# MONTHLY LUNCHTIME SEMINAR SERIES

45TH Session:

THE STEALTH RULES OF

EVIDENCE

(What You Don't Know Will Hurt You)

Justice Warren D. Wolfson Mr. Carlton D. Fisher, FACTL

October 25, 2016

#### **JUSTICE WARREN WOLFSON**

After 18 years as a criminal defense attorney in Chicago, Warren Wolfson served 33 ½ years as a trial and appellate court judge in Cook County, Illinois. He resigned from the bench on August 14, 2009, to accept the position of Dean of the DePaul University College of Law. After two years as Dean, he was appointed Distinguished Visiting Professor of Law, his current position.

Justice Wolfson is the co-author of Trial Evidence, 5<sup>th</sup> Edition, and Materials In Trial Advocacy, 7<sup>th</sup> Edition. He serves as vice chairman of the Special Supreme Court Committee on Illinois Evidence, and frequently speaks to judges and lawyers on federal and Illinois evidence rules, effective advocacy, and professional conduct. He is a member of the Character and Fitness Committee of the Illinois Board of Admissions to the Bar and is Chairman of the State Housing Appels Board. He also serves as co-vice-chair of the Illinois Sentencing Policy Advisory Council and is on the Board of the Lawyers Assistance Program.

In the past, Justice Wolfson has taught trial advocacy and evidence at the Chicago-Kent College of Law and trial advocacy at the University of Chicago Law School. He also has taught at the National Institute for Trial Advocacy. Several of Justice Wolfson's poems have been published in a variety of journals.

#### CARLTON D. FISHER

Carlton Fisher is a capital partner in the national law firm of Hinshaw & Culbertson LLP. Before joining Hinshaw in 1982, he served as a Judge Advocate in the United States Marine Corps where he tried more than 250 federal felony cases involving murder, robbery, burglary, larceny, drug offenses and military offenses as a Defense Counsel and then as a Trial (prosecuting) Counsel.

While at Hinshaw, he has tried more than 80 civil cases to verdict in Illinois, Indiana, Maryland, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas and Washington, and has been admitted *pro hac vice* in over 30 state and federal courts. He is admitted to practice law in Illinois and the U.S. District Courts of Illinois and Indiana. He has argued appeals before Illinois, New York and Pennsylvania state and federal appellate courts.

Mr. Fisher is a Fellow of the American College of Trial Lawyers, an organization founded in 1950 which recognizes the very best of the trial bars of the United States and Canada. The College's Fellows are chosen strictly by invitation and only after a rigorous, confidential investigation. Fellowship is limited to one percent of the lawyers in any individual State or Province.

He has been recognized by his Chicago peers as a Leading Lawyer in the category of Personal Injury Defense Law: Products Liability and General and a Super Lawyer in the area of Transportation Law, and with a Martindale-Hubbell AV Peer Review Rating, its highest rating for ethics and legal ability.

In his numerous local and national CLE presentations, he has instructed on topics such as federal court removal, motions in limine, evidence, jury instructions, trial advocacy, commercial motor vehicle accidents, and hindsight bias in juror decision making.

Mr. Fisher was the recipient of the Waterman Prize and the Rickert Award for Excellence in Moot Court at the University of Illinois College of Law. While attending the University of Illinois as an undergraduate, Mr. Fisher became a member of Phi Beta Kappa, Omicron Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha and Phi Eta Sigma honorary fraternities.

#### FACT SCENARIO

On February 14, two years ago, at 3 pm, Arthur Fletcher was standing at the corner of Main and Elm, waiting to cross the street. A black Cadillac went past him and struck a pedestrian in the intersection.

A police officer, Sam Schultz, arrived at the scene ten minutes later. Fletcher told the officer he saw the black Cadillac drive past him "very fast" through the red light signal before striking the pedestrian.

The pedestrian sues Max Jones, driver of the black Cadillac for money damages due to injuries suffered in the accident. Six months ago Fletcher gave his discovery deposition, where he said the same things he said to Officer Schultz.

During discovery, the plaintiff's lawyer learns that Max Jones was employed by Acme Delivery Service at the time of the accident and that Jones was in the process of delivering a package for his employer. The plaintiff adds Acme to the lawsuit.

The trial begins.

#### ILLINOIS HEARSAY ANALYSIS

Prepared by Warren D. Wolfson

- I. Examine the out-of-court statement, words or conduct, ask: Is it intended by the declarant to be an assertion?
  - A. If not, there is no hearsay issue
  - B. If yes-
- II. Examine the relevant purpose for offering the out-of-court statement:
  - A. Is it offered for the truth of the matter asserted in the statement? If offered for the truth, to be admissible the words or act must be:
    - i. A Rule 80i(d)(2)(A), (B), (C), (D), (E) or (F) hearsay exemption, OR
    - 2. An exception to the rule against hearsay contained in Rules 803 or 804, OR
    - 3. A hearsay exception created by an Illinois statute.
  - B. is it not offered for the truth of the matter asserted in the statement?
    - 1. If not for the truth, there is no hearsay issue.
    - 2. Examples of non hearsay relevant purposes:
      - a. Notice to listener
      - b. Motive of listener
      - c. Listener's reason for acting or not acting
      - d. Listener's mental state
      - e. Independent legal consequences, such as slander, contract, or gift
      - f. Rule 703 basis for expert's opinion
- III. For any out-of-court statement, assertion or not, for truth or not, ask:
  - A. Is it relevant for the stated purpose?
  - B. Is it reliable, i.e., authentic, proper foundation, first hand knowledge?
  - C. is it offered in good faith, not a subterfuge?
  - D. Can it pass a Rule 403 balancing test?
  - E. Can the jury follow an instruction that limits the statement to its relevant purpose?

### STATUTORY EVIDENCE RULES

- I. 725 ILCS HEARSAY EXCEPTIONS IN CRIMINAL CASES:
- 5/115-5-Admissibility of business records (Also see IRE 803(6) and (8)
  - 5/115-5.1--Coroner's medical or laboratory examiner records
  - 5/115-10--Prior statements of child victim of sex abuse
- 5/115-10.1--Prior inconsistent statements of witness who is subject to cross-examination
- 5/115-10.2--Prior statements of witness who refuses to testify despite a court order to testify
- 5/115-10.2a--Prior statement of witness in domestic violence cases when that witness is not available to testify
- 5/115-10.3--Prior statements by certain adults in prosecutions for a physical act, abuse, neglect, or financial exploitation
- 5-115-10.4--Admission of a prior statement by a witness who is deceased at the time of trial
- 5/115-10.5--Qualfied individuals' statements concerning the status of property in certain drug prosecutions
- 5/115-12---Prior identification of a person if the witness making the identification is subject to cross-examination
- 5/115-13--Prior statements by victims of sex offenses to medical personnel
  - 5/115-15--Admissibility of laboratory reports

Note: Several of the statutes listed above are open to Sixth Amendment Confrontation Clause challenge.

## II. HEARSAY EXCEPTIONS IN CIVIL CASES:

- 735 ILCS 5/8-2601--Out-of-court statements of a child under 13 concerning sex abuse
- 735 ILCS 5/8-2701--Out-of-court statements by elder adults with certain incapacities in specified cases
- 750 ILCS 5/606(e)--Child's out-of-court statements used in a custody or visitation hearing
- III. STATUTES THAT AUTHORIZE PROPENSITY EVIDENCE IN CERTAIN CRIMINAL CASES:
- 725 ILCS 5/115-7.3--Propensity evidence admissible in certain sexual assault and attempt child abduction cases
- 725 ILCS 5/115-7.4--Propensity evidence admissible in certain domestic violence cases
- 725 ILCS 5/115-20--Evidence of a defendant's certain prior convictions are admissible to prove defendant's propensity when the victim is the same person who was the victim in the offense resulting in that conviction
- IV. STATUTORY EXCLUSION OF CERTAIN EVIDENCE IN SPECIFIED SEXUAL CRIMINAL OFFENSES (Rape Shield)
- 725 ILCS 5/115-7--Prior sexual activity or reputation of an alleged victim or corroborating witness is inadmissible, with two exceptions listed in sec. 115-7a

#### ILLINOIS EVIDENCE RULES-CHARACTER

Any analysis of these rules requires the proponent of the evidence to make a clear statement of relevant purpose.

