MONTHLY LUNCHTIME SEMINAR SERIES

44TH Session:

EVIDENTIARY FOUNDATIONS

Judge Lynn M. Egan
Judge Deborah Mary Dooling
Judge John P. Kirby

September 28, 2016

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 19 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently 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 manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is 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 are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has 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 has also been 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 has 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 and damages. She also serves as a mentor for new judges and was recently appointed to 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 nearly 10,000 hours of 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.

JUDGE DEBORAH MARY DOOLING

Judge Deborah Mary Dooling is assigned to the Law Division of the Circuit Court of Cook County. She presides over a jury room and hears pretrial conferences, dispositive motions, jury and bench trials, and post-trial matters. From June of 1997 to April of 2003, and then from February 2004 to present, the numerous jury trials over which Judge Dooling has presided include multi-party actions for medical and legal malpractice, personal injury, breach of contract, and product liability.

In addition to her regular trial assignment, Judge Dooling is Supervising Judge of the Surety Section of the Circuit Court of Cook County. In 2003, Chief Judge Timothy C. Evans entrusted Judge Dooling with the responsibility of overseeing the authorization of all civil sureties and bond certificates in the Circuit Court. Judge Dooling has also been assigned to the Chancery Division. In Chancery, Judge Dooling was responsible for an individual calendar that included actions for equitable remedies such as injunctions, declaratory actions, specific performance, administrative hearings and many class actions.

Prior to her Law Division assignment, Judge Dooling presided over criminal matters, including a night narcotics and felony trial room. The trial room was an individual calendar, which involved all aspects of criminal practice, including pretrial discovery motions, felony jury and bench trials, fitness and restoration hearings, habeas corpus, and post-conviction petitions involving constitutional issues

In addition to her courtroom duties, Judge Dooling is a frequent participant in continuing legal education programs for law students, lawyers and fellow judges. The Illinois Supreme Court appointed Judge Dooling a member of the Illinois Judicial Conference and a member of the Committee on Discovery Procedures. As an adjunct professor of law at The John Marshall Law School, Judge Dooling has taught advanced trial advocacy since 1992.

Before her election to the bench, Judge Dooling worked in the legal department of two international corporations and obtained extensive trial practice in both the State and Federal Court system. As an assistant state's attorney in Cook County, Judge Dooling's experience included practice in the criminal, civil and appellate divisions of the office, rising to a supervisory position. She ultimately assumed a position as the legislative liaison for the State's Attorney's Office in Springfield.

Judge Dooling was admitted to the Illinois Bar in 1978 following her graduation from Chicago-Kent College of Law, and then admitted to the Florida Bar in 1981. Judge Dooling is a 1975 graduate of the University of Illinois, Champaign-Urbana, and a 1971 graduate of Sacred Heart High School.

JOHN P. KIRBY

Judge John P. Kirby was elected to the bench in 1998 and has been assigned to the Law Division since 2011. He is currently assigned to a jury room, where he presides over trials in a wide variety of cases, including complex litigation. Prior to his jury room assignment, Judge Kirby presided over a high volume motion call in the Law Division, which included every type of case filed in the Division. Prior to his assignment to the Law Division, Judge Kirby presided over a criminal jury room at 26th & California in the Criminal Division. Judge Kirby was the first Illinois judge to create and preside over a Veteran's Court and was instrumental in establishing a virtual high school for young offenders in Cook County.

Judge Kirby was a solo practitioner and a Cook County Assistant State's Attorney prior to becoming a judge and graduated from The John Marshall Law School in 1983.

SECTION A

- ***Evidentiary Foundations,*** *by Judge Lynn M. Egan, September 2016*

EVIDENTIARY FOUNDATIONS

by
Judge Lynn M. Egan
September 2016

I. Overview

The evidentiary foundation for a particular piece of evidence is related to the concept of relevance inasmuch as the proponent of evidence cannot demonstrate relevance unless the evidence is properly identified and authenticated. *Michael H. Graham, Graham's Handbook of Illinois Evidence 801-802 (2016 Ed.).*[1] Indeed, Illinois Rule of Evidence 901 expressly provides that authentication or identification is a "condition precedent to admissibility." *Ill. R. Evid. 901 (eff. Jan 1, 2011).* Without proper identification and authentication, evidence may be deemed irrelevant and, therefore, inadmissible. As a result, it is essential that practitioners understand and adhere to the rules governing evidentiary foundations.

NOTE: Even if evidence is properly identified and authenticated, it may nevertheless be excluded "if its probative value is substantially outweighed by such factors as prejudice, confusion, or potential to mislead the jury." *Parks v. O'Young, 289 Ill.App.3d 976, 980-981 (1st Dist., 1997)(Trial court properly excluded evidence that defendant doctor mistreated "other black patients."). See also, Ill. R. Evid. 403 (eff. Jan 1, 2011).* Prejudice in this context means "'an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt or horror.'" *People v. Barnes, 2013 IL App (1st) 112873, ¶ 44.*

Properly authenticated evidence may also be excluded if it was obtained through "abuse of discovery procedures." *Healy v. Bearco Management, Inc., 216 Ill.App.3d 945, 956 (2d Dist., 1991). See, Supreme Court Rule 219(d)("The court may order that information obtained through abuse of discovery procedures be suppressed.").*

II. Offer of Proof

As expressly noted in Illinois Rule of Evidence 103(a)(2), claims of error may not be based on a ruling that excluded evidence unless an offer of proof was made. Importantly, however, a formal offer of proof, whereby questions are posed to a witness outside the presence of the jury, is unnecessary. *People v. Forest, 2015 IL App (4th) 130621, ¶ 34-38.* Instead, there must simply be a sufficient basis upon which a reviewing court can assess whether exclusion of the testimony caused prejudice. *Id.*

Thus, an adequate offer of proof should inform the trial court "of what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose." *Clayton v. County of Cook, 346 Ill.App.3d 367, 385 (1st Dist., 2004).*

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[1] *"Evidence is considered to be relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Clayton v. County of Cook, 346 Ill.App.3d 367, 384 (1st Dist., 2004). Evidence does not have to be disputed to be "of consequence." See also, Ill. R. Evid. 401 (eff. Jan 1, 2011).*

Importantly, "failure to make an offer of proof results in a waiver of review of whether the evidence was excluded improperly." Id. *See also, Ill. R. Evid. 103(a)(2)(eff. Jan 1, 2011).* Thus, it is imperative that practitioners be vigilant and specific when making an offer of proof because a party is "bound" by his offer of proof. *People v. Allison, 236 Ill.App.3d 175, 188 (1st Dist., 1992).*

NOTE: "Where the attitude of the trial court is such as to prevent a party from presenting offers of proof, none are necessary in order to preserve full review of the court's rulings which exclude evidence." *Aguinaga v. City of Chicago, 243 Ill.App.3d 552, 572 (1st Dist., 1993).* Additionally, if it is "apparent that the trial judge understood the nature of the objection and the character of the evidence...or if the questions themselves and circumstances surrounding them show the purpose and materiality of the evidence," an offer of proof may not be necessary. *Carter v. Azaran, 332 Ill.App.3d 948, 956 (1st Dist., 2002).*

III. Limiting Instructions

There are instances in virtually every trial when evidence is relevant and admissible for a specific, but limited, purpose. In these instances, it is important that practitioners not overlook the usefulness of an instruction that advises the jury of the limited purpose for which they may consider the evidence because there is a "strong presumption" that jurors follow the instructions given by the court. *People v. Nixon, 2016 IL App (2d) 130514, ¶ 44.*

While the decision not to request a limiting instruction can be a reasonable trial strategy intended to avoid further emphasizing negative evidence (*People v. Herron, 2013 IL App (1st) 113469-U, ¶ 25),* more often than not, especially in civil cases, it is simply a missed opportunity to avoid general consideration of evidence that is only appropriate for a much narrower purpose. *See, People v. Camp, 128 Ill.App.3d 223 (1st Dist., 1984)(evidence admitted for limited purpose or as to only one party may be considered generally unless a proper objection is made and a limiting instruction is requested.).* Thus, attorneys should consider such instructions in advance of trial and be prepared to provide the actual language of the instruction so it is given contemporaneously with the introduction of the relevant evidence.

