MONTHLY LUNCHTIME SEMINAR SERIES

65TH Session:

CASES EVERY LAWYER SHOULD KNOW

Judge Lynn M. Egan, Ret.

June 27, 2018

JUDGE LYNN M. EGAN (Ret.)

Judge Lynn M. Egan was a Cook County Circuit Court judge from 1995--2017 and served in the Law Division for nearly 22 years. She presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. For several years before her retirement in 2017, she was the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She managed these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan was committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts were transferred to Judge Egan each year for settlement conferences and she helped facilitate settlements totaling over 275 million dollars.

Judge Egan also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She was also a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court-ordered medical exams, attorney-client/work product privileges, sanctions, special interrogatories, examination of experts and damages. She also served as a mentor for new judges and the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 13,000 hours of free CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois. She currently works as a mediator at ADR Systems in Chicago.

CASES EVERY LAWYER SHOULD KNOW

By

Judge Lynn M. Egan, Ret.

June 2018

I. Motions Aimed at Pleadings.

- *Vernon v. Schuster, 179 Ill.2d 338 (1997)(Assessing witness credibility is outside the proper scope of a section 2-615 motion.) See also, Webb v. Damisch, 362 Ill.App.3d 1032 (1st Dist., 2005)(Same principle applies in the context of a section 2-619 motion.)*
- *Sarno v. Akkeron, 292 Ill.App.3d 80 (1st Dist., 1997)(Meticulous practice mandates that practitioners specify whether they are relying on section 2-615 or 2-619.) Accord, Hastings Mutual Ins. Co. v. Ultimate Backyard, 2012 IL App (1st) 101751.*

II. Summary Judgment Motions/Supreme Court Rule 191.

- *Robidoux v. Oliphant, 201 Ill.2d 324 (2002)(Affidavits in support of summary judgment are a substitute for trial testimony and must have a proper evidentiary foundation or they may not be considered.)*

III. Requests to Admit/Supreme Court Rule 216.

- *Vision Point of Sale, Inc. v. Haas, 226 Ill.2d 334 (2007)(When deciding whether good cause exists under Rule 183 for an extension of time to answer requests to admit, the trial court may not consider facts or circumstances that go beyond the reason for noncompliance. Delinquency caused by mistake, inadvertence or even attorney neglect may constitute good cause.)*
- *Szczeblewski v. Gossett, 342 Ill.App.3d 344 (5th Dist., 2003)(A request to admit can be used to establish the causal connection between a defendant's conduct and a plaintiff's injuries, the necessity and reasonableness of the medical service received by the plaintiff and the reasonableness of the cost of those services. In order to satisfy the rule's requirement of making a good faith effort to answer requests to admit, a party must make a reasonable effort to secure answers from person and documents within that party's control, including the attorney and insurance company investigators or representatives.)*

IV. Attorney-Client & Work Product Privileges.

- *Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103 (1982)(The Court considered the work product and attorney-client privileges.)(The Court embraced the "control group test" when assessing the attorney-*

client privilege and concluded that the work product privilege typically protects an attorney's notes & memoranda of oral conversations with witnesses/employees because they "represent the attorneys' efforts in reviewing, analyzing & summarizing the portion of the communications ...which the attorneys believed important in developing their theories of their client's cause." As such, they necessarily "reveal the shaping process by which the attorney[s] [have] arranged the available evidence for use in trial." **NOTE**: *The work product privilege is more likely to yield if the notes or memoranda contain verbatim statements from the witnesses or are reviewed/signed by them.) Additionally, there is a narrow exception that allows access to otherwise privileged notes if the party seeking disclosure demonstrates "the absolute impossibility of securing similar information from other sources."*

- *Claxton v. Thackston, 201 Ill.App.3d 232 (1st Dist., 1990)(The court considered the attorney-client and work product privileges.)("Not all communications between attorney and client are privileged."****"To be entitled to the privilege, a claimant must show that the statement: 1) originated in a confidence that it would not be disclosed; 2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and 3) remained confidential." If the claimant is a corporation, it must also show that the statement was made by someone in the corporate control group. There are two tiers of corporate employees whose communications with the attorney are protected: top management/decision-makers and those employees who advise top management and upon whose opinion and advice the decision-makers rely.)*
- *Midwesco-Paschen Joint Venture v. IMO Industries, Inc., 265 Ill.App.3d 654, 682 (1st Dist., 1994)("There is no requirement that suit be filed before the attorney-client privilege attaches."****"Distribution of otherwise privileged materials to individuals outside of the control group destroys the privilege."*
- *Chicago Trust Co. v. Cook County Hospital, 298 Ill.App.3d 396 (1st Dist., 1998)(Insurer-insured extension of attorney-client privilege, control group analysis & Medical Studies Act privilege—Justice Warren Wolfson at his finest!)*