- 1. Conforming Conduct (CC) -- IR 404(a)
  - a. For criminal cases only
  - b. Requires an inference of conforming conduct
  - c. Only by opinion and/or reputation on direct--IR 405(a)
  - d. No cross-examination on or evidence of specific acts
- 2. Essential Element (EE) of charge, claim, or defense--IR 405(b)(1)
  - a. Used in civil and criminal cases
  - b. Proof is by opinion, reputation, or specific acts on direct or cross-examination. (See IR 405(b)(2) for use of victim's prior violent conduct in homicide or battery cases where self defense is an issue.)
- 3. Crimes, wrongs, or other acts--IR 404(b)
  - a. Used in civil or criminal cases
  - b. Used for any relevant purpose, other than CC or propensity
  - c. Must not rely on an inference about the actor's propensity
- 4. The Balancing Test--IR 403
  - a. If the offered evidence is relevant and reliable it is subject to the IR 403 balancing test
  - b. The IR 403 objection is forfeited unless it is timely raised by the opponent of the evidence

## CHARACTER EVIDENCE SUMMARY-Illinois Law

- (1) General rules of relevance apply in civil and criminal cases when a character trait of a person is an essential element of a charge, claim, or defense. Rule 405(b)(1). Examples: spouse's character for violence in a child custody case; reckless character of a truck driver when suit is against the trucking company for negligent or reckless entrustment of a vehicle to the company's employee, or when an entrapment defense is raised. Rule 405(b)(2) allows evidence of an alleged victim's violent character and applies only to criminal homicide or battery cases
- (2) With the exceptions contained below, evidence of a person's character trait is not admissible to prove he/she acted in conformity with that trait on a particular occasion. See Rule 404(a). This is a circumstantial evidence rule that applies only to situations where the character trait is offered to show the person possessing the trait acted in conformity with it on a particular occasion. It does not cover situations where a character trait is an essential element of the charge, claim, or defense. There are exceptions to this prohibition of conforming conduct character evidence. They are:
- (a) In criminal cases, relevant character traits of an accused and of an alleged victim may be offered under circumstances contained in Rules 404(a)(1)and (2). These exceptions do NOT apply to civil cases.
- (b) In all cases, civil or criminal, evidence of any witness's truthful or untruthful character may be admitted under circumstances contained in Rules 607, 608, and 609. But evidence of truthful character cannot be admitted under Rule 608 unless and until untruthful character is made an issue.
- (c) Character evidence to prove conformity or propensity of a person may be admitted against a defendant only in cases of sexual assault, child molestation, certain domestic assaults, certain stalking offenses, and attempted child abduction. (By statute, not rule, in criminal cases only.)

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- (d) Rules 405(a) and (b) and Rule 608 contain methods of proof on direct and cross-examination when character trait evidence evidence is relevant and admissible. Character trait evidence admitted pursuant to Rules 404(a)(1) and (2) and 608 may be proved on direct examination only by opinion or reputation, not by specific acts of conduct. Specific act cross-examination concerning Rule 404(a) and Rule 608 character traits also is not permitted by the Rules. But when a character trait is an essential element of a charge, claim, or defense pursuant to Rules 405(b)(1) or 405(b)(2), it may be proved on direct examination by opinion, reputation, or specific acts of conduct. Cross-examination then may include specific acts of conduct.
- (3) Rule 404(b) provides that in civil or criminal cases evidence of uncharged or unpled crimes, wrongs, or other acts may be admitted for any relevant purpose, other than to prove a person's character trait in order to show that on a particular occasion that person acted in conformity with his/her character. That is, the evidence is not allowed to prove that person's propensity to do something. Relevant purposes include, but are not limited to, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. When identity is the issue, the proponent of the evidence must establish a striking similarity of the uncharged act to the relevant charged act; in all other cases a general similarity is sufficient. Advance notice to the defendant is required in criminal cases. The Illinois Supreme Court has held that Rule 404(b) does not apply to non-parties in a case; rule 401 does.

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## SECTION B

 What You Need to Know About the "Not So New" Illinois Rules of Evidence, by Mr. Carlton D. Fisher, October 2016.

# WHAT YOU NEED TO KNOW ABOUT THE "NOT SO NEW" ILLINOIS RULES OF EVIDENCE

# A COMPANION OUTLINE FOR USE WITH THE ILLINOIS RULES OF EVIDENCE

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JUDGE LYNN EGAN'S LUNCHTIME CLE SERIES
WITH JUSTICE WARREN WOLFSON
OCTOBER 25, 2016

## WHAT YOU NEED TO KNOW ABOUT THE "NOT SO NEW" ILLINOIS RULES OF EVIDENCE IN CIVIL CASES

I. THE LAW OF EVIDENCE IN ILLINOIS HAS BEEN CODIFIED INTO AND MODERNIZED IN THE ILLINOIS RULES OF EVIDENCE

THE COMMITTEE COMMENTARY PROVIDED EXPLANATIONS FOR THE NEW RULES. AN ABBREVIATION OF THIS COMMENTARY (WITH SOME UPDATES BASED ON THE CHANGES THAT HAVE BEEN MADE THROUGH OCTOBER 2015) APPEARS BELOWAT I.A. – I.E (PAGES 1-5).

- A. Reserved Certain Rules Have Been Intentionally Left Blank
  - 1. Subsequent Remedial Measures IRE 407
  - 2. Present Sense Impression Exception to Hearsay Rule IRE 803(1) &
  - 3. Learned Treatise Exception to Hearsay Rule IRE 803(18)
- B. Modernization Certain Rules Have Been Modernized
  - 1. IRE 106 Remainder of or Related Writings or Recorded Statements

The concept of completeness is expanded to other parts of statement or other writings which "ought in fairness" to be considered at same time.

2. IRE 406 – Habit and Routine Practice

This rule continues clear direction of allowing habit and routine practice evidence regardless of lack of eyewitnesses or corroboration.

3. IRE 408 - Compromise and Offers to Compromise

Hypothetical statements no longer prerequisite to inadmissibility of statements in settlement negotiations.

4. IRE 613 – Examining Witness Concerning Prior Statement

Rejecting 1903 Illinois Supreme Court decision, prior inconsistent statement need not be shown to witness prior to cross-examination, but on direct exam proponent must show "affirmative damage" to impeach.

5. IRE 702 - Expert Testimony - The Frye/Donaldson Rule

Rule 702 covers new and novel scientific methods per *Frye/Donaldson* and also the non-*Frye* situations. See more extensive discussion below.

6. IRE 801(d) – Statements Which Are Not Hearsay But In For Truth

In criminal cases only, some prior inconsistent statements are considered not hearsay and admissible in some circumstances.

7. IRE 801(d)(2) & (D) – "Statement" by a Party or Its Agent

Renames an "admission" as a "Statement of a Party-Opponent" and confirms clear direction of allowing a party's agent's/servant's "statement/admission" when made (a) during existence of relationship and (b) concerning a matter within scope of the agency/employment.

8. IRE 803(13) - Family Records

Rejecting 1928 Illinois Supreme Court decision, statements about family records admissible as hearsay exception notwithstanding presence of declarant and timing of the statement.

9. IRE 803(14), (15), (19), (20), (23) – Miscellancous Hearsay Exceptions

Fills in gaps of Illinois law concerning hearsay statements about property, reputation, boundaries, general history and judgments.

10. IRE 803(16) and 901(b)(8) – Statements in Ancient Documents
1899 Illinois Supreme Court decision about 30 year limitation to real property document relaxed in favor of all encompassing limit of 20 years.

11. IRE 804(b)(3)- Statement Against Interest

Reasonable person would not have made statement unless believing it to be true. In criminal cases, if corroborated and trustworthy, then statement exposing the declarant to criminal liability is admissible as a hearsay exception; if not corroborated or trustworthy, then not admissible.

12. IRE 806 - Attacking and Supporting Credibility of Declarant

Dispenses with requirement of opportunity to deny or explain an inconsistent statement or conduct of out of court declarant under all eircumstances when hearsay statement is involved. This rule applies to absent declarants.

13. IRE 902(11) - Certified Records of Regularly Conducted Activity

Following Federal Rules of Evidence model, business records are now self authenticating.

14. IRE 1004 – Admissibility of Other Evidence of Contents

Degrees of secondary evidence and necessity of showing steps beyond judicial process to obtain original record possessed by a third party are rejected in this new rule, rejecting previous Supreme Court cases.

15. IRE 1007 - Testimony or Written Admission of Party

Testimony or written admission may now be employed to prove the contents of a document - previously never the law in Illinois.

#### C. Recommendations Accepted -

After recommending a limited number of changes to Illinois evidence law (1) where the issue was never previously addressed or (2) where prior Illinois law was outdated or impractical, the Supreme Court approved recommendations in two areas of evidence law:

- 1. 405 and 608 Opinion testimony is added to reputation testimony as a method of proving character in Rule 405 and in Rule 608 with respect to attacking or bolstering the credibility of a witness through the use of a character witness.
- 2. 803(3) The exception to the hearsay rule concerning "Existing Mental, Emotional, or Physical Condition" now eliminates previous Illinois requirements that (a) the statement was made by a declarant unavailable to testify and (b) the trial court find there is a reasonable probability the statement is truthful.
- D. <u>Structural Change</u> 803(6), (7), (8), (9) and (10) Business and Public Records

The new IRE recognize the universally accepted division between business records, IRE 803(6), and public records and reports, IRE 803(8), in both civil and criminal cases.

In addition, the new IRE recognize the well accepted principle that the absence of entries in business records, IRE 803(7), and public records, IRE 803(10), can be used to prove nonoccurrence or nonexistence of a matter of which such a record would regularly be made and preserved.