Importantly, Supreme Court Rule 105 expressly states that the trial court "shall" give a limiting instruction "upon request" when evidence is introduced for a limited purpose. *Ill. R. Evid. 105 (eff. Jan. 1, 2011).* However, the court is under no obligation to give such an instruction *sua sponte. People v. Foster, 195 Ill.App.3d 926, 950 (5th Dist., 1990).*

IV. Foundational Requirements Are Evidence-Specific

Obviously, different types of evidence require different types of authentication. Regrettably, these differences are sometimes blurred or even ignored, resulting in the avoidable exclusion of significant evidence. Thus, it is helpful to review the foundational requirements for evidence that is commonly relied upon during trial.

A. Witness Competence

Because it is a threshold issue, it is appropriate to begin with an understanding of the issue of witness competence. Although Illinois common law previously contained a variety of incompetence rules, the current state of the law provides that all persons who possess the requisite degree of mental capacity, personal knowledge and appreciation of the duty to testify truthfully are presumed competent to testify. *Graham, supra at 441.*[2] While this presumption can be overcome, the burden of proving lack of competence is on the party challenging the witness. *People v. Jackson, 2015 IL App (3d) 140300.* However, as with all evidentiary issues, it is appropriate to begin with the actual rules of evidence and relevant statutes.

i. Applicable Rules and Statutes

- **Ill. R. Evid. 104. Preliminary Questions**

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of 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.

NOTE: As suggested by the final sentence of Rule 104, hearsay and other inadmissible evidence may be considered when determining the preliminary question of admissibility. *People v. Taylor, 2011 IL 110067, ¶ 40.*

- **Ill. R. Evid. 601. General Rule of Competency**

Every person is competent to be a witness, except as otherwise provided by these rules, by other rules prescribed by the Supreme Court, or by statute.

- **Ill. R. Evid. 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

- **725 ILCS 5/115-14. Criminal Cases.**

The determination of the competency of witnesses in criminal trials is governed by section 115-14 of the Code, which provides as follows:

(a) Every person, irrespective of age, is qualified to be a witness and no person is disqualified to any matter, except as provided in subsection (b).

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[2] *The Dead Man's Act provides a major exception to this general rule. See, 735 ILCS 5/8-201, et seq.(West 2016).*

(b) A person is disqualified to be a witness if he or she is:
(1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him or her; or
(2) Incapable of understanding the duty of a witness to tell the truth.

- **735 ILCS 5/8-201 to 5/8-601. "Dead Man's Act."**

The following three requirements must be satisfied in order to render a witness incompetent under this statute:

1) The witness must be an adverse party or person directly interested in the action;
2) The witness must seek to testify on his own behalf;
3) An adverse party suing or defending as a representative of a deceased person or a person under a legal disability is protected as to any conversation with the deceased or person under a legal disability and as to any event taking place in that person's presence.

ii. Foundation

While the determination about whether a witness is competent to testify is within the discretion of the trial court, the foundational inquiry focuses on the following four specific factors: 1) ability of the witness to receive correct impressions from his senses; 2) ability to recollect those impressions; 3) ability to understand and answer questions and; 4) the ability to appreciate the moral duty to tell the truth. *People v. Sykes, 341 Ill.App.3d 950, 973 (1st Dist., 2003). Accord, Green by Fritz v. Jackson, 289 Ill.App.3d 1001 (1st Dist., 1997).* Section 115-14 of the Code of Criminal Procedure, *supra*, focuses on intellectual, rather than moral, fitness as the measure of witness competency as it disqualifies a witness who is incapable of understanding the duty to answer truthfully, but not a witness who is unlikely to tell the truth. *People v. Jackson, supra at ¶ 45.*

NOTE: The trial court may determine a witness' competence to testify by observing the witness' demeanor and ability to testify during a preliminary examination outside the presence of the jury. Such an examination may be conducted by the trial court alone or counsel may be permitted to participate in the *voir dire* examination of the witness, the latter option being at the discretion of the judge. *People v. Graves, 2012 IL App (4th) 110536.*

CAUTION: Being declared disabled in terms of the person or finances is not synonymous with testimonial incompetence, "but merely goes to the weight the trier of fact might afford such testimony." *Green by Fritz, supra.* The same is true of being adjudicated disabled under the Probate Act (*Clark v. Otis Elevator Co., 274 Ill.App.3d 253 (1st Dist., 1995)*) or declared incompetent under the Mental Health Code. *People v. Cox, 87 Ill.App.2d 243 (4th Dist., 1967).* Similarly, conditions such as senility, mental deficiency, and Down's syndrome do not automatically render a witness incompetent to testify. *People v. Williams, 147 Ill.2d 173 (1991); People v. Scott, 108 Ill.App.3d 607 (1st*

Dist., 1982); People v. Davis, 223 Ill.App.3d 580 (2d Dist., 1992). In fact, even sanity is "not the test of competency." *Graham, supra at 445.*

B. Judicial Notice

Lawyers regularly ask trial judges, in both criminal and civil trials, to take judicial notice of a wide variety of things, including facts, pleadings, findings of governmental agencies and even evidence in other trials.[3] The concept "is founded on the assumption that certain factual determinations are not subject to reasonable dispute and thus may be appropriately resolved other than by the production of evidence." *Graham, supra at 92.* While such a request can be appropriate and helpful, there are specific limitations to the scope of judicial notice. Moreover, there are two different types of facts subject to judicial notice: adjudicative facts and legislative facts. Needless to say, it is important to understand the distinction between these categories.

Adjudicative facts "are simply the facts of the particular case"...the 'who did what, where, when, how, and for what reason.' They relate to the parties, their activities, their properties, their business." *Id.* They also include matters that are generally known, such as historical events, government statistics, geographical facts, and facts which are capable of verification by accurate sources.