V. Illinois Supreme Court Rule 215 Exams.

- *Krasnow v. Bender, 78 Ill.2d 42, 48 (1979)(A medical history is "an integral and necessary part" of an Illinois Supreme Court Rule 215 physical examination, so any advise not to provide such a history during such an exam is considered an "unreasonable interference with the medical examination" that can warrant sanctions against the attorney.) Significantly, a nurse can be the individual to elicit the medical history. Id. at 49.* **NOTE:** *Physical exams under this rule may be conducted by any "licensed professional," not just a doctor.* **CAUTION:** *The rule provides*

that any order compelling an exam shall fix the time, place and conditions and scope of the exam. Also, even though the prior requirement of demonstrating "good cause" has been eliminated, timing of the request for such an exam is a "critical consideration." (Ill.Sup.C.Rule 215, Committee Comments).

- *Pursuant to 735 ILCS 5/2-1003(d), any plaintiff who is required to submit to a Rule 215 examination has the right to have his attorney "or such other person as [he] may wish" present during the exam.*

VI. Admissions.

- *Knauerhaze v. Nelson, 361 Ill.App.3d 538 (1st Dist., 2005)(Judicial and evidentiary admissions are separate and distinct concepts. A statement of fact that has been admitted in a pleading is a judicial admission & is binding on the party making it. As a result, they do not need to be introduced as evidence at trial; instead, they serve as "formal concessions...or stipulations...that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.***In contrast, evidentiary admissions "must be offered into evidence and are always subject to contradictions or explanation."* **NOTE:** *Verified pleadings remain binding as judicial admissions even after an amended pleading is filed – unless the amended pleading asserts that the original pleading was made through mistake or inadvertence. An admission in an unverified pleading is a binding judicial admission unless the pleading is amended; at that point, the admission can only be used as an evidentiary admission.*
- *Green v. Jackson, 289 Ill.App.3d 1001 (1st Dist., 1997)(Judicial admissions do not include admissions made in the course of other court proceedings. Such statements are considered evidentiary admissions.)*

VII. Jury Selection.

- *Batson v. Kentucky, 476 U.S. 79 (1986)(Discrimination during jury selection is unlawful. Race, gender, ethnic background and sexual orientation are all protected classes. People v. Hudson, 195 Ill.2d 117 (2001); Hernandez v. New York, 500 U.S. 352 (1991); SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471 (9th Cir. 2014).*
- *McDonnell v. McPartlin, 192 Ill.2d 505, 526 (2000)(Batson prohibition is not restricted to criminal cases; it applies to all parties in civil cases.)*
- *People v. A.S., 2016 IL App (1st) 161250 (A three-step process is employed to assess Batson challenges.)*
- *People v. Byrd, 2017 IL App (2d) 140715, ¶24-30 (Remedies for a Batson violation can include dismissing the entire venire or seating the challenged juror.)*

NOTE: *Effective January 1, 2018, the Illinois juror qualification statute was amended so as to preclude discrimination based on religion and economic*

status. 705 ILCS 305/2 (West 2018). Notably, this statute does not include sexual orientation. However, the Illinois Human Rights Act (775 ILCS 5/1-103(Q)) defines unlawful discrimination so as to include sexual orientation.