#### E. Referenced Statutes

Rather than incorporate an appendix to the IRE that references statutory authority which relates in one form or another to the law of evidence, the Supreme Court decided to make these references in the body of the text of the IRE. Two of the six citations pertain to civil cases:

- 1. IRE 409 and 735 ILCS 5/8-1901 payment or offering to pay for medical, hospital or similar expenses is not admissible to prove liability for injury.
- 2. IRE 611(c) and 735 ILCS 5/2-1102 these rules provide a definition of adverse party or agent of adverse party with respect to "hostile witnesses" who may be interrogated with leading questions.

#### F. General, Preliminary, Threshold and Miscellaneous Principles

#### 1. Scope of the rules

- a. These rules govern proceedings in the courts of Illinois and are effective unless in conflict with a rule or a decision of the Illinois Supreme Court. The January 6, 2015 amendment to the Comment to IRE 101 notes that there is no current statutory rule of evidence that is in conflict with a rule contained in the Illinois Rules of Evidence.
- b. The rules apply to small claims actions, subject to the application of SCR 286(b) IRE 1101(c).

#### 2. Rules Arc Inapplicable Under A Few Circumstances

- a. Preliminary Questions of Fact when determinations of questions of fact are being made by the court under IRE 104 to rule on the admissibility of certain evidence IRE 1101(b)(1) but not issues of privilege.
- b. Grand jury proceedings IRE 1101(b)(2)
- c. Miscellaneous proceedings extradition, rendition, miscellaneous criminal proceedings, post-conviction and contempt proceedings IRE 1101(b)(3).
- d. Ouery What about SCR 90 Arbitration Hearings?

#### 3. Rulings on Evidence – IRE 103

- a. Although IRE 103(a) is similar to FRE 103(a), its format and order are different, especially since the changes effective October 15, 2015 were made.
- b. 103(a) discusses the effect of an erroneous ruling when a substantial right of the party is affected. When a ruling allows for admission of the contested evidence, a timely objection or motion to strike, which state the specific ground of objection, must be made to preserve the error. When evidence is excluded, an offer of proof about the substance of the contested

evidence must be made, unless the substance of the contested evidence was apparent from the context within which the questions were asked.

- c. Except that Illinois requires the renewal of a timely objection or an offer of proof to preserve an error for appeal, except in criminal cases.
- d. IRE 103(b) specifies how a claim of error must be made in civil and criminal eases. This language is new to IRE 103 as of October 2015.
- e. For civil and criminal cases where no previous ruling on admissibility of contested evidence has been made (e.g. no motion in limine made and ruled upon), a contemporaneous trial objection or offer of proof must be made. IRE 103(b)(1).
- f. For criminal cases where a ruling on contested evidence has been made, a contemporaneous trial objection or offer of proof need not be renewed. IRE 103(b)(2).
- g. <u>For civil cases</u>, a contemporaneous objection to or offer of proof about the contested evidence <u>must be made even if court rules before or during trial.</u> IRE 103(b)(3).
- h. <u>Posttrial motions in a criminal or civil jury case (not a civil bench trial) must assert a claim of error</u> to preserve the claim for appeal. IRE 103(b)(4).
- i. IRE 103(c) discusses the record to be made about the ruling and an offer of proof in question and answer format.
- j. Proceedings will be conducted in a way that insulates the jury from suggestions of inadmissible evidence. IRE 103(d).
- k. Plain errors affecting substantial rights can always be noticed. 1RE 103(e).

#### 4. Presumptions – IRE 301

The IRE is identical to the FRE and provides that in those actions not otherwise governed by another rule, statute or court decision, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast—IRE 301.

5. Privileges – IRE 501 & 502

IRE 501 is identical to FRE 501 in that the privilege of a witness, person, government, state or political subdivision shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience – IRE 501.

In addition to common law privileges (e.g. attorney client, marital), Illinois statutory privileges that may be involved in civil cases include:

Physician and patient – 735 ILCS 5/8-802

Clergy - 735 1LCS 5/8-803

Union agent and union member - 735 ILCS 5/8-803.5

Reporter - 735 ILCS 5/8-901

Voter - 735 ILCS 5/8-910

Interpreter and interpreter for deaf - 735 ILCS 5/8-911 & 912

IRE 502 was added in 2013 and deals with circumstances of waiver of the attorney client and work product privileges. "Inadvertent disclosure" does not waive the privileges if the holder of the privilege or protection took reasonable steps to prevent disclosure and the holder promptly took reasonable steps to rectify the error, including (if applicable) following supreme Court Rule 201(p).

#### II. WHAT THE ILLINOIS RULES OF EVIDENCE ALLOW YOU TO DO:

- A. Ask Preliminary Questions of Qualifications, Privilege, Admissibility
  - 1. Court can address preliminary questions IRE 104(a)
  - 2. Allow evidence subject to its relevancy being "tied up" IRE 104(b)
  - 3. See IRE 1101(b)(1) rules of evidence suspended in some cases, including preliminary determinations of fact.
- B. Have Evidence Admitted for a Limited Purpose
  - 1. Upon request, Court admits evidence IRE 105
  - 2. Court may instruct the jury about limited purpose-IP1 2.02 and 3.07

PRACTICE TIP # 1 — HAVE "LIMITED PURPOSE" INSTRUCTIONS READY FOR IMMEDIATE USE BY A TRIAL JUDGE IF YOU ARE OBJECTING TO EVIDENCE THAT THE JUDGE DECIDES IS ADMISSIBLE FOR A LIMITED PURPOSE. WHEN AN EXPERT WITNESS TESTIFIES ABOUT EVIDENCE THAT IS NOT OTHERWISE ADMITTED DURING THE TRIAL (see IRE 104(a) and IRE 703), USE IPI 2.04 and 3.08.

- C. Require Contextual Completeness "In Fairness" By Allowing Opponent's Contemporaneous Use of Remainder of Related Writings or Recorded Statements When Proponent Only Uses Some Parts of Writing or Statement
  - 1. Adverse party may require introduction of other parts of a writing or recorded statement IRE 106
  - 2. This contextual completeness requirement applies if the other statements "ought in fairness" be considered contemporaneously with adverse party's selected writing or statement.
  - 3. This requirement is not limited to one document or the same document.
  - 4. SCR 212(c) applies a similar principle for the use or reading of other parts of a deposition.

PRACTICE TIP#2-BE PREPARED TO OFFER UP MORE COMPLETE EXCERPTS FROM THE WITNESS' PRIOR STATEMENTS OR DEPOSITION TESTIMONY IF YOUR OPPONENT IS SELECTING A STATEMENT OUT OF CONTEXT

- D. Use Short Cut Proof by Having Court Take Judicial Notice of Adjudicative Facts IRE 201
  - 1. A fact not subject to reasonable dispute and will be binding in civil cases:
    - a. Generally known within the territorial jurisdiction of the Circuit Court
    - b. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned
  - 2. May be accepted by court / shall be accepted if party requests
  - 3. Opportunity to be heard and then have jury informed they shall accept it as conclusive

PRACTICE TIP # 3 – ASK YOUR TRIAL OPPONENTS TO PROVIDE ADVANCE NOTICE OF ANY ADJUDICATIVE FACTS FOR WHICH THEY WILL SEEK JUDICIAL NOTICE AND BE PREPARED TO ADVISE THE COURT AND YOUR OPPONENT IN ADVANCE OF ANY SUCH ADJUDICATIVE FACTS FOR WHICH YOU SEEK JUDICIAL NOTICE

#### III. WHAT IS RELEVANT EVIDENCE? - IRE 401 AND 402

- A. Any Evidence Having any Tendency to make the Existence of any Fact that is of Consequence. . .more probable or less probable. . . IRE 401.
- B. Irrelevant Evidence is Inadmissible IRE 402.
- C. Relevant Evidence is Admissible, except as Otherwise Provided by Law IRE 402.
- D. Party May Introduce Evidence Relevant to Weight or Credibility IRE 104(3).
- IV. IN GENERAL, WHAT RELEVANT EVIDENCE MAY BE EXCLUDED? IRE 403
  - A. Relevant Evidence May Be Excluded Under the IRE 403 "Balancing Test" If Its Probative Value is Substantially Outweighed by Danger of
    - 1. Unfair prejudice
    - 2. Confusion of issues
    - 3. Misleading the jury
  - B. Relevant Evidence May Be Excluded by Considerations of
    - 1. Undue delay
    - 2. Waste of time
    - 3. Needless presentation of cumulative evidence
- V. WHAT TYPES OF EVIDENCE ARE LEGALLY RELEVANT/ADMISSIBLE?
  - A. Habit or Routine Practice IRE 406
    - 1. Relevant to prove that conduct of person/organization was in conformity with habit or routine practice.
    - 2. Regardless of corroboration or eyewitnesses.