The other type of facts appropriate for judicial notice is legislative facts, which include matters of law, such as the common law and statutes of states and jurisdictions across the United States. *Id. at 105.* It also includes municipal ordinances, administrative rules and regulations. *Id.*

NOTE: Adjudicative facts require a higher degree of indisputability than legislative facts and are governed by Illinois Rule of Evidence 201. *People v. Shamhart, 2016 IL App (5th) 130589.*

i. Applicable Rule

- **Ill. R. Evid. 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

[3] *The court may also do so sua sponte. People v. Barham, 337 Ill.App.3d 1121 (5th Dist., 2003).*

may be made after judicial notice has been taken. *(See, Cook County Board of Review v. PTAB, 339 Ill.App.3d 529 (1st Dist., 2002).*

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.[4]

(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.

ii. Foundation

The foundational requirements for judicial notice are simply notice to the opposing party and providing the court with the necessary information. Once done, the jury should be instructed about the matter judicially noticed. *See Ill. R. Evid. 201(g), supra.*

NOTE: There is case law suggesting that information from "'mainstream Internet sites such as MapQuest and Google Maps is reliable enough to support a request for judicial notice.'" *Peters v. Riggs, 2015 IL App (4th) 140043, ¶ 49.*

C. Witness Honesty or Dishonesty – Character & Reputation Evidence

Because assessments of witness credibility must be made in every trial, the character or reputation of a witness for truthfulness or untruthfulness is relevant. However, "one witness is not permitted to judge the truthfulness of another's testimony." *Robert S. Hunter, Trial Handbook for Illinois Lawyers – Civil 446 (7th ed. 1997).*[5] Yet, character and reputation evidence are admissible in certain circumstances. Importantly, these two categories of evidence are distinct and their use is limited to specific circumstances. Thus, it is essential to understand the distinctions and permissible scope of use.

Character evidence concerns "the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as honesty, peacefulness, or truthfulness. Reputation is the community estimation of him." *Graham, supra at 256.*

CAUTION: Generally, character evidence is not admissible in order to prove that a person "acted in conformity therewith on a particular occasion," except in criminal cases as provided in "Rule 404(a)(1)(regarding the character of the accused), and under Rule 404(a)(2)(regarding the character of the alleged victim)." *Ill. R. Evid. 404 Comment.*[6] As a result, circumstantial use of character evidence is not permitted in civil cases. *Graham, supra at 257.*

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[4] *Importantly, In re S.M., 2015 IL App (3d) 140687, ¶ 23 suggests that the request must be made during the evidentiary phase of trial, but has been criticized for its failure to acknowledge subsection (f). See, Graham, supra at 102.*

[5] *But see, People v. Lehner, 326 Ill. 216 (1927)(following proper foundation, witness may be asked, "In view of that reputation, would you believe him under oath?"). Notably, this case was acknowledged, but criticized as improper opinion character evidence in People v. Robert P., 354 Ill.App.3d 1051, 1062 (___ Dist., 2005).*

[6] *Although the rules applicable to both criminal and civil cases are referenced, this handout and the discussion will focus on their application in civil cases.*

i. Applicable Rules

- **Ill. R. Evid. 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 particular 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.

- **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.

- **Ill. R. Evid. 608. Evidence of Character of Witness For Truthfulness or Untruthfulness.**

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. *See also, Graham, supra at 531.*

ii. Foundation

Once the character of a witness for truthfulness has been attacked (*Dodds v. Western Kentucky Navigation, 297 Ill.App.3d 702 (5th Dist., 1998)*), rebuttal evidence consisting of opinion or reputation testimony may be admitted if a proper foundation is established. In order to do so, the proponent of the testimony must satisfy the following requirements:

- Demonstrate that the witness knows the general reputation of the principal witness for truth and veracity in the neighborhood in which he lives or amongst those with whom the latter works or socializes. *People v. Kliner, 185 Ill.2d 81 (1998); Graham, supra at 534-535.*
- The reputation witness must be asked, based on personal contact with the principal witness in a social or work context, whether he knows or has formed an opinion about the latter's character for truthfulness.
- The testimony must relate to character for truthfulness at the time of trial and must be based on specific instances of the witness's alleged acts that are known to the testifying witness. *Kliner, supra at 173; accord, Graham, supra at 535.*
- Demonstrate that the opinion or reputation witness has adequate knowledge. *Jackson v. Naffah, 241 Ill.App.3d 1043 (1st Dist., 1993)(conversation at a Christmas party two years before trial deemed inadequate.).*
- The reputation testimony must be based on having discussed the reputation with others, having heard it discussed by others, or never having heard it discussed even though contrary remarks would have been heard if they existed. *People v. Clauson, 261 Ill.App.3d 373 (1st Dist., 1994); Graham, supra.* (Although the character witness may be cross-examined about whether he has heard rumors or reports that are inconsistent with his opinion, the substance of the rumors or reports is inadmissible. *Id. at 536.*).

See also, Thomas A. Mauet, Trial Techniques and Trials 173 (9th ed. 2013).

CAUTION: A witness who offers opinion testimony about another's character for truthfulness cannot be cross-examined about particular acts of misconduct by the primary witness, including criminal convictions. *Graham, supra at 535.*

D. Habit /Routine Practice/Custom & Usage

It has long been accepted that evidence about habit, routine practice and custom and usage may be admitted to prove that on a particular occasion a person or organization acted consistent with that habit, custom or practice. *Kavales v. Norther Illinois Gas Co., 305 Ill.App.3d 536, 549 (1st Dist., 1999).*[7] Despite the undisputed nature of this conclusion, however, review of case law and evidentiary treatises reveals decades of confusing and sometimes conflicting discussions about this type of evidence.

Unfortunately, "much of the complexity in the law governing evidence of 'habit,' 'custom,' and 'routine practice' stems from the failure of Illinois courts to adequately define these terms and to distinguish evidence of 'habit' from evidence of 'character.' Some of these terms have never been defined by Illinois courts. Others have been defined or used in more than one way. The lack of agreed upon definitions has made meaningful discussion and analysis of the law in this area almost impossible." *William A. Schroeder, Evidence of Habit and Routine Practice, 29 Loy. U. Chi. L.J. 385, 387 (Winter 1998).* An easy example of this point is found in *Collins v. Roseland Community Hospital, 219 Ill.App.3d 766, 773 (1st Dist., 1991),* where the Appellate Court simultaneously discussed the disputed evidence as "habit and routine" and "routine and customary practice." *See also, Robert S. Hunter, Trial Handbook for Illinois Lawyers – Civil, Vol. 1,* 604-605 *(8th ed. 2015-2016)("habit is often confused with 'custom and usage' and with 'usual method or practice,' but should be clearly distinguished since the rules are different and are applied in entirely different situations.").*

Happily, because Illinois Rule of Evidence 406 now explicitly covers both habit and routine practice, the confusion inherent in many of the older cases on this subject may dissipate over time.[8] However, Rule 406 does not address custom and usage so practitioners should be aware of the different contexts in which this particular concept arises.

