized dispositions in criminal cases in the federal system; (2) the addition of “postconviction hearings,” which was added by the supreme court by amendment on April 8, 2013, effective as of that date; and (3) the inclusion of “contempt proceedings in which the court may act summarily,” which is identical to the third bullet point in FRE 1101(b).

The addition of “postconviction hearings” in IRE 1101(b)(3), effective April 8, 2013, occurred to assure consistency 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 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 Act hearings, testimony that does not comply with the codified rules of evidence. In People v. Gibson, 2018 IL App (1st) 162177, ¶¶ 127-140, the appellate court equated the circuit court hearing required by the Illinois Torture Inquiry and Relief Commission Act (TIRC, see 775 ILCS 40/1, et seq.), specifically section 50 of that Act (775 ILCS 40/50), with the hearings required by the Post-Conviction Act. Referring to section 50 “as a new species of postconviction proceeding” (id. 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.

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.”

IRE 1101(b)(3), as originally codified, included as an exception to the application of the rules of evidence “granting or revoking probation.” That exception was stricken by the supreme court effective January 6, 2015. The exception concerning probation revocation proceedings might have represented a 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.

Note that, 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

Rule 1102. Amendments

These rules may be amended as provided in 28 U.S.C. § 2072.

ILLINOIS RULES OF EVIDENCE

[FRE 1102 NOT ADOPTED.]

COMMENTSARY

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

Rule 1103. Title

These rules may be cited as the Federal Rules of Evidence.

ILLINOIS RULES OF EVIDENCE

Rule 1102. Title

These rules may be known and cited as the Illinois Rules of Evidence.

COMMENTSARY

Author's Commentary on Ill. R. Evid. 1102

IRE 1102 is the Illinois counterpart to FRE 1103.
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 abuse, 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.)
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.)
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.)
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; 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.)
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.)
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.
Section 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.)
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.)
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.

(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


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 ac-
cused 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 foun-
dational testimony business records as evidence, sub-
ject 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 mem-
orandum or record of any act, transaction, occur-
rence, 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 reason-
able 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 other-
wise be admissible in evidence under the law, subsec-
tion (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.)
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.)
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.)
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.)
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.)
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.)
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 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.)