- 3. Illinois case law had been inconsistent on whether eyewitness testimony prohibits habit testimony; the recent trend is confirmed in this new rule.
- B. Subsequent Remedial Measures, if Offered IRE 407 IS RESERVED:
  - 1. In products liability cases, there is a split in authority in Illinois as to admissibility of post-remedial measures depending on if the change occurred after the design/manufacture of defect or after the date of injury.
  - 2. Changes may be admissible if offered to:
    - a. Prove ownership, if controverted;
    - b. Prove ownership, if controverted;
    - c. Prove control, if controverted; or
    - d. Prove impeachment.

PRACTICE TIP # 4 – BE PREPARED TO MASK PHOTOGRAPHS OR REDACT DOCUMENTS THAT SHOW OR MEMORIALIZE A SUBSEQUENT REMEDIAL MEASURE; BUT ONCE AN EXCEPTION TO EXCLUSIONARY RULE HAS BEEN SATISFIED, THEN BE PREPARED TO USE EVIDENCE THAT IS UNMASKED OR NOT REDACTED

- C. Evidence of Offers to Settle or Conduct/Settlements Made in Negotiations Regarding a Claim if Offered for a Different Purpose IRE 408(b)
  - 1. Otherwise discoverable evidence presented in settlement negotiations may be admissible.
  - 2. For example, a party may offer such evidence in proving a witness' bias or prejudice, negating an assertion of undue delay, establishing bad faith, or proving an effort to obstruct.

PRACTICE TIP # 5 – ALWAYS SEEK ADVANCE RULING, SIDE BAR OR VOIR DIRE OF A WITNESS ON YOUR USE OF TESTIMONIAL OR DOCUMENTARY EVIDENCE THAT WILL DISCLOSE SETTLEMENT NEGOTIATIONS OR AGREEMENTS

D. Inadmissibility of Pleas, Plea Discussions, and Related Statements - IRE 410

This rule has undergone significant change since its initial adoption in 2010/2011. The language that discusses the circumstances when the statements are admissible has been withdrawn. Careful attention should be addressed to the change in language and the circumstances of inadmissibility.

- E. Insurance Against Liability Is Generally Inadmissible IRE 411; However, It May Be Admissible When Offered to Prove:
  - 1. Agency
  - 2. Ownership
  - 3. Control
  - 4. Bias or Prejudice of the witness

PRACTICE TIP # 6 – SINCE THIS EVIDENCE CAN BE INCENDIARY, BE SURE YOU HAVE AN ADVANCE RULING, SIDE BAR OR VOIR DIRE OF A WITNESS CONCERNING LIABILITY INSURANCE

F. Evidence of Other Offenses in Criminal Cases – IRE 413

This rule is a new addition to the IRE in October 2015. It provides for admissibility of the defendant's commission of other offenses in specific criminal prosecutions under specific provisions of the Illinois Code of Criminal Procedure.

- VI. WHAT TYPE OF EVIDENCE IS SPECIFICALLY INADMISSIBLE BECAUSE IT IS CONSIDERED LEGALLY IRRELEVANT
  - A. Character Evidence and Evidence of Other Wrongs/Acts Not Admissible to Prove Conduct IRE 404
    - 1. 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 IRE 404(a)
    - 2. The first two exceptions to this rule only apply to an accused or an alleged victim in a criminal case IRE 404(a)(1) & (2)
    - 3. The remaining exception allows evidence of the truth-telling character of a witness as provided for in IRE 607, 608 and 609 IRE 404(a)(3)
    - 4. Evidence of other wrongs/acts see IRE 404(b) and IRE 405(b)(1) & (2).
  - B. Subsequent Remedial Measures IRE 407

The draft rule provided as follows:

When, (1) after an injury or harm allegedly caused by an event, or (2) after manufacture of a product but prior to an injury or harm allegedly caused by that product, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is

not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or for purposes of impeachment.

The rule was rejected by the Illinois Supreme Court. Divergent Illinois cases should be consulted to determine admissibility in products liability cases.

- C. Conduct, Statements, Offers or Acceptances in Settlement Negotiations Are Inadmissible When Offered to Prove IRE 408:
  - 1. Liability for injury
  - 2. Invalidity
  - 3. Amount of disputed claim
  - 4. Or impeach with prior inconsistent statements

PRACTICE TIP # 7 - CHALLENGE THE ADMISSIBILITY OF EVIDENCE ABOUT SETTLEMENT NEGOTIATIONS THROUGH MOTIONS IN LIMINE SINCE RAISING THE OBJECTION DURING TRIAL WILL ONLY BRING ATTENTION TO THE INADMISSIBLE EVIDENCE

- D. Payment of Medical/Similar Expenses Is Inadmissible IRE 409 735 ILCS 5/8-1901 This rule codifies a very explicit statute.
- E. Presence or Absence of Liability Insurance to Show Whether Person Acted Wrongfully or Negligently Is Inadmissible IRE 411

PRACTICE TIP # 8 – STOCK MOTIONS IN LIMINE WILL USUALLY HANDLE PROBLEMS RE INSURANCE; HOWEVER, WITNESSES MUST BE ADVISED THAT INADVERTENT OR INTENTIONAL BLURTING OUT OF THIS EVIDENCE CAN RESULT IN A MISTRIAL

F. Prior Sexual Activity or Reputation as Evidence - IRE 412

Like IRE 413, this new rule was added in October 2015. It provides that evidence of the sexual activity of a person alleged to be a victim of a sexual offense is inadmissible in criminal and civil cases, unless the evidence meets certain statutory exceptions.

#### VII. TESTIMONIAL EVIDENCE

- A. Witnesses are Presumed to be Competent IRE 601
- B. Witnesses Must Have Personal Knowledge IRE 602 and Lay Witnesses May Be Permitted to Give Lay Opinions IRE 701
  - 1. Foundation for personal knowledge may, but need not, be laid through the witnesses' own testimony

PRACTICE TIP # 9 – USE EVIDENTIARY FOUNDATION OUTLINES OR HANDBOOKS TO ENSURE YOU HAVE LAID SUFFICIENT FOUNDATION FOR A WITNESS' TESTIMONY, ESPECIALLY DOCUMENTS AND PHOTOGRAPHS

2. Unless they are expert witnesses

PRACTICE TIP # 10 – AS INDICATED IN PRACTICE TIP # 1, USE IPI 2.02, 2.04 AND 3.07 TO INSTRUCT JURY THAT BASES OF EXPERT OPINIONS ARE NOT ADMITTED SUBSTANTIVELY

- 3. Cross examination of a witness on matters about which the witness lacks knowledge is often improper, but a litany of "I don't knows" may establish lack of credibility if the witness is being evasive.
- C. Witnesses Must Provide "Truthful" Testimony After Declaring to Do So by Oath/Affirmation IRE 603
- D. Certain Witnesses Have Special Rules
  - 1. Interpreters IRE 604
  - 2. Judges may not testify IRE 605
  - 3. **Jurors IRE 606** 
    - a Jurors may not testify at trial
    - b. Post-Verdict rules

A juror's affidavit testimony to support an attack on or "invalidate" the jury's verdict may be on the following topics:

- (1) Whether any extraneous prejudicial information was improperly brought to jury's attention;
- (2) Whether any extraneous prejudicial information was improperly brought to bear upon any juror; or

(3) Whether there was a mistake in entering the verdict onto the verdict form.

Upon an inquiry into the "validity" of a verdict or indictment, jurors may not testify about:

- (1) Any matter or statement occurring during the course of the jury's deliberations, or
- (2) To the effect of anything upon that or any other juror's mind or emotions as influencing the juror assent or dissent to the verdict or indictment, or
- (3) Concerning the juror's mental processes in connection therewith.

PRACTICE TIP # 11 - IN VOIR DIRE/JURY SELECTION, ALWAYS ASK OR COMMENT UPON THE REQUIREMENT THAT JURORS NOT CONSULT WITH ANY "13<sup>TH</sup> JUROR" - ANOTHER PERSON, INTERNET, SCENE VISIT, OR OTHER REFERENCES - OR ANY ELECTRONIC INFORMATION

- E. Testimony May Be Attacked (or in some cases bolstered)
  - 1. A Witness' Credibility May Be Impeached By Anyone IRE 607
    - a. Witness may be impeached with prior inconsistent statement without the necessity of confronting the witness IRE 613
    - b. Except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon the showing of "affirmative damage"

The intent of this rule is to prevent the sham of calling a witness for the purpose of presenting to the jury a favorable prior inconsistent statement that is not admissible substantively. However, the rule is inapplicable if the prior inconsistent statement is otherwise admissible substantively. See IRE 613(c).

- c. Moreover, "affirmative damage" need not be shown if
  - i. Admission by party opponent -801(d)(2)
  - ii. Hearsay exceptions: at last count 22 out of 24 listed exceptions 803
- d. In summary, with one limitation, any party may impeach the credibility of any witness. See SCR 238.