Specifically, it seems that custom and usage is most frequently seen in contractual or other commercial disputes. *See e.g., Pickus Construction & Equipment v. American Overhead Door, 326 Ill.App.3d 518, 524 (2d Dist., 2001)(breach of construction contract); State Security Insurance Co. v. Burgos, 205 Ill.App.3d 739, 746 (1st Dist., 1990)(insurance coverage dispute); Clark v. General Foods Corp., 81 Ill.App.3d 74, 78-79 (3d Dist., 1980)(breach of employment agency contract); Klaub v. Vokoun, 169 Ill.App. 434, 438-439 (1st Dist., 1912)(mechanic's lien action).* Significantly, it can be

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[7] *A further distinction can be made between "true" habit evidence and careful habits evidence. William A. Schroeder, Evidence of Habit and Routine Practice, 29 Loy. U. Chi. L.J. 406 (Winter 1998).*

[8] *Regrettably, the comments to the most recent version of the civil jury instruction about careful habits (IPI No. 10.08) still cite the "eyewitness" rule, which is expressly contrary to Rule 406 and more recent case law. Although the comments also cite a case which repudiated the eyewitness rule in wrongful death cases, one would hope that future revisions to the IPI comments will more plainly clarify this issue so as to be fully consistent with Rule 406.*

used to establish the standard of care. *Skubak v. Lutheran General Health Care Systems, 339 Ill.App.3d 30, 39 (1st Dist., 2003). Accord, Advincula v. United Blood Services, 176 Ill.2d 1, 38 (1996).*

In contrast, habit and routine practice evidence is utilized in a wide variety of cases. *See, People v. Ealy, 2015 IL App (2d) 131106 (murder); Village of Prairie Grove v. Puryear, 2014 IL App (2d) 140286-U(municipal violation); Hambrick v. Banas, 2014 IL App (3d) 130328-U (police excessive force); Grewe v. West Washington County Unit Dist. #10, 303 Ill.App.3d 299 (5th Dist., 1999)(premises liability); Hajian v. Holy Family Hospital, 273 Ill.App.3d 932 (1st Dist., 1995)(medical malpractice).* The distinction, of course, concerns the specific context and point sought to be proved. For instance, if the evidence concerns whether an individual acted consistent with prior conduct, habit testimony is used. If the evidence relates to an organization or other entity, routine practice is used.

i. Applicable Rule & Jury Instruction

- **Ill. R. Evid 406 Habit; Routine Practice**

  Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

- **IPI 10.08 Careful Habits As Proof of Ordinary Care**

  If you decide there is evidence tending to show that the [decedent][plaintiff][defendant] was a person of careful habits, you may infer that he was in the exercise of ordinary care for his own safety [and for the safety of others] at and before the time of the occurrence, unless the inference is overcome by other evidence. In deciding the issue of the exercise of ordinary care by the [decedent][plaintiff][defendant] you may consider this inference and any other evidence upon the subject of the [decedent's][plaintiff's][defendant's] care.

ii. Foundation

In order to establish an adequate foundation for habit testimony, the proponent must "'show conduct that becomes semiautomatic, invariably regular and not merely a tendency to act in a given manner.'" *Alvarado v. Goepp, 278 Ill.App.3d 494, 497 (1st Dist., 1996), citing Hajian v. Holy Family Hospital, 273 Ill.App.3d 932, 942 (1st Dist., 1995).* Additionally, it is in response to a particular kind of repeated situation. Importantly, "unvarying regularity is the key." *Schroeder, supra at 388.*

The proper foundation for evidence of routine practice also requires the proponent to show "a regular response to a repeated specific situation so that the act becomes semi-automatic and of virtually invariable regularity." *Kavales v. Northern Illinois Gas Co., 305 Ill.App.3d 536, 549 (1st Dist., 1999).* Importantly, and different from habit evidence, "'the types of conduct qualifying for admission as a routine business practice are ministerial

[not discretionary] acts: mailing, filing, sending notice, and the like.'" *Id., citing Knecht v. Radiac Abrasives, Inc., 219 Ill.App.3d 979, 984-986 (5th Dist., 1991).*

Finally, the foundation for custom and usage evidence requires proof that the conduct is "so well known, uniform, long established and *generally acquiesced in* as to induce a belief that the parties contracted with reference to it, nothing appearing in their contract to the contrary." *Capital Development Board v. G.A. Rafel & Company, Inc., 143 Ill.App.3d 553, 559 (2d Dist., 1986).* Not surprisingly, a single instance or even a few isolated instances are insufficient to establish custom. *Pickus Construction & Equipment v. American Overhead Door, 326 Ill.App.3d 518, 524 (2d Dist., 2001)(evidence about three prior bids deemed "wholly insufficient."). Accord, Schlicher v. Board of Fire & Police Commissioners of Westmont, 363 Ill.App.3d 869, 876 (2d Dist., 2006).*

NOTE: Courts may take judicial notice of a business custom and practice if it is commonly and generally known. *Hunter, supra at 847.* The same is true of certain habits. *Id. at 846.*

E. Demonstrative Exhibits

As with so many evidentiary issues, the distinction between demonstrative evidence and "real" evidence is often ignored during trial. However, the distinction is significant as it affects all phases of a trial, including motions for directed verdict, the exhibits that may be sent to jurors during deliberations and, of course, the ultimate jury verdict. *People v. Flores, 400 Ill.App.3d 566, 573 (2d Dist., 2010).* Yet, many of the basic definitions of demonstrative evidence are not particularly instructive. For instance, *Black's Law Dictionary* defines it as "physical evidence that one can see and inspect (such as a model or photograph) and that, while of probative value and usually offered to clarify testimony, does not play a direct part in the incident in question." *Black's Law Dictionary 577 (7th ed. 1999).*

As a result, a more practical distinction for practitioners is that demonstrative evidence, regardless of its form, has no probative or substantive value itself. *Stavrou v. Edward Health Services Corp., 2016 IL App (2d) 150002-U, ¶ 33.* Instead, it merely serves as a visual aid to the jury in understanding other evidence. *Bachman v. General Motors Corp., 332 Ill.App.3d 760, 796 (4th Dist., 2002).* Importantly, courts look favorably upon the use of demonstrative evidence because it helps the jury understand the issues raised during trial. *Sharbono v. Hilborn, 2014 IL App (3d) 120597, ¶ 30.* Thus, the focus for use at trial is relevance and fairness. *Id.*

i. Applicable Rule

- **Ill. R. Evid. 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.

CAUTION: Because it is not substantive and has no probative value, "demonstrative evidence is not subject to the same stringent discovery disclosures as substantive evidence." *Levit v. SSM Healthcare, 2011 IL App (1st) 102336-U, ¶ 20.*

ii. Foundation

As noted above, the primary considerations for use of demonstrative evidence are relevance and fairness. Once those considerations are satisfied, the witness merely needs to state that the exhibit accurately represents what it purports to show and will assist the witness in explaining his testimony to the jury. *People v. Robinson, 2011 IL App (1st) 093507-U, ¶ 12-13.*

"Only if demonstrative evidence is inaccurate or tends to mislead the jury will its admission constitute an abuse of discretion." *Levit, supra at ¶ 21.*

F. Courtroom Demonstrations

Similar to demonstrative exhibits, courtroom demonstrations can be appropriate to help illustrate witness testimony, particularly to explain the nature of claimed injuries. Although such demonstrations are within the discretion of the trial court, it is commonly accepted that medical witnesses may use models of the human body to demonstrate certain physical limitations. Similarly, in product liability or medical negligence cases, witnesses frequently use surgical instruments to help explain their testimony and plaintiffs who suffered scarring are able to display those scars for the benefit of the jury. *See generally, LeMaster v. Chicago Rock Island & Pacific Railroad Co., 35 Ill.App.3d 1001 (1st Dist., 1976).* Of course, "indecent exposures are not permitted." *Robert J. Steigmann, Illinois Evidence Manual Volume 1, 503 (3d ed. 1995).*

Importantly, such demonstrations are not limited to civil cases. In criminal cases, victims are permitted to display their scars *(People v. Barnes, 2013 IL App (1st) 112873),* and anatomically correct dolls have been used in child abuse cases in order to assist young children during their testimony. *People v. Carter, 244 Ill.App.3d 792 (1st Dist., 1993).*

CAUTION: It is improper to involve a juror in such a demonstration. *Schaffner v. Chicago & North Western Transportation Co., 129 Ill.2d 1 (1989).*

G. Computer Simulations

The use of computer simulations has become much more common during trial and it is without dispute that such evidence has a powerful effect on jurors. As with so many other types of evidence, simulations can be used for both demonstrative purposes and as substantive reconstruction of an event.