VIII. Offer of Proof.

- *Clayton v. County of Cook, 340 Ill.App.3d 367, 385 (1st Dist., 2004)("An adequate offer of proof apprises the circuit court of what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose. The failure to make an offer of proof results in a waiver of review of whether the evidence was excluded improperly.")* **NOTE:** *Pursuant to Illinois Rule of Evidence 103(a)(2), "error may not be predicated upon a ruling which admits or excludes evidence" absent an offer of proof.*
- *Carter v. Azaran, 332 Ill.App.3d 948, 956-957 (1st Dist., 2002)("An offer of proof is not required if it is apparent that the trial judge understood the nature of the objection and the character of the evidence sought to be introduced or if the questions themselves and circumstances surrounding them show the purpose and materiality of the evidence. Finally, a party will not waive an argument by failing to make an offer of proof where the attitude of the trial court prevents a party from making an offer of proof."*

IX. Adverse Examination/735 ILCS 5/2-1102.

- *Skubak v. Lutheran General Healthcare Systems, 339 Ill.App.3d 30, 38 (1st Dist., 2003)(The examination of an adverse witness is governed by 735 ILCS 5/2-1102, which states that defendants or their agents may be called and examined by the plaintiff as though under cross-examination. Once the adverse examination has concluded, defense counsel may examine the witness about the matters to which he testified, but may not cross-examine him. Additionally, defense counsel may not raise new matters during the examination.)*

X. Cross-Examination: Bias.

- *Chapman v. Hubbard Woods Motors, Inc., 351 Ill.App.3d 99 (1st Dist., 2004)(A witness cannot be cross-examined about a bias that does not exist at the time of trial, even if it existed at the time of deposition.)*

XI. Criminal Convictions.

- *Thurmond v. Monroe, 159 Ill.2d 240 (1994)(Traffic court convictions are inadmissible in later civil proceedings as proof of the facts that serve as a basis for the conviction.* **NOTE:** *This holding does not apply to convictions based on guilty pleas.)*

- *People v. Montgomery, 47 Ill.2d 510 (1971)(Proof of a witness' criminal convictions may be used to impeach the witness' credibility if the crime was punishable by death or imprisonment in excess of 1 year, or involved dishonesty or false statement, and the trial judge determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice. Such evidence is inadmissible if older than 10 years from the date of conviction or release from custody, whichever is later.)*

XII. Same Part of the Body Rule.

- *Voykin v. Estate of DeBoer, 192 Ill.2d 49 (2000)(The Supreme Court reexamined the "same part of the body rule" in order to resolve conflict among the appellate districts, ultimately concluding that evidence of injury to the same part of the body may be admissible to negate causation, negate or reduce damages or as impeachment, it is not automatically relevant. Instead, a defendant seeking to introduce such evidence must demonstrate a causal relationship between the prior and present injury. Importantly, the court also noted that "in normal circumstances," a lay juror cannot assess this relationship without the assistance of expert testimony.)* **CAUTION:** *Some trial judges believe that the requirement of demonstrating a causal relationship is relaxed if the evidence of prior injury is intended solely as impeachment.* **NOTE:** *The holding of Voykin is inapplicable if plaintiff opens the door to this evidence by inquiring about it during direct examination. Janky v. Perry, 343 Ill.App.3d 230 (3d Dist., 2003).*

XIII. Recent Exam/Prognosis Opinions.

- *Decker v. Libell, 193 Ill.2d 250 (2000)("The calendar alone does not determine" whether testimony about a plaintiff's prognosis is admissible. Instead, the following factors should be considered: 1) the nature of the injury or condition; 2) the type of treatment given; 3) the length of time plaintiff received treatment; 4) the number & frequency of plaintiff's visits; 5) the length of time between plaintiff's last visit and the witness' formation of opinion; 6) the length of time between the formation of opinion and trial.)*

XIV. Autopsy Reports.

- *Clayton v. County of Cook, 346 Ill.App.3d 367 (1st Dist., 2004)(An autopsy report is admissible as prima facie evidence of cause of death pursuant to 725 ILCS 5/115-5.1 (West 2016).*

XV. Post-Event Literature.

- *Bergman v. Kelsey, 375 Ill.App.3d 612 (1st Dist., 2007)(Although post-event literature is not admissible to establish the standard of care, it is*

appropriate to demonstrate the diagnostic capabilities of medical technology and for impeachment purposes.)[1] *See also, Granberry v. Carbondale Clinic, 285 Ill.App.3d 54 (5th Dist., 1996).*

XVI. Illinois is a Frye State.

- *Donaldson v. Central Illinois Public Service Co., 199 Ill.2d 63 (2002)(Illinois adopted the "general acceptance" test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) for determining the admissibility of expert testimony.* This standard provides that "scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs." **NOTE:** General acceptance does not concern the expert's ultimate conclusion; instead, the general acceptance test focuses on the underlying methodology used to generate the conclusion. Additionally, general acceptance of the methodology "does not mean that the methodology be accepted by unanimity, consensus, or even a majority of experts. A technique, however, is not 'generally accepted' if it is experimental or of dubious validity.")