- 2. Credibility of Witness May Be Attacked or Supported By Opinion or Reputation Testimony but this rule is subject to two limitations:
  - a. Evidence may only refer to character "for truthfulness or untruthfulness"; these words were added to the title of IRE 608 in January 2015.
  - b. But evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence IRE 608
  - c. The FRE 608(b) Impeachment by "Prior Bad Acts" Rule was not adopted by IRE.
  - d. In Illinois, a witness may not be cross-examined about (1) specific instances of the witness' own conduct related to truthfulness or (2) specific instances of conduct related to the truthfulness or untruthfulness of another witness. The "specific-act" impeachment method is not permitted in Illinois.
  - e. Moreover, Illinois does not permit proof of specific instances of conduct by extrinsic evidence to support or attack a witness' character for truthfulness e.g. cannot testify that a witness is an "inveterate liar" or that lawyer was suspended from the practice of law.
  - f. However, for purposes of attacking general credibility, Illinois permits inquiry about a witness' disreputable occupation (prostitute) or narcotics addiction at time of testifying or at time of event. Query Will there be any new disreputable occupations or criminal propensities recognized by common law or the new rules? Query How is "general credibility" any different than "character for untruthfulness"?
- 3. Credibility of Witness May Be Attacked with Conviction of a Crime IRE 609 so long as it is
  - a. No more than 10 years old (end of sentence to time of trial) and involves either (1) an offense where the punishment involves death or confinement for more than 1 year or (2) any offense involving dishonesty or false statement
  - b. Unless unfair prejudice substantially outweighs probative value of the evidence.
  - c. The original Comment to IRE 609, which discussed the Illinois Supreme Court cases of People v. Montgomery and People v. Harris, was withdrawn in January 2015.

PRACTICE TIP # 12 - IN SCR 213, SCR 214, AND SCR 237 REQUESTS, ASK OPPONENT TO DISCLOSE WHETHER ANY WITNESS HAS A CONVICTION THAT SATISFIES IRE 609 OR IF THERE IS ANY WITNESS WHO WILL OFFER ANY OPINION OR REPUTATION TESTIMONY ABOUT ANOTHER WITNESS' CREDIBILITY OR CHARACTER

- F. Credibility May Not Be Attacked or Bolstered by Religious Beliefs or Opinions of the Witness 610
- G. Use of Documents in Testimonial Evidence
  - 1. A <u>writing</u> to refresh recollection/memory must be produced at the hearing for inspection, cross exam or admission by adverse party IRE 612. It is the trial court's duty to order disclosure, no matter how.

Note: this rule only addresses the option of an adverse party when a witness uses a <u>writing</u> to refresh his or her memory; it does not affect the practice of refreshing a witness' memory.

2. When examining a witness about a prior statement, neither statement nor its contents needs to be shown or disclosed to witness – but on request opposing counsel may be shown statement – IRE 613(a)

PRACTICE TIP # 13 - IN SCR 237 REQUEST, ASK THAT OPPONENT PRODUCE ANY PRIOR STATEMENT BEFORE EXAMINING THE WITNESS ABOUT THE STATEMENT; USE SCR 214 REQUEST BEFORE TRIAL TO OBTAIN COPIES OF PRIOR STATEMENTS OF ANY OF YOUR EXPERT WITNESSES PURSUANT TO IRE 613

- 3. Extrinsic Evidence of Prior Inconsistent Statement Not Admissible IRE 613(b) unless
  - a. Witness explains or denies
  - b. Opposing party can question the witness
  - c. Justice requires
  - d. Unless the cross-examiner asks the witness about the statement and gets an unequivocal "Yes, I said that," then the questioner must prove up the impeaching statement.
  - e. Opportunity to explain or deny or question on the statement does not apply if the statement is one of a party-opponent (previously referred to as an "Admission."

PRACTICE TIP # 14 – IF YOUR OPPONENT TRIES TO OFFER INTO EVIDENCE A PRIOR INCONSISTENT STATEMENT OF A WITNESS, ENSURE YOU SEEK A HEARING TO ALLOW YOU TO QUESTION AND ALLOW WITNESS TO EXPLAIN OR DENY THE STATEMENT BEFORE IT IS ADMITTED AS "EXTRINSIC EVIDENCE" OF IMPEACHMENT.

- H. Mode and Order of Interrogation
  - 1. Court control IRE 611(a)
    - a. Ascertain truth
    - b. Avoid needless time
    - c. Protect witnesses from harassment/embarrassment
  - 2. Direct/Cross/Additional Cross as if on Direct if Beyond Scope IRE 611(b)
  - 3. The scope of cross examination is to be limited to the subject matter of the direct examination and matters affecting the credibility of the witness (with October 2015 new language) which include matters within the knowledge of the witness that:
    - a. explain
    - b. qualify
    - e. discredit or
    - d. destroy

the witness's direct testimony. Added to IRE on October 15, 2015.

- 4. Leading questions on cross, not direct unless necessary to develop testimony IRE 611(e)
- 5. Hostile/unwilling/adverse witness may he lead IRE 611(c), 735 ILCS 5/2-1102

PRACTICE TIP # 15 -- REMEMBER THAT AFTER YOU EXAMINE YOUR PARTY OPPONENT AS AN ADVERSE WITNESS, YOUR OPPONENT MUST ASK QUESTIONS AS IF ON DIRECT EXAMINATION

I. The Court May Ask Questions of Witness – 614

PRACTICE TIP #16 - CONSIDER ALLOWING JURORS TO ASK QUESTIONS OF WITNESSES - SEE IPI 1.01 (Par. 15), 7<sup>TH</sup> CIRCUIT PROCEDURE AND JUDGE WOLFSON'S PROCEDURE

- J. Exclusion of Witnesses at Request of a Party or on Court's Own Order IRE 615 unless
  - 1. Party is a natural person
  - 2. Officer or employee of party
  - 3. Person shown to be essential to party's case
  - 4. Person authorized by law to be present

PRACTICE TIP # 17 - IF YOU ARE REPRESENTING AN ORGANIZATION BUT THE KEY PERSON WITH KNOWLEDGE IS NO LONGER AN EMPLOYEE, ASK FOR PERMISSION TO ALLOW HIS/HER ATTENDANCE DURING TRIAL

- K. Lay and Expert Opinion Testimony
  - 1. Lay Opinion Testimony IRE 701
    - a. Rationally based on witness' perception
    - b. Helpful to clear understanding of witness' testimony or factual determination
    - c. Not based on IRE 702 (Expert testimony)
  - 2. Expert May Testify in Form of Opinion IRE 702
    - a. If knowledge will assist jury to understand evidence or determine a fact in issue, then
    - b. A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise. Use IPI 3.08

PRACTICE TIP # 18 – CONSIDER CONDUCTING A VOIR DIRE OF THE WITNESS ON IIIS/HER QUALIFICATIONS AFTER YOUR OPPONENT PROFFERS THE WITNESS AS AN EXPERT IF YOU BELIEVE THE EXPERT'S QUALIFICATIONS ARE WEAK AND WILL HELP CAST DOUBT ON EXPERT'S OPINIONS

c. If opinion based on "new or novel scientific methodology or principle," then the *Frye - Donaldson* General Acceptance rule applies and a IRE 104(a) hearing should be conducted as early as possible.

The Frye-Donaldson "General Acceptance" rule provides that:

Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

- 3. Bases of Opinion Testimony IRE 703
  - a. Facts or data may be those perceived by or made known to the expert at or before the hearing
  - b. If of type reasonably relied upon by experts in the field, they need not be admissible in evidence IRE 703
  - c. Query Since IRE did not adopt the last sentence of FRE 703 (not present when Wilson v. Clark adopted FRE 703 in 1981), does the trial court have to conduct a 403 balancing test analysis to allow disclosure to the jury of inadmissible evidence? Can the inadmissible evidence be used on direct examination?

PRACTICE TIP # 19 – SEEK AN IRE 403 HEARING AND TENDER IPI 2.04 OR MODIFIED IPI 2.04 INSTRUCTION ABOUT HOW AND WHY THE BASES OF AN EXPERT'S TESTIMONY SHOULD NOT BE DISCLOSED AND/OR CONSIDERED AS SUBSTANTIVE EVIDENCE

- 4. Opinion or Inference Testimony May Embrace an Ultimate Issue to be Decided by a Jury IRE 704
- 5. Expert May Testify by Opinion or Inference IRE 705
  - a. Without first testifying to underlying data, unless required by court
  - b. But may be required on cross examination to disclose underlying facts or data
- 6. No provision for Court Appointed Experts in IRE, but SCR allow appointment of impartial medical/psychological examiner SCR

215(d) – Query – Are IME's really impartial and independent experts?

7. Although IRE did not adopt FRE 706(d) – Parties' Experts of Own Selection – Illinois case law allows parties discretion to choose, disclose, and abandon their own experts, with the caveat that no one "owns" an expert witness. People v Speck.