- **Foundation**

Regardless of how the evidence is used, computer animations are permitted so long as a foundation demonstrating sufficient similarity is made. *Dillon v. Evanston Hospital, 199 Ill.2d 483 (2002).* In an accident reconstruction setting, there must be sufficient data about the accident in evidence in order to support an expert's opinion about the

foundation. Hudson v. City of Chicago, *378 Ill.App.3d 373, 401 (1st Dist., 2007).* In fact, the trial court is not expected to blindly accept an expert's assertion that his testimony has an adequate foundation; instead, the court must independently analyze it. Id. *at 402.* Needless to say, such evidence must also fairly and accurately illustrate the issues involved in the case. *Thomas A. Mauet, Trial Techniques And Trials 311 (9th ed. 2013).* Thus, if the computer simulation is intended to show what actually happened in a case, the animation must be supported by the evidence or it will not be allowed. *See,* Spyrka v. County of Cook, *366 Ill.App.3d 156 (1st Dist., 2006)(video animation designed to show the formation of a blood clot in plaintiff's leg deemed misleading because it was not supported by the evidence.).* Additionally, such evidence is inappropriate if its use is merely intended to precondition the jury to accept a party's theory, rather than illustrating the other evidence. Id.

NOTE: The use of limiting instructions can shield the demonstrative use of computer simulations from claims of unfair prejudice. *See,* Stavrou v. Edward Health Services Corporation, *2016 IL App (2d) 150002-U (Appellate court emphasized use of limiting instructions in finding trial court did not err in allowing computer animation depicting formation of umbilical cord hematoma.).*

H. Computer-Generated & Computer-Stored Documents

"Illinois courts have recognized a distinction between computer-generated and computer-stored records. Records directly generated by a computer are admissible as representing the tangible result of the computer's internal operations. In contrast, printouts of computer-stored records constitute statements placed into the computer by out-of-court declarants and cannot be tested by cross-examination and, therefore, are inadmissible absent an exception to the hearsay rule." Anderson v. Alberto-Culver USA, Inc., *337 Ill.App.3d 643, 667 (1st Dist., 2003).*

Computer-generated documents include cell phone records, GPS receiver records, seismograph readings, data recorder readings (black boxes), flight recorder data, and billing data generated instantaneously by a computer. Aliano v. Sears, Roebuck & Co., *2015 IL App (1st) 143367, ¶ 31.*

i. Applicable Rule

- Ill. **R. Evid. 901. Requirement of Authentication or Identification**

  (b) *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.

  (c) 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:

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

- **Ill. R. Evid. 803. Hearsay Exceptions;Availability of Declarant Immaterial**

(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 tie 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.

ii. Foundation

Because computer-generated records are not dependent on the observations or reporting of a human declarant, the evidentiary foundation only requires proof that the recording device was accurate and operating properly when the evidence was created. *Bachman v. General Motors Corporation, 332 Ill.App.3d 760, 789 (4th Dist., 2002).*

Admission of computer-stored data can occur pursuant to the business records exception to the hearsay rule if the following foundational information is elicited: 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 foundational testimony establishes that the source of the information, method and time of preparation indicate its trustworthiness and justifies its admission. *Aliano v. Sears, Roebuck & Co., 2015 IL App (1st) 143367, ¶ 31.*

CAUTION: Where computer-stored documents are produced by human input obtained from original documents, the originals must be made available to the opposing party and the proponent of the documents must be able to provide testimony about the facts contained therein from a competent witness who has seen the originals. *Id.*

If the originals have been destroyed by the party offering the computer-stored version, the latter will be inadmissible unless the proponent can show that the destruction was accidental or done in good faith and without intent to prevent their use at trial. *Id.*

I. Photographs/Videotapes

Still photographs, motion pictures, and videotapes have long been an integral part of both civil and criminal trials and may be used to illustrate or corroborate the testimony of a witness or as substantive evidence of what the photograph or videotape depicts. *Borren v. Boc Group, Inc., 385 Ill.App.3d 284 (5th Dist., 2008).* Thus, they may be used

as mere demonstrative exhibits or as "real" evidence. Notably, videotapes are admissible on the same basis as still photographs. *People v. Johnson, 2016 IL App (4th) 150004, ¶ 63.*[9]

Significantly, "day-in-the-life" videos may also be played during voir dire in order to allow defendants an opportunity to question prospective jurors about their ability to remain fair and impartial, even after seeing graphic depictions of the plaintiff's condition or injuries. *Roberts v. Sisters of St. Francis Health Services, Inc., 198 Ill.App.3d 891 (1st Dist., 1990).* Of course, the decision is a discretionary one for the trial court, which will not be reversed unless the defendant can demonstrate that the ruling prevented meaningful voir dire examination. *Golden v. Kishwaukee Community Health, 269 Ill.App.3d 37, 49 (1st Dist., 1995). Accord Foley v. Fletcher, 361 Ill.App.3d 39 (1st Dist., 2005).*

NOTE: Gruesomeness alone is insufficient to justify exclusion of photographs or videotapes. *Kimble v. Jorgenson Co., 358 Ill.App.3d 400, 417 (1st Dist., 2005).*

i. Applicable Rules

- **Ill. R. Evid. 901 Requirement of Authentication or Identification**

(c) *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.

- **Ill. R. Evid. 1001(2). Definitions**

"Photographs" include still photographs, X-ray films, video tapes, motion pictures and similar or other products or processes which produce recorded images.