XVII. Hearsay.

- *People v. Lawler, 142 Ill.2d 548 (1991)(An out-of-court statement is no less objectionable as hearsay merely because the declarant testifies at trial.)* **NOTE:** *This declaration by the Illinois Supreme Court implicitly overrules these earlier Appellate decisions: Werner v. Bolti, Marinaccio & DeSalvo, 205 Ill.App.3d 673 (5th Dist., 1990); Singh v. Air Illinois, Inc., 165 Ill.App.3d 923 (1st Dist., 1988) & Pyse v. Byrd, 115 Ill.App.3d 1003 (3d Dist., 1983).*

XVIII. Silent Witness Rule.

- *People v. Taylor, 2011 IL 110067 (*The Illinois Supreme Court states that this rule was originally applied as long ago as 1922, but it is most recently utilized in cases where automatic cameras and surveillance systems are involved. *People v. Taylor, 2011 IL 110067, ¶ 32.* Pursuant to this rule, "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." *Id.*

CAUTION: The foundational requirements for admission of evidence captured by automatic cameras or surveillance systems that produce videotapes, CDs or DVDs are different from photographs or videotapes where the camera operator is present at the time the evidence is created. Just as importantly, the requirements

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[1] *Bergman v. Kelsey also contains a useful discussion of the admissibility of a testifying physician's personal practice in order to impeach credibility. Accord, Schmitz v. Binette, 368 Ill.App.3d 447 (2006).*

are case specific. People v. Taylor, *supra at 35.* However, the Illinois Supreme Court approved use of the following factors, while noting the list is "nonexclusive," such that some factors may not be relevant or additional factors may need to be considered in certain cases:

1) The device's capability for recording and general reliability;
2) Competency of the operator;
3) Proper operation of the device;
4) Showing the manner in which the recording was preserved (chain of custody);
5) Identification of the persons, locale, or objects depicted; and
6) An explanation of any copying or duplication process.

Id. Significantly, deficiencies in the foundational evidence, such as a film that is partially inaudible or contains gaps, does not make the remainder of the film inadmissible. Id. *at 39.* Indeed, the Taylor court declared that requiring proof that no alterations, deletions or changes have been made when an original DVR recording was copied to videotape was "overly restrictive." Id. *at 43.* As a result, "a strict proof of chain of custody is not necessary" if other factors demonstrate the recording's authenticity. Id. *at 41.* Instead, gaps in the chain of custody merely go to the weight of the evidence, not admissibility. Id.

Additionally, preservation of only a copy, rather than the original recording, is not fatal because videotapes and photographs are not subject to the best evidence rule and the accepted definition of an "original" recording includes "'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.'" Id. *at 42.*

XIX. Video Foundation & Day In the Life Films.

- Velarde v. Illinois Central R.R. Co., *354 Ill.App.3d 523 (1st Dist., 2004)(The foundation for videotapes includes evidence that the film was an accurate portrayal of what it purportedly showed and that its probative value was not substantially outweighed by the danger of unfair prejudice.")*
- Carroll v. Preston Trucking Co., *349 Ill.App.3d 562 (1st Dist., 2004)("The cameraman is not necessary where a foundation can be laid by another competent witness who has sufficient knowledge to testify that the videotape fully represents what it purports to show.")*
- Cisarik v. Palos Community Hospital, *144 Ill.2d 84 (1991)(Day in the Life films are considered demonstrative evidence, not substantive evidence. Such films are subject to pre-trial discovery requests, except for plaintiff's outtakes.)*
- Roberts v. Sisters of St. Francis, *187 Ill.App.3d 1098 (1st Dist., 1989)(It is proper to allow prospective jurors to view "Day in the Life" video during jury selection.)*