#### VIII. HEARSAY

#### A. Definitions

- "Hearsay" is a person's oral or written assertion or assertive non-verbal conduct ("Statement"), other than one made by the person making the statement ("declarant") while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted (801(a),(b), and (c)) IRE 801; it includes the situation when the declarant is on the witness stand.
- 2. A statement is not hearsay if it is a "statement" by a party opponent offered against a party and is:
  - a. Party's own statement, or
  - b. A statement a party manifested an adoption or belief in its truth, or
  - c. Statement by person authorized by party to make the statement, or
  - d. Statement by party's agent/employee concerning matter within scope of agency/employment and made during existence of relationship
  - e. Statement of eo-conspirator, or
  - f. Statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party IRE 801

Note: Although 801(d)(2) refers to "Admission[s] by Party-Opponent," the rule allows substantive admissibility to statements made by party opponents which are not necessarily classic "admissions" or "statements against interest" when they were made.

PRACTICE TIP # 20 - ASK FOR IRE 801(d) NON-HEARSAY STATEMENTS OR "ADMISSIONS" IN DISCOVERY REQUESTS

- 3. Oft forgotten point for purposes of hearsay analysis, it is irrelevant that the witness is both the out-of-court declarant and the witness.
- B. Hearsay is not admissible except as provided by IRE, other SCR, or statute IRE 802 or if the "statement" is an exception to the rule of inadmissibility, even though the declarant is available as a witness IRE 803:
  - 1. Present sense impression (RESERVED) IRE 803(1)

Illinois has never recognized the present sense impression exception to the hearsay rule. Some cases have discussed it in limited circumstances. The FRE provides that "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible as a present sense impression.

2. Excited utterance and then existing mental, emotional or physical condition – IRE 803(2) & (3)

Illinois courts previously referred to these as the "spontaneous declaration" and "state of mind" exceptions.

3. Statements for purpose of medical diagnosis or treatment - IRE 803(4)

The advocate will need to consider whether the words used were necessary for purpose of medical diagnosis or treatment, especially where the statement comments on a previous event that may be important to an issue in a case.

The IRE is different from the FRE in that statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial are not admissible in Illinois courts as exceptions to the hearsay rule. For example, the exception does not apply to an examining physician. Consequently, the admissibility of such statements will need to be analyzed for their admissibility as admissions.

4. Recorded recollection – IRE 803(5)

Unlike FRE 803(5), the new Illinois rule allows the trial court to receive a recorded recollection into evidence, as opposed to just reading it to the jury, when requested by the proponent of the recorded recollection, not just an adverse party.

5. Business records, public records, absences of such records and vital statistics – IRE 803(6), (7), (8), (9) & (10)

Note: 725 ILCS 5/115-5.1 allows records kept in the ordinary course of business related to medical examinations on deceased persons or autopsies in both civil and criminal actions.

However, 735 ILCS 5/8-2201 prohibits admissibility of evidence related to a coroner's verdict to prove any fact in controversy in a civil action.

- 6. Religious and/or family records IRE 803(11), (12), & (13)
- 7. Property, ancient, and commercial documents IRE 803(14), (15), (16) & (17)
- 8. Learned treatises (RESERVED) IRE 803(18)

Some commentators contend that adoption of FRE 803(18) would have represented a substantive change from Illinois appellate law. Others, like Professor Graham, contend that the appellate eases which preclude specific reference to learned treatises on direct examination are wrongly decided. Trial judges are divided on allowing experts to testify to the contents of IRE 703 "learned treatise" materials. Irrespective of whether the learned treatise material is quoted or referenced on direct or cross examination, the learned treatise references may not be admitted substantively, either as direct evidence when used to inform the jury of the basis of an expert's opinion, or when used for impeachment.

PRACTICE TIP # 21 – CONSIDER THE USE OF AN IMMEDIATE LIMITING INSTRUCTION WHEN AN OPPOSING EXPERT TESTIFIES ABOUT INFORMATION APPEARING IN A LEARNED TREATISE – ASSUMING THE EXPERT WITNESS IS ALLOWED TO DO SO; BE PREPARED FOR SUCII AN INSTRUCTION AFTER YOU CROSS EXAMINE YOUR OPPOSING EXPERT WITNESS WITH A LEARNED TREATISE

- 9. Reputation re: family, boundaries, history and character 803(19), (20) & (21)
- 10. Judgments -803(22) and (23)
- II. Receipt or paid bill 803(24)

This rule has no counterpart in FRE and adopts the common law rule that receipts or paid bills are prima facie evidence of fact of payment and that the charge was reasonable.

C. Special Rules apply to Hearsay Exceptions if the Declarant is Unavailable – IRE 804

- 1. Unavailability includes
  - a. Claim of privilege
  - b. Refuses to testify despite court order
  - c. Testifies to a lack of memory
  - d. Death, physical or mental infirmity
  - e. Absent or unable to procure attendance by process or other means
- 2. Unavailability Does Not Exist Where Unavailability is Due to Procurement or Wrongdoing of the Proponent of a Statement for Purpose of Preventing Witness from Attending or Testifying
- 3. If Declarant is Unavailable, then the Following Statements Are Not Excluded by Hearsay Rule
  - a. Former testimony at another hearing (where opportunity to develop testimony) or discovery deposition as provided by SCR 212(a)(5)

Note: SCR 212(a)(5) was amended on 12/8/2010, effective 1/1/2011, to provide that the discovery deposition of a party who is unavailable due to death or infirmity is admissible for cases filed on or after 1/1/2011. But the comments of the amended rule note that discovery depositions of unavailable parties should be admitted in "rare, but compelling" circumstances – ones that would be "extremely limited." The prohibition of using the discovery deposition of a controlled expert's discovery deposition continues.

- b. Dying declaration only applies in a homicide case
- c. Statement against interest
- d. Statement of personal or family history
- e. Forfeiture by wrongdoing
- D. Hearsay Within Hearsay is Admissible IRE 805
- E. Attacking and Supporting Credibility of Declarant IRE 806
- F. Unlike FRE 807, there is no "catch-all" or "residual" exception rule that allows a court to determine the trustworthiness of other hearsay statements.

There are a few statutes applicable in criminal and civil cases that consider the interaction with the Constitution's Confrontation Clause.

#### IX. AUTHENTICATION AND ADMISSIBILITY OF CERTAIN EVIDENCE

- A. Extrinsic Evidence Authentication Requirements are Described by Illustration IRE 901
  - 1. Witness with knowledge IRE 901(b)(1)
  - 2. Non-expert handwriting opinion IRE 901(b)(2)
  - 3. Comparison and distinctive characteristics IRE 901(b)(3)&(4)
  - 4. Voice identification and telephone conversations IRE 901(b)(5)&(6)
  - 5. Records and reports public and ancient IRE 901(b)(7)&(8)
  - 6. Processes, systems, approved methods IRE 901(b)(9)
- B. Self Authentication Does Not Require Extrinsic Evidence IRE 902 When:
  - 1. Public, official, newspaper, periodicals, and other enumerated documents IRE 902 (1) (10)
  - 2. Certified business records IRE 902(11)
    - a. Made at or near the time of occurrence by person with knowledge
    - b. Kept in course of regularly conducted activity
    - c. Made by regularly conducted activity as a regular practice, accompanied by written declaration under oath
    - d. The Committee Commentary indicates that self authentication of business records is provided by IRE 902(11), following the model of FRE and 18 USC 3505.

PRACTICE TIP #22 – CONSIDER ASKING OPPOSING PARTIES IN DISCOVERY REQUESTS AND NON-PARTIES IN DEPOSITIONS UPON WRITTEN INTERROGATORIES (AS IS DONE IN TEXAS) FOR SELF AUTHENTICATED, CERTIFIED AND READILY ADMISSIBLE BUSINESS RECORDS

3. Subscribing Witness' Testimony Is Unnecessary – IRE 903

#### X. WRITINGS, RECORDINGS AND PHOTOGRAPHS

A. Definitions of Writings, Recordings, Photographs, Originals and Duplicates – IRE 1001

PRACTICE TIP #23 - USE IRE 1001 DEFINITIONS IN DISCOVERY REQUESTS

- B. Original is Required Except as Otherwise Provided IRE 1002
- C. Duplicates Are Admissible IRE 1003 -Unless
  - 1. Genuine question of authenticity
  - 2. Unfair to admit duplicate in place of original

PRACTICE TIP #24 – REACH A RECIPROCAL AGREEMENT WITH YOUR OPPONENT ABOUT NO NEED TO AUTHENTICATE ANY RECORDS – UNLESS THERE IS A QUESTION OF THE AUTHENTICITY OF PARTICULAR DOCUMENTS

- D. Other Evidence of Contents of Writing, Recording or Photograph Is Admissible IRE 1004 if
  - 1. Original lost or destroyed
  - 2. Original not obtainable
  - 3. Original in opponent's possession
  - 4. No controlling issue related
- E. Public Records May Bc Proved By Copy IRE 1005
- F. Summaries, Admissions and Testimony May Also Prove Up the Contents of a Writing, Record or Photograph IRE 1006
- G. Testimony or Written Admission of a Party May Prove Up the Contents of Writings, Recordings or Photographs Regardless of Nonproduction of the Original IRE 1007
- H. Court's and Jury's Functions In Determining Contents If There Is an Issue of (1) Whether Asserted Writing Ever Existed, (2) Whether Another Writing, Recording or Photograph at Trial Is the Original, or (3) Whether Other Evidence Reflects the Original's Contents, the Jury Decides These Issues of Fact Court Determines If Condition of Fact Under IRE 104(a) Is Fulfilled.