- **"Silent Witness Rule"**

Although the Illinois Supreme Court states that this rule was originally applied as long ago as 1922, 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.*

ii. Foundation

The foundational requirement for admission of a traditional photograph or videotape is simple and straightforward: testimony of any person with personal knowledge of the object depicted *at a time relevant to the issues* that the photograph or videotape is a fair and accurate representation of the object. Notably, the photographer or videographer

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[9] *See, Cisarik v. Palos Community Hospital, 144 Il.2d 339 (1991) for the discoverability of "day-in-the-life" films.*

need not testify. *Johnson v. Bailey, 2012 IL App (3d) 110016.* In fact, the foundation witness does not need to have any knowledge about the time or conditions when the photo or video was created – so long as he has personal knowledge of the object or scene depicted and can state that it is accurately portrayed by the evidence. *People v. Hebel, 174 Ill.App.3d 1, 27 (5th Dist., 1988).* Additionally, as with all evidence, the probative value must not be substantially outweighed by the danger of unfair prejudice. *See e.g., Carroll v. Preston Trucking Company, Inc., 349 Ill.App.3d 562, 566-567 (1st Dist., 2004)(surveillance video of plaintiff who claimed constant pain properly excluded because video was edited to show only short periods of time when he was actively engaged in yard work, but not when he left the cameraman's range of sight, thereby creating the impression that plaintiff was able to sustain labor-intensive activities without rest or without experiencing pain.).*

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 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.*

NOTE: The scope of discoverability in misdemeanor cases is no longer limited to the list articulated in *People v. Schmidt, 56 Ill.2d 572 (1974).* Given the "fundamental changes that have occurred in law and society since that ruling," as well as the fact that Illinois

law mandates use of automatic recording devices in all law enforcement squad cars, prosecutors must now produce video of traffic stops, even in misdemeanor cases. *People v. Kladis, 2011 IL 110920, ¶ 26 & 29.*

J. Faxed Documents

Although faxed documents are not nearly as common since the more recent reliance on email, they still play a role in some trials. As a result, it is important to understand the foundational requirements. Initially, it is noteworthy that there does not seem to be any dispute that such documents are admissible under the business records exception to the hearsay rule. *People v. Mormon, 97 Ill.App.3d 556 (1st Dist., 1981).* However, the foundational requirements as initially articulated in *People v. Hagan, 145 Ill.2d 287 (1991),* wherein the court likened fax documents to computer printouts, have been criticized. *See, Michael H. Graham, Graham's Handbook Of Illinois Evidence 1213 (2016 ed.)("authentication of faxed documents was addressed in People v. Hagan, 145 Ill.2d 287 (1991), where the Supreme Court incorrectly looked for guidance to computer printouts which incorporate requirements for the introduction of business records.").*

i. Applicable Rule

- **Ill. R. Evid. 901. Requirement of Authentication or Identification**

(c) *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:

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

ii. Foundation

The Illinois Supreme Court noted the foundational requirements as follows: 1) testimony from a person who can explain a business' procedures for compiling information and methods for checking for mechanical and human error; 2) testimony explaining the operation of the machine and that it properly did what it was supposed to do; and 3) testimony about the mechanical reliability of the machine. *Hagan, supra at 310.*

According to *Graham, supra,* the foundational requirements are as follows: 1) evidence that the documents received fairly and accurately reflect the documents faxed or that the faxed documents were accurately received; 2) evidence that the machines used to send and receive the fax are capable of producing an accurate reproduction when properly employed, and were, in fact, properly employed; and 3) evidence that the faxed document originated with and was received by those asserted to have performed these tasks. *Michael H. Graham, Graham's Handbook Of Illinois Evidence 1213 (2016 ed.).*

K. Email/Text Messages/Social Media

In terms of establishing a proper foundation for admissibility, e-mail and text messages are treated like any other form of documentary evidence. *See, People v. Downin, 357 Ill.App.3d 193 (2005).* As a result, the requirements for authenticating more traditional writings also apply to e-mail and text messages. *Id. at 203. Accord, People v. Watkins, 2015 IL App (3d) 120882, ¶ 36.*[10] *See also, M. Robins, Evidence at the Electronic Frontier: Introducing E-Mail At Trial in Commercial Litigation, 29:2 Rutgers Computer & Tech. L. 219, 228 (2003).* This includes the fact that authentication may occur through the use of both direct and circumstantial evidence, including methods such as the reply doctrine, distinctive characteristics, chain of custody, or a process or system. *People v. Downin, supra at 203.*

i. Applicable Rule

- **Ill. R. Evid. 901. Requirement of Authentication or Identification**

(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:

(4)Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

ii. Foundation

The Appellate Court decisions discuss the necessary foundation for admission of e-mails and text messages in a very holistic way. In addition to noting that both direct and circumstantial evidence may be used, the cases also use language that suggests a rather relaxed approach. For instance, they commonly preface the analysis with the generic language that "an adequate foundation is laid when a document is identified and authenticated" (*People v. Chromik, 408 Ill.App.3d 1028, 1046 (3d Dist., 2011)),* followed by the unremarkable observation that the foundational evidence must demonstrate that the document is what its proponent claims. *People v. Emeka, 2015 IL App (4th) 130929-U, ¶ 53. See also, People v. Augustine, 2016 IL App (2d) 141158-U, ¶ 42.*

This means that the proponent of the evidence "need only prove *a* rational basis upon which the fact finder may conclude that the document did in fact belong to or was authored by the party alleged." *Id.* Circumstantial evidence that can be sufficient includes "factors such as appearance, contents, substance, and distinctive characteristics, which are taken into consideration with the surrounding circumstances." *Id.* As a result, the actual contents of the e-mails and text messages can be used for authentication purposes if the information "would only be known by the alleged author of

[10] *The same holds true for social media postings such as MySpace. People v. Klincar, 2011 IL App (5th) 090143-U. ¶ 12.*

the document or, at the very least, by a small group of people including the alleged author." Id.

NOTE: Authentication evidence is viewed in the light most favorable to the proponent of the evidence. *People v. Watkins, 2015 IL App (3d) 120882, ¶ 36.*

CAUTION: Authentication of e-mails, or any other document, is not established merely because a party produced it during the course of discovery. Unlike other jurisdictions, Illinois has not enacted any rules allowing authentication by production. *Complete Conference Coordinators, Inc. v. Kumon North America, Inc., 394 Ill.App.3d 105, 108 (2d Dist., 2009).*

L. Similar Happenings

The law recognizes the propriety of drawing inferences from occurrences in unrelated cases for the following purposes: 1) to show the existence of a particular danger or hazard; or 2) to show the defendant's knowledge of the generally hazardous nature of the condition. *Balough v. Northeast Illinois Regional R.R. Co., 409 Ill.App.3d 750, 778 (1st Dist., 2011), citing Bachman v. General Motors Corp., 332 Ill.App.3d 760, 785-786 (4th Dist., 2002).* The validity of such inferences, however, often depends on the presence of a sufficient degree of similarity between the unrelated cases and the case being tried. Id.[11] This does not mean the accidents occurred in an identical manner. *Jablonski v. Ford Motor Co., 398 Ill.App.3d 222, 268 (5th Dist., 2010), rev'd on other grounds.*

The determination about whether prior occurrences are sufficiently similar is a discretionary matter for the trial court. *Balough, supra.*

- **Foundation**

When offered to show the existence of a particular danger, sufficient similarity is established by showing 1) the condition alleged to be the common cause of danger in earlier accidents must be the condition contributing to the danger in the case being tried; and 2) the instrumentality that caused the danger in the earlier accidents was in substantially the same condition as at the time of the accident involved in the case being tried. Id.