XX. Post Accident Remedial Measures.

- *Bulger v. CTA, 345 Ill.App.3d 103, 111 (1st Dist., 2003)(Generally, evidence of post-accident remedial measures is inadmissible to prove negligence. However, there are several exceptions to the general rule, including where the defendant was required to act by an outside governmental authority rather than voluntarily, where ownership or control is disputed, to prove disputed issues of feasibility of precautionary measures or for impeachment. Importantly, impeachment use of such evidence is not allowed if the value of the impeachment depends on an impermissible inference of prior negligence.)* **NOTE:** *"Time of accident" evidence is separate and distinct from evidence of post-accident remedial measures. Id. at 117. See, Diminskis v. CTA, 124 Ill.2d 226, 242 (1988)(CTA accident report admissible through bus driver.)*

XXI. Collateral Source Rule & 735 ILCS 5/2-1205 & 1205.1.

- *Perkey v. Portes-Jarol, 2013 IL App (2d) 120470. (Appellate court interpreted the meaning of the statutory language concerning the right of recoupment.) These statutory provisions represent an exception to the collateral source rule in that they allow judgments in medical malpractice cases (2-1205) and "all cases on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on any theory or doctrine, to which Section 2-1205 does not apply" (2-1205.1) to be reduced by the medical benefits provided on behalf of the plaintiff, subject to the following conditions:*
    1) *Application is made within 30 days to reduce the judgment;*
    2) *The reduction shall not apply to the extent of any right of recoupment, such as subrogation or lien;*
    3) *The reduction shall not reduce the judgment by more than 50% of the total amount of the judgment entered on the verdict;*
    4) *The damages awarded shall be increased by the amount of any insurance premiums or the direct costs paid by the plaintiff for the benefits in the 2 years prior to plaintiff's injury or death;*
    5) *There shall be no reduction for charges paid for medical expenses which were directly attributable to defendant's "adjudged negligent acts or omissions."*

NOTE: *Section 2-1205, which applies to medical malpractice cases, allows reduction up to 100% of the medical benefits provided, but section 1205.1, which applies to all other cases, allows reduction of "the amount in excess of $25,000 of the benefits provided for medical charges."*

- *Miller v. Sarah Bush Lincoln Health, 2016 IL App (4th) 150728 (The Appellate court considered whether Section 2-1205 allows verdicts to be reduced by the amount of bills written off by health care providers because those amounts were never paid by anyone. The court concluded that "the plain language of Section 2-1205* ***does not*** *allow a defendant to reduce a*

judgment by an amount that was neither paid to medical providers nor payable to the plaintiff.")

Course Evaluation Form

Title of Course: "CASES EVERY LAWYER SHOULD KNOW

Date of Course: June 27, 2018 Location: James R. Thompson Center Assembly Hall Auditorium

Directions: On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

Rate how well this course satisfied your personal objectives **5 4 3 2 1**

Comments:_____

Rate how well the environment contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate how well the written materials contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate the level of significant intellectual, educational or practical content **5 4 3 2 1**

Comments:_____

Please rate the faculty using the same 1 – 5 scale:

Name: JUDGE LYNN M. EGAN (Ret.)

Comments:_____

_____

_____

Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1

SUGGESTIONS FOR FUTURE SEMINARS:_____

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CASES EVERY LAWYER SHOULD KNOW

Judge Lynn M. Egan, Ret.

June 27, 2018

PLEADINGS

- A fictitious party cannot be designated as an appropriate party. *Suarez v. Ro-Mar Terminal Warehouse Co., Inc.*, [illegible] *Ill.App.3d 228, 230 (1st Dist., 1993).*
- Thus, joinder of a "John Doe" does not toll the statute of limitations. *Id.*
- 735 ILCS 5/2-413, which provides for joinder of interested parties whose names are unknown, does NOT provide a vehicle for joining unknown parties. Also, it applies primarily to *in rem* proceedings. *Id. at 231.*
- Suit by or against a dead person is a complete nullity & does not invoke the jurisdiction of the court. *Marcus v. Art Nissen & Son, Inc.*, *224 Ill.App.3d 464, 468 (1st Dist., 1991).*

PLEADING MOTIONS

- Understand the differences between 2-615 and 2-619 motions & honor the proper scope of each.
- It is improper to combine these pleading motions without specifying the procedural vehicle relied upon. *Sarno v. Akkeron, 292 Ill.App.3d 80 (1st Dist., 1997).* Failure to specify which section is relied upon may result in denial of the motion.
- It is futile to ask a trial judge to assess witness credibility in either a 2-615 or 2-619 motion because this is outside the proper scope of both motions. *Vernon v. Schuster, 179 Ill.2d 338 (1997).*

SUMMARY JUDGMENT – AFFIDAVITS/EXHIBITS

- Remember that affidavits in support of SJ are a substitute for trial testimony. *Robidoux v. Oliphant*, *201 Ill.2d 324 (2002).*

- This means that they MUST have a proper evidentiary foundation, as do all exhibits! The more relaxed standard of *Wilson v. Clark* does not apply to SJ motions. *Id*.