#### USEFUL REFERENCES FOR THE ILLINOIS RULES OF EVIDENCE

- 1. Graham's Handbook of Illinois Evidence, 2016 Edition
- 2. Retired Appellate Justice Gino L. Divito's Color-Coded Guide with Comparison of IRE with FRE and Illinois Common Law, Statutes and Supreme Court Rules online at www.tdrlawfirm.com
- 3. IICLE Seminar on the Illinois Rules of Evidence by Retired Justice Warren Wolfson and Professor Thomas Mauet (formerly of Hinshaw & Culbertson)
- 4. Federal Rules of Evidence and appellate cases interpreting those rules
- 5. Other states' rules of evidence that mimic the Federal Rules of Evidence and appellate cases interpreting those rules
- 6. Evidence manuals and annotated practice handbooks that track the Federal Rules of Evidence

PRACTICE TIP #25 – IN THE WORDS OF THE DESK SERGEANT ON HILL STREET BLUES AT THE CONCLUSION OF THE MORNING ROLL CALL – "LET'S BE CAREFUL OUT THERE" AND "WATCH OUT FOR THE STEALTH RULES OF EVIDENCE"

Carl Fisher's 25 Practice Tips in Using the Illinois Rules of Evidence

PRACTICE TIP#1-HAVE "LIMITED PURPOSE" INSTRUCTIONS READY FOR IMMEDIATE USE BY A TRIAL JUDGE IF YOU ARE OBJECTING TO EVIDENCE THAT THE JUDGE DECIDES IS ADMISSIBLE FOR A LIMITED PURPOSE. WHEN AN EXPERT WITNESS TESTIFIES ABOUT EVIDENCE THAT IS NOT OTHERWISE ADMITTED DURING THE TRIAL (see IRE 104(a) and IRE 703), USE IPI 2.04 and 3.08.

PRACTICE TIP # 2 – BE PREPARED TO OFFER UP MORE COMPLETE EXCERPTS FROM THE WITNESS' PRIOR STATEMENTS OR DEPOSITION TESTIMONY IF YOUR OPPONENT IS SELECTING A STATEMENT OUT OF CONTEXT

PRACTICE TIP#3 – ASK YOUR TRIAL OPPONENTS TO PROVIDE ADVANCE NOTICE OF ANY ADJUDICATIVE FACTS FOR WHICH THEY WILL SEEK JUDICIAL NOTICE AND BE PREPARED TO ADVISE THE COURT AND YOUR OPPONENT IN ADVANCE OF ANY SUCH ADJUDICATIVE FACTS FOR WHICH YOU SEEK JUDICIAL NOTICE

PRACTICE TIP# 4 – BE PREPARED TO MASK PHOTOGRAPHS OR REDACT DOCUMENTS THAT SHOW OR MEMORIALIZE A SUBSEQUENT REMEDIAL MEASURE; BUT ONCE AN EXCEPTION TO EXCLUSIONARY RULE HAS BEEN SATISFIED, THEN BE PREPARED TO USE EVIDENCE THAT IS UNMASKED OR NOT REDACTED

PRACTICE TIP # 5 – ALWAYS SEEK ADVANCE RULING, SIDE BAR OR VOIR DIRE OF A WITNESS ON YOUR USE OF TESTIMONIAL OR DOCUMENTARY EVIDENCE THAT WILL DISCLOSE SETTLEMENT NEGOTIATIONS OR AGREEMENTS

PRACTICE TIP # 6 – SINCE THIS EVIDENCE CAN BE INCENDIARY, BE SURE YOU HAVE AN ADVANCE RULING, SIDE BAR OR VOIR DIRE OF A WITNESS CONCERNING LIABILITY INSURANCE

PRACTICE TIP # 7 – CHALLENGE THE ADMISSIBILITY OF EVIDENCE ABOUT SETTLEMENT NEGOTIATIONS THROUGH MOTIONS IN LIMINE SINCE RAISING THE OBJECTION DURING TRIAL WILL ONLY BRING ATTENTION TO THE INADMISSIBLE EVIDENCE

PRACTICE TIP#8 – STOCK MOTIONS IN LIMINE WILL USUALLY HANDLE PROBLEMS RE INSURANCE; HOWEVER, WITNESSES MUST BE ADVISED THAT INADVERTENT OR INTENTIONAL BLURTING OUT OF THIS EVIDENCE CAN RESULT IN A MISTRIAL

PRACTICE TIP#9 – USE EVIDENTIARY FOUNDATION OUTLINES OR HANDBOOKS TO ENSURE YOU HAVE LAID SUFFICIENT FOUNDATION FOR A WITNESS' TESTIMONY, ESPECIALLY DOCUMENTS AND PHOTOGRAPHS

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PRACTICE TIP#13 – IN SCR 237 REQUEST, ASK THAT OPPONENT PRODUCE ANY PRIOR STATEMENT BEFORE EXAMINING THE WITNESS ABOUT THE STATEMENT; USE SCR 214 REQUEST BEFORE TRIAL TO OBTAIN COPIES OF PRIOR STATEMENTS OF ANY OF YOUR EXPERT WITNESSES PURSUANT TO IRE 612

PRACTICE THP # 14 ~ IF YOUR OPPONENT TRIES TO OFFER INTO EVIDENCE A PRIOR INCONSISTENT STATEMENT OF A WITNESS, ENSURE YOU SEEK A HEARING TO ALLOW YOU TO QUESTION AND ALLOW WITNESS TO EXPLAIN OR DENY THE STATEMENT BEFORE IT IS ADMITTED AS "EXTRINSIC EVIDENCE" OF IMPEACHMENT

PRACTICE TIP# 15 – REMEMBER THAT AFTER YOU EXAMINE YOUR PARTY OPPONENT AS AN ADVERSE WITNESS, YOUR OPPONENT MUST ASK QUESTIONS AS IF ON DIRECT EXAMINATION

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PRACTICE TIP # 19 – SEEK AN IRE 403 HEARING AND TENDER IPI 2.04 OR MODIFIED 1PI 2.04 INSTRUCTION ABOUT HOW AND WHY THE BASES OF AN EXPERT'S TESTIMONY SHOULD NOT BE DISCLOSED AND/OR CONSIDERED AS SUBSTANTIVE EVIDENCE

PRACTICE TIP # 20 - ASK FOR IRE 801(d) NON-HEARSAY STATEMENTS OR "ADMISSIONS" IN DISCOVERY REQUESTS

PRACTICE TIP# 21 – CONSIDER THE USE OF AN IMMEDIATE LIMITING INSTRUCTION WHEN AN OPPOSING EXPERT TESTIFIES ABOUT INFORMATION APPEARING IN A LEARNED TREATISE; BE PREPARED FOR SUCH AN INSTRUCTION AFTER YOU CROSS EXAMINE YOUR OPPOSING EXPERT WITNESS WITH A LEARNED TREATISE

PRACTICE TIP #22 – CONSIDER ASKING OPPOSING PARTIES IN DISCOVERY REQUESTS AND NON-PARTIES IN DEPOSITIONS UPON WRITTEN INTERROGATORIES (AS IS DONE IN TEXAS) FOR SELF AUTHENTICATED, CERTIFIED AND READILY ADMISSIBLE BUSINESS RECORDS

PRACTICE TIP #23 – USE IRE 1001 DEFINITIONS IN DISCOVERY REQUESTS

PRACTICE TIP #24 – REACHA RECIPROCAL AGREEMENT WITH YOUR OPPONENT ABOUT NO NEED TO AUTHENTICATE ANY RECORDS – UNLESS THERE IS A QUESTION OF THE AUTHENTICITY OF PARTICULAR DOCUMENTS

PRACTICE TIP #25 – IN THE WORDS OF THE DESK SERGEANT ON HILL STREET BLUES AT THE CONCLUSION OF THE MORNING ROLL CALL – "LET'S BE CAREFUL OUT THERE" AND "WATCH OUT FOR THE STEALTH RULES OF EVIDENCE

#### **Course Evaluation Form**

Title of Course: "THE STEALTH RULES OF EVIDENCE" (What You Don't Know Will Hurt You)

Date of Course: October 25, 2016 Loca	ation: The T	Thompso	on Cer	nter /	Asse	emb	ly H	all	_	
<b>Directions</b> : On a scale of 1 to 5, (5 being the higher rate the program:	est o <b>r</b> best ar	nd 1 being	the lov	vest c	r wo	rst),	pleas	e		
Rate how well this course satisfied your personal objectives 5 4  Comments:					4	3	2	1		
Rate how well the environment contributed to the Comments:				5	4	3	2	1		
Rate how well the written materials contributed Comments:				5	4	3	2	1		
Rate the level of significant intellectual, education Comments:				5	<b>4</b> –	3	2	1		
		<del> </del>								
Please rate the faculty using the same 1 5 scale:	Overall T Effectiv	Effectiveness Teaching Meth							al or	
Name: JUSTICE WARREN WOLFSON	5 4 3	2 1	5 4	1 3	2	1	5	4	3	2 1
Comments:										
Name: MR. CARLTON FISHER	5 4 3	2 1	5 4	1 3	2	1	5	4	3	2 1
Comments:										
					_			-		
SUGGESTIONS FOR FUTURE										
SEMINARS:								<del></del>	_	

### THE STEALTH RULES OF **EVIDENCE**

Justice Warren D. Wolfson Mr. Carlton D. Fisher

October 25, 2016

## RELEVANT EVIDENCE

...means evidence having any tendency to make the existence or nonexistence 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.