In product liability cases, pre-occurrence similar happenings may be admitted to show the existence of a defect and the defendant's knowledge of it, but post-occurrence happenings may only be admitted to show the existence of a defect. *Bass v. Cincinnati, Inc., 180 Ill.App.3d 1076 (1st Dist., 1989).*

When offered to show the defendant's knowledge of the generally hazardous nature of the condition, the proponent does not need to demonstrate similarity between prior

[11] *Needless to say, it also requires a showing of relevance. Henderson v. Illinois Central Gulf Railroad Co., 114 Ill.App.3d 754 (4th Dist., 1983).*

accidents and the accident involved in the case being tried. *Trimble v. Olympic Tavern, Inc., 239 Ill.App.3d 393, 397 ((2d Dist., 1993).*

CAUTION: When dissimilar prior accidents are used to prove the defendant's knowledge of a generally hazardous condition, the proponent may not introduce the specific details of the prior accidents. *Id.*

Significantly, just as a plaintiff is permitted to introduce evidence of prior similar happenings in order to establish liability, a defendant may introduce evidence of the absence of similar happenings. *Schaffner v. Chicago & North Western Transportation Co., 129 Ill.2d 1 (1989). Accord, Jones v. DHR Cambridge Homes, Inc., 381 Ill.App.3d 18 (1st Dist., 2008).* In order to do so, the defendant must offer a sufficient foundation, which includes evidence that the absence of claims occurred while the same product was used under similar conditions as those encountered by the plaintiff in the pending case. *Salvi v. Montgomery Ward & Co., 140 Ill.App.3d 896, 905 (1st Dist., 1986).*

NOTE: Evidence of the absence of prior accidents has less probative value than evidence of previous accidents, which makes it more easily outweighed by the claim that it represents collateral issues that will confuse the jury. *Jones, supra.*

M. Business Records

Business records are frequently relied upon as substantive evidence in both civil and criminal cases. Common examples include medical records from hospitals and doctors, shipping records from trucking companies, bid proposals from contractors and wage verification records from employers. Despite the frequency with which they are required at trial, business records cannot be utilized to prove the truth of their contents unless the proponent satisfies one of the rules governing such evidence.

i. Applicable Rules

- **Supreme Court Rule 236 & 725 ILCS 5/115-5(a)**

Illinois Supreme Court Rule 236 (applicable in civil cases) and 725 ILCS 5/115-5(a) (applicable in criminal cases) allow the admission of records of a business' regularly conducted activities as an exception to the hearsay rule. The rationale supporting the rule and statute is as follows: because their purpose is to assist in the proper transaction of a business, the motive for following an accurate routine is high and the motive to falsify is nonexistent. *Kimble v. Jorgenson Co., 358 Ill.App.3d 400, 414 (1st Dist., 2005).* Supreme Court Rule 236 codifies the business records exception to the hearsay rule. *Id. See also, Michael H. Graham, Graham's Handbook Of Illinois Evidence 995 (2016 ed.).*

NOTE: So-called "double hearsay" does not fall outside the scope of Rule 236. *In re Estate of Weiland, 338 Ill.App.3d 585, 601 (2d Dist., 2003).*

Although medical records were originally excluded from Rule 236, the April 1992 amendment to the rule removed this exclusion so that medical records are now covered.

- **Ill. R. Evid. 803. Hearsay Exceptions; Availability of Declarant Immaterial**

(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 indication 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.

- **Ill. R. Evid. 902. Self-Authentication**

(11) *Certified Records of Regularly Conducted Activity.* The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information 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.

ii. Foundation

The above rules and statute make clear that a business record may be admitted into evidence even though the witness did not make the original entries – as long as the

proponent provides the proper foundational evidence. Hinken v. Laurato, *2012 IL App (1st) 111506-U, ¶ 51.*

The foundational evidence can be provided by a records custodian, other qualified witness or by certification in compliance with Rule 902(11). People v. Torruella, *2015 IL App (2d) 141001, ¶ 29.*

Specifically, the proponent of the evidence must establish the following: (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. People v. Nixon, *2015 IL App (1st) 130132, ¶ 110.*

CAUTION: Records made with an eye toward litigation do not qualify as having been made in the regular course of business. Kimble, *supra at 415.* However, merely because a record was made in response to a singular event does not automatically disqualify it as having been made in the regular course of business. Id.

N. Stipulations

A stipulation is an agreement between the parties and can cover facts, evidence, admissions, or procedure. Although stipulations can be oral or written, parties are better served by creating a written record of the precise nature and scope of their stipulations.

When made, a stipulation is conclusive as to all matters included in it and no proof of the stipulated facts is necessary thereafter. People v. McFadden, *2016 IL 117424, ¶ 15.* Of course, a stipulation does not remedy any evidentiary shortcomings of the stipulated facts. People v. Davis, *2016 IL App (1st) 142414, ¶ 15.*

CAUTION: A party's offer to stipulate does not automatically preclude his opponent from offering evidence of the facts included in the proposed stipulation. *See,* People v. Henderson, *142 Ill.2d 258, 319 (1990).* Although the trial court should consider that a stipulation may remove a proposition from dispute, thereby rendering the evidence non-probative, this consideration is not dispositive. As noted by the Illinois Supreme Court in Lee v. Chicago Transit Authority, *152 Ill.2d 432, 462-463 (1992),* "the proponent of the evidence is entitled to have the court also consider the fair and legitimate weight that introduction of the evidence would have upon the trier of fact," particularly because "'a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence.'" (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 403.1, at 170 (5th ed. 1990).

NOTE: The trial court may accept a stipulation even when it involves a waiver of due-process rights. Smith v. Freeman, *232 Ill.2d 218 (2009).*

EVIDENTIARY FOUNDATIONS

Judge Lynn M. Egan
Judge Deborah Mary Dooling
Judge John P. Kirby

September 28, 2016

START WITH THE RULES

- Relevance is the key to admissibility; and relevance cannot be established without proper identification or authentication.

Illinois Rule 901:

Identification/authentication is a "condition precedent to admissibility."

Ill. R. Evid 901 (eff. Jan. 1, 2011)

BUT DON'T FORGET...

Even if properly identified/authenticated, evidence may still be excluded if:

1. Its probative value is substantially outweighed by factors such as prejudice, confusion or potential to mislead the jury. (Prejudice means "'an undue tendency to suggest decision on an improper basis...such as sympathy, hatred, contempt or horror.")

2. It was obtained through abuse of discovery procedures. (Sup.Ct.Rule 219(d)).

PROTECT YOUR RECORD

Ill. R. Evid 103(a)(2) expressly provides that no claim of error can be based on the exclusion of evidence unless the proponent of the evidence made an *offer of proof.*

An offer of proof must advise the trial court of:

- The nature of the proposed evidence/testimony;
- From whom it will be elicited & its purpose.

Can forego offer of proof if:

- Trial court attitude prevents it; or
- It is apparent the trial court understood the evidence, & its purpose/materiality.

LIMITING INSTRUCTIONS

- Very important & useful – "strong presumption" that jurors follow court instructions. *People v. Nixon, 2016 IL App (2d) 130514.*

- Supreme Court Rule 105 requires a trial judge to give such an instruction "upon request" when evidence admitted for a limited purpose. Don't miss this opportunity as judge not required to give *sua sponte.*

- Consider their use IN ADVANCE OF TRIAL and be prepared with specific language so instruction is given at the appropriate time.

FOUNDATION: EVIDENCE SPECIFIC

- While preparing for trial, consider each & every piece of evidence and how you will get it admitted in the event of an objection.

- Do not simply assume your opponent will not object or that your trial judge will relax the rules.

- When confronted with an objection, START WITH THE RULES!!