- Judges are obliged to recognize evidentiary deficiencies in this context even in the absence of an objection.

REQUESTS TO ADMIT

- The law changed dramatically in *Vision Point of Sale, Inc. v. Haas*, *226 Ill.2d 334 (2007)*, *BUT*....do not assume that untimely answers due to mistake, inadvertence or attorney neglect will be allowed. Trial courts simply have discretion under Rule 183 to consider whether these reasons constitute "good cause."

- In order to satisfy Rule 216's requirement of making a good faith effort to obtain answers, a party must make a reasonable effort to secure answers from persons & documents within that party's control, including the attorney & insurance company investigators/representatives. *Szczeblewski v. Gossett*, *342 Ill.App.3d 344 (5th Dist., 2003)*.

REQUESTS TO ADMIT

- An attorney CANNOT sign the answers to a request to admit on behalf of the party. *Brookbank v. Olson, 389 Ill.App.3d 683 (1st Dist., 2009); Coleman v. Akpakpan, 402 Ill.App.3d 822 (1st Dist., 2010).*

- This remains true even if the party cannot be located. *Brookbank, supra.*

ATTORNEY-CLIENT & WORK PRODUCT PRIVILEGES

- *Consolidation Coal Co. v. Bucyrus-Erie Co.*, *89 Ill.2d 10[illegible] (1982).* The "control group" test is utilized when analyzing these privileges in the corporate context. There are two groups of corporate employees whose communications with the attorney are protected:

1. Top management = Decision-makers.
2. Second tier = Employees who advise top management & upon whose opinion/advice the decision-makers rely.

ATTORNEY-CLIENT & WORK PRODUCT PRIVILEGES

- The work product privilege typically protects an attorney's notes/memoranda of oral conversations with witnesses/employees because they represent the attorney's mental impressions. *Consolidation Coal*, *supra*.
- However, the privilege may yield if the notes contain verbatim statements from the witnesses or are reviewed/signed by them. *Id*.

NOTE: There is a limited exception to the privilege that allows access to privileged notes if the party seeking disclosure can demonstrate "the absolute impossibility of securing similar information from other sources." *Id*.

ATTORNEY-CLIENT PRIVILEGE

Not all communications with an attorney are privileged. Party seeking protection of the privilege must establish the following:

1. Statement originated in a confidence that it would not be disclosed;
2. Was made to an attorney acting in his legal capacity for the purpose of securing legal advice/services;
3. The information remained confidential.

Claxton v. Thackston, 201 Ill.App.3d 232 (1st Dist., 1990)

PRIVILEGE

Don't forget Supreme Court Rule 201(n):

When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

RULE 215 EXAMINATIONS

- A medical history is an integral part of a Rule 215 exam. *Krasnow v. Bender, 78 Ill.2d 42, 48 (1979).*
- Attorneys may not advise clients to withhold a history during such an exam. To do so is considered an "unreasonable interference with the medical examination" and could justify sanctions. *Id.*
- Any "licensed professional" may conduct the Rule 215 exam, not just a physician.
- 735 ILCS 5/2-1003(d) provides that any plaintiff who is required to submit to an exam has the right to have his attorney "or such other person as [he] may wish" present during the exam.