III. R. Evid. 401 (eff. Jan. 1, 2011)

#### RELEVANT

- Purpose!
- Why is it offered?
- For what?
- To do what?

#### RELIABLE

Personal Knowledge and Foundation - Rule 602

Lay and Expert Opinions - Rule 701 - 705

Hearsay and Non-Hearsay - Rule 801 - 806

Authenticity - Rule 900 +

Original Writings - Rule 1000 +

Dead Man's Act

#### RIGHT

Unfair Prejudice, jury confusion, time-wasting - Rule 403

Subsequent Remedial Measures - Rule 407

Compromise and Offers to Compromise - Rule 408

Payment of Medical and Similar Expenses - Rule 409

### RIGHT cont.

Pleas, Plea Discussion, Related Statements - Rule 410

Liability Insurance – Rule 411

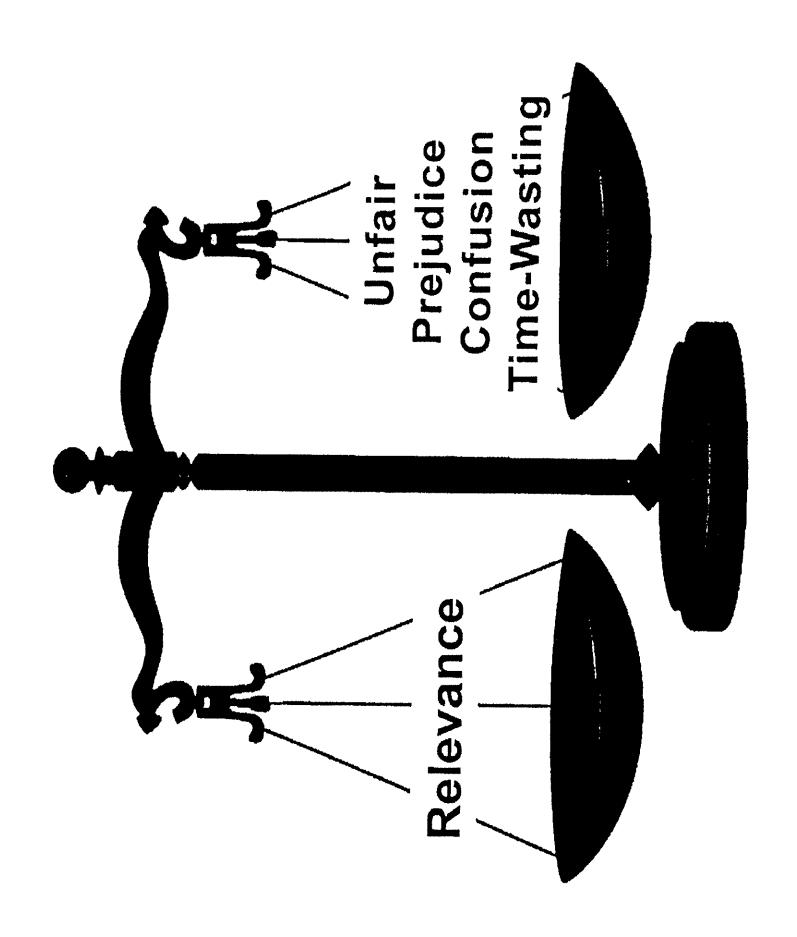
Victim's Past Behavior in Sex Offense Cases - Rule 412

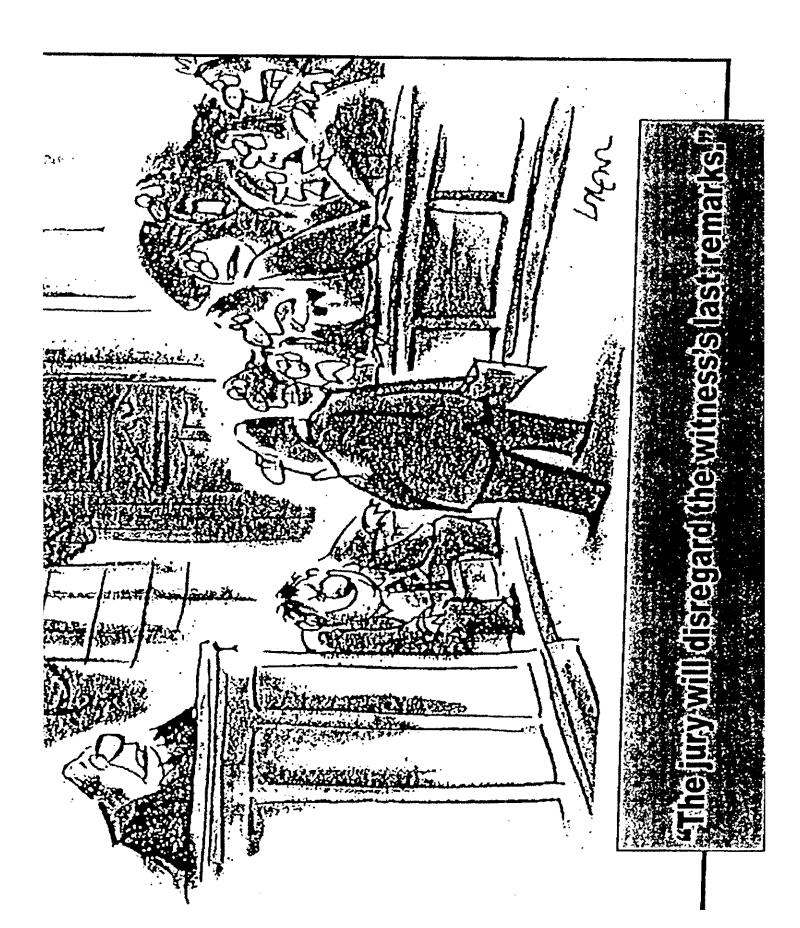
Privileges – Rule 501-502

## **EXCLUSION OF RELEVANT** EVIDENCE

Although relevant, evidence may be excluded if its of unfair prejudice, confusion of the issues, or misleading of probative value is substantially outweighed by the danger the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

III. R. Evid. 403 (eff. Jan. 1, 2011)





# ON JUDICIAL DISCRETION

"The discretion of a judge is the law of tyrants...

In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable."

Lord Camden, CJ <u>The King v. Almon</u> 5 Geo. 3 (Hillary Term, 1765) (Point: There is nothing new under the sun.)

## Practice Tips

Mr. Carlton D. Fisher



## "Not So New" Illinois Rules of Evidence What You Need to Know About the

## Judge Lynn Egan & Justice Warren Wolfson October 25, 2016 Evidence Seminar with

Carlton D. Fisher, FACTL Hinshaw & Culbertson LLP 222 N. LaSalle Street, Suite 300 Chicago, IL 60601 cfisher@hinshawlaw.com

#### Overview



#### The Law of Evidence in Illinois Has Been Codified and Modernized in the Illinois Rules of Evidence Why Not Use The Rules?

## Useful References for the Illinois Rules of Evidence



- Graham's Handbook of Illinois Evidence, 2016 Edition
- Gino Divito's Colorcoded Guide with Comparison Online at www.tdrlawfirm.com
- Warren Wolfson and Professor Thomas Mauet (formerly of **IICLE Seminar on the Illinois Rules of Evidence by Justice** Hinshaw & Culbertson)
- Federal Rules of Evidence and appellate cases interpreting those rules
- State rules of evidence that mimic the Federal Rules of Evidence and appellate cases interpreting those rules
- Evidence manuals and annotated practice handbooks that track the Federal Rules of Evidence

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## **Preliminary Questions**



Ask Preliminary Questions of Qualifications, Privilege, Admissibility

- 1. Court can address preliminary questions -IRE 104(a)
- Allow evidence subject to its relevancy being "tied up" - IRE 104(b)
- But see IRE 1101(b)(1) rules suspended

# What the Rules Allow You to Do



# Have Evidence Admitted for a Limited Purpose

- 1. Upon request, Court admits
- evidence IRE 105
- Instructs