- NEVER respond by saying, "But Judge, this is crucial to my case."

WITNESS COMPETENCE

- Every person is presumed competent to testify, except as otherwise noted in the rules/statutes. (*Ill.R.Evid 601).*
- The burden of proving lack of competence is on the party challenging the witness.

Foundational inquiry focuses on 4 factors:

1. Witness' ability to receive correct impressions from his senses;
2. Witness' ability to recall those impressions;
3. Witness' ability to understand & answer questions;
4. Witness' ability to appreciate moral duty to tell the truth.

JUDICIAL NOTICE

Two types of facts appropriate for judicial notice:

Adjudicative facts and Legislative facts

Adjudicative facts governed by Ill. R. Evid 201:

- Court shall take judicial notice upon request if given necessary information
- Parties entitled to chance to be heard
- Judicial notice may be taken at any stage of proceeding
- Jury shall be informed of judicially noticed fact in CIVIL case.

Foundational Requirements

Notice to opposing party

Provide trial judge with necessary information

WITNESS HONESTY: CHARACTER & REPUTATION EVIDENCE

1. Character evidence = "the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as honesty, peacefulness, or truthfulness."

2. Reputation evidence = "the community estimation of him."

3. Governed by Ill. R. Evid 404, 405 & 608.

ILL. R. EVID 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;

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense & 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.

HABIT/ROUTINE PRACTICE/CUSTOM

- Words matters – understand the differences between these evidentiary concepts and BE PRECISE in describing the proposed testimony.
- They are used in different circumstances and are governed by different rules and foundational requirements.
- Custom & practice most commonly used in contractual or commercial disputes.
- Habit & routine practice are seen in a wide variety of cases & are expressly governed by Ill. R. Evid 406.

CUSTOM & PRACTICE

Foundational Requirements:

1. Proof that the conduct is so well known, uniform, long established & generally acquiesced in as to induce a belief that the parties contracted with reference to it. *Capital Development Board v. G.A. Rafel & Co., Inc., 143 Ill.App.3d 553, 559 (2d Dist., 1986).*

NOTE: A single instance or a few isolated instances are insufficient to establish custom. *Pickus Construction v. American Overhead Door, 326 Ill.App.3d 518, 524 (2d Dist., 2001).*

HABIT & ROUTINE PRACTICE

- The foundation is essentially the same for both habit and routine practice: evidence that there is a regular, semi-automatic response to a repeated, specific situation so that the act becomes invariably regular.
- Unvarying regularity is the key in both instances.
- Ill. R. Evid 406 applies to both types of evidence, without regard to the presence of eyewitnesses or corroborating evidence.
- The difference between the two concepts? Habit applies to the conduct of an individual, while routine practice applies to the conduct of an organization.

DEMONSTRATIVE EXHIBITS

- Merely serves as a visual aid to the jury in understanding other evidence.

- No probative or substantive value itself.

Foundational Considerations

1. Relevance & fairness: and
2. Witness testifies that the exhibit accurately represents what it purports to show & that it will assist him in explaining his testimony to the jury.

COMPUTER SIMULATIONS

- Permitted so long as the proponent demonstrates sufficient similarity between the simulation and the facts in evidence.
- Trial court is not required or expected to simply accept an expert's claim that there is sufficient similarity; the judge must independently analyze it.
- It is inappropriate to use solely as a means to precondition the jury to accept a party's theory.
- Don't forget limiting instructions in this context!

COMPUTER-GENERATED & COMPUTER-STORED EVIDENCE

- Ill. R. Evid 901(c)(9) & 803 apply.
- *Computer-generated* evidence = records directly generated by a computer as the result of the computer's internal operations. (Cell phone records, GPS receiver records, black box data).
- Foundation: proof recording device was accurate & properly operating when evidence was created.
- *Computer-stored* evidence = data placed in the computer by out-of-court declarants.
- Foundation: equipment is standard, data entered in regular course of business close in time to event recorded, source of the data, method & time of preparation indicates its trustworthiness. **NOTE**: Need originals.

PHOTOGRAPHS/VIDEOTAPES

- Ill. R. Evid 901(c)(1), 1001(2) & "Silent Witness" Rule apply.

- "Photographs" = still photos, x-ray films, video tapes, motion pictures & other products which produce recorded messages.

- Videotapes are admissible on the same basis as still photographs.

- "Day-in-the-Life" videos may be shown during *voir dire* in order to more accurately assess whether jurors can remain fair & impartial after seeing graphic depictions of injury.

TRADITIONAL FOUNDATION

- Testimony of any person with personal knowledge of the object depicted that photo or video is a fair & accurate representation of the object.
- Photographer/videographer need not testify.
- Probative value cannot be substantially outweighed by danger of unfair prejudice.
- **BUT**....gruesomeness alone is insufficient to exclude photos/video.

SILENT WITNESS RULE

- Applied in cases involving automatic cameras or surveillance systems. *People v. Taylor, 2011 IL 110067.*
- Foundational requirements are case specific & list of relevant factors is "nonexclusive":

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

FAXED DOCUMENTS

- Ill. R. Evid 901(c)(9) – process or system – applies.

Foundational requirements include:

1. Testimony from someone who can explain a business' procedures for compiling information & methods for checking for mechanical/human error;
2. Testimony explaining operation of the machine & that it functioned properly;
3. Testimony about the mechanical reliability of the machine.

People v. Hagan, 145 Ill.2d 287 (1991)

EMAIL & TEXT MESSAGES

- Treated like any other form of documentary evidence. *People v. Downin, 357 Ill.App.3d 193 (2005).*
- This means the requirements for authenticating more traditional writings apply. *Id.*
- Ill. R. Evid 901(b)(4) – distinctive characteristics – applies.
- Foundation requires a rational basis upon which to conclude that the document belonged to or was authored by the party alleged.
- Both direct & circumstantial evidence may be used to authenticate. (This means actual contents of message can be considered.)

EMAIL & TEXT MESSAGES

NOTE: Authenticating evidence is viewed in the light most favorable to the proponent of the evidence. *People v. Watkins, 2015 IL App (3d) 120882.*

CAUTION: Authentication of email or text messages (or any other document) is not satisfied merely because a party produced it during the course of discovery. *Complete Conference Coordinators, Inc. v. Kumon North America, Inc., 394 Ill.App.3d 105 (2d Dist., 2009).*

SIMILAR HAPPENINGS

Evidence of occurrences in unrelated cases may be admissible for the following purposes:

1. To show the existence of a particular danger or hazard; or
2. To show the defendant's knowledge of the generally hazardous nature of the condition.

There must be a sufficient degree of similarity between the unrelated cases & the matter being tried. Does not need to be identical.

BUSINESS RECORDS

- Ill. S.Ct. Rule 236 & Ill. R. Evid 803 & 902(11) apply.

Foundation requires evidence of the following:

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 or within a reasonable time thereafter.

NOTE: Records made in anticipation of litigation do not qualify as business records..

STIPULATIONS

- Agreement between the parties that can cover facts, evidence, admissions or procedure.
- Can be oral or written, but better practice is to formalize in writing.
- Once made, the stipulation is conclusive as to all matters included in it.

QUESTION: What about an admission of liability? Must the plaintiff accept it?