ADMISSIONS

Understand the differences between judicial & evidentiary admissions. *Knauerhaze v. Nelson, 361 Ill.App.3d 538 (1st Dist., 2005).*

- Judicial admission = statement of fact that is admitted in a pleading. Binding on the party making it.
- Evidentiary admission = must be offered into evidence and are subject to contradiction or explanation. Admissions made in the course of unrelated court proceedings are considered evidentiary admissions. *Green v. Jackson, 289 Ill.App.3d 1001 (1st Dist., 1997).*

JURY SELECTION

- *Batson v. Kentucky, 476 U.S. 79 (1986).* Discrimination during jury selection is unlawful. This prohibition applies in criminal AND civil cases.
- Protected classes include: race, gender, ethnic background & sexual orientation. *People v. Hudson, 195 Ill.2d 117 (2001); Hernandez v. New York, 500 U.S. 352 (1991); SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471 (9th Cir. 2014).*
- *Batson* involves a three-step process and remedies for a violation can include dismissing the entire venire or seating the challenged juror. *People v. A.S., 2016 IL App (1st) 161250; People v. Byrd, 2017 IL App (2d) 140715.*

JURY SELECTION -- CHANGES

- Effective Jan. 1, 2018, the Illinois juror qualification statute (705 ILCS 305/2 (West 2018)) was amended.

- The changes now preclude discrimination based on **religion** and **economic status.**

- Although the amended statute did not include sexual orientation, the Illinois Human Rights Act makes discrimination based on sexual orientation unlawful. *775 ILCS 5/1-103(Q).*

OFFERS OF PROOF

- The failure to make an offer of proof about excluded evidence results in waiver on review. *Clayton v. County of Cook, 340 Ill.App.3d 367, 385 (1st Dist., 2004). Accord Illinois Rule of Evidence 103(a)(2).*

- Not required "where the attitude of the trial court prevents a party from making an offer of proof." *Carter v. Azaran, 332 Ill.App.3d 948, 956-957 (1st Dist., 2002).*

ADVERSE EXAMINATION

- Governed by *735 ILCS 5/2-1102 (West 2018).*
- When defendants or their agents are called by plaintiff, the inquiry is by cross-examination. Defense counsel may subsequently inquire, but as though on direct examination and may not raise new matters.

Skubak v. Lutheran General Healthcare Systems, 339 Ill.App.3d 30, 38 (1st Dist., 2003)

CROSS-EXAMINATION: BIAS

In order to cross-examine a witness about a bias, the bias must exist at the time of trial. It is insufficient if the bias existed only at the time of deposition.

Chapman v. Hubbard Woods Motors, Inc., 351 Ill.App.3d 99 (1st Dist., 2004)

CRIMINAL CONVICTIONS

A witness' criminal convictions may be used to impeach the witness' credibility if the following criteria are satisfied:

1. The crime was punishable by death or imprisonment in excess of 1 year, or involved dishonesty/false statement; and

2. The trial judge determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice.

3. The evidence is inadmissible if older than 10 years from date of conviction or release from custody, whichever is later.

People v. Montgomery, 47 Ill.2d 510 (1971)

CRIMINAL CONVICTIONS

- Traffic court convictions are inadmissible in later civil suits as proof of the facts that serve as a basis for the conviction. *Thurmond v. Monroe, 159 Ill.2d 240 (1994).*
- This holding does NOT apply to convictions based on guilty pleas.

SAME PART OF THE BODY RULE

- *Voykin v. Estate of DeBoer, 192 Ill.2d 49 (2000).* Evidence of injury to the same part of the body MAY be admissible to negate causation, negate or reduce damages or for impeachment.
- However, such evidence is no longer automatically admissible. Instead, proponent of the evidence must establish a causal relationship between the prior & present injury.
- This will almost always require expert testimony.

NOTE: The Voykin limitation is inapplicable if plaintiff opens the door by inquiring about the prior injury during direct examination. *Janky v. Perry, 343 Ill.App.3d 230 (3d Dist., 2003).*

RECENT EXAM/PROGNOSIS OPINIONS

Decker v. Libell, 193 Ill.2d 250 (2000). The calendar alone no longer determines whether opinions about a plaintiff's prognosis are admissible. Instead, the following factors must be considered:

1. Nature of the injury or condition
2. Type of treatment given;
3. Length of time plaintiff received treatment;
4. Number & frequency of plaintiff's visits;
5. Length of time between plaintiff's last visit & witness' formation of opinion;
6. Length of time between formation of opinion & trial.

AUTOPSY REPORTS

An autopsy report is admissible as *prima facie* evidence of cause of death pursuant to *725 ILCS 5/115-5.1 (West 2018).*

Clayton v. County of Cook, 346 Ill.App.3d 367 (1st Dist., 2004)

POST-EVENT LITERATURE

Even though post-event literature is inadmissible to establish the standard of care, it is permitted to demonstrate the diagnostic capabilities of medical technology and for impeachment purposes.

Bergman v. Kelsay, 375 Ill.App.3d 612 (1st Dist., 2007)

FRYE APPLIES IN ILLINOIS

- The standard for determining the admissibility of expert testimony is the "general acceptance" test of *Frye v. United States*, *293 F. 1013 (D.C. Cir. 1923)*. *Donaldson v. Central Illinois Public Service Co.*, *199 Ill.2d 63 (2002)*.
- General acceptance does not concern the expert's ultimate conclusions; instead, it focuses on the underlying methodology used to generate the conclusion.
- A *Frye* hearing is only triggered when the opinions involve novel science. This is not synonymous with controversial or disputed!

HEARSAY

An out-of-court statement offered for the truth of the matter asserted does not become non-hearsay merely because the declarant testifies at trial. *People v. Lawler*, *142 Ill.2d 548 (1991).*

CAUTION: Earlier, appellate cases to the contrary have been implicitly overruled by *Lawler* & should not be relied upon.

SILENT WITNESS RULE

"A witness need not testify to the accuracy of the [illegible] the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation." *People v. Taylor, 2011 IL 110067, ¶ 32.* The following factors are relevant:

1. The device's capability for recording & general reliability;
2. Competency of the operator;
3. Proper operation of the device;
4. Showing the manner in which the recording was preserved (chain of custody);
5. Identification of the persons, locale, or objects depicted; and
6. An explanation of any copying or duplication process.

SILENT WITNESS RULE

- Significantly, the *Taylor* court held that "a strict proof of chain of custody is not necessary" if the relevant factors demonstrate the recording's authenticity. *Id. at 41.*
- Additionally, deficiencies in the foundational evidence, such as gaps in a film, does not make the remainder of the film inadmissible. *Id. at 39.*
- Gaps in the chain of custody merely go to the weight of the evidence, not admissibility. *Id.*

DAY IN THE LIFE FILMS

- Day in the Life films are demonstrative, not substantive evidence. *Cisarik v. Palos Community Hospital*, 144 Ill.2d [illegible] *(1991).*
- It is appropriate to allow prospective jurors to view Day in the Life films during jury selection. *Roberts v. Sisters of St. Francis, 187 Ill.App.3d 1098 (1st Dist., 1989).*
- Establishing the foundation for videotapes does not require the cameraman; instead, the foundation can be established by any witness who has sufficient knowledge to attest that the videotape accurately represents what it purports to show. *Carroll v. Preston Trucking Co., 349 Ill.App.3d 562 (1st Dist., 2004).*

POST ACCIDENT REMEDIAL MEASURES

Evidence of post-accident remedial measures is inadmissible to prove negligence. *Bulger v. CTA, 345 Ill.App.3d 103, 111 (1st Dist., 2003).* Exceptions to the general rule include:

1. *Where the defendant was required to act by an outside governmental agency, rather than voluntarily;*
2. *Where ownership or control is disputed;*
3. *To prove disputed issues of feasibility of precautionary measures or for impeachment.*

CAUTION: "Time of accident" evidence is different from evidence of post-accident remedial measures. *Id. at 117.*

VERDICT REDUCTION

735 ILCS 5/2-1205 & 2-1205.1 permit reductions in the amount of a jury verdict by the amount of medical benefits provided on behalf of the plaintiff, subject to the following conditions:

1. Application is made within 30 days;
2. Reduction does not apply to the extent of any right of recoupment, such as subrogation or liens;
3. Reduction cannot exceed 50% of the total amount of the judgment entered on the verdict;
4. Damages shall be increased by the amount of any insurance premiums or direct costs paid by the plaintiff for the benefits in the 2 years prior to the injury;
5. No reduction for charges paid for medical expenses which were directly attributable to defendant's negligence.

VERDICT REDUCTION

Every attorney should know these two cases:

1. *Perkey v. Portes-Jarol, 2013 IL App (2d) 120470.*
2. *Miller v. Sarah Bush Lincoln Health, 2016 IL App (4th) 150728.* Section 2-1205 does not allow a defendant to reduce verdict by amount of bills written off by healthcare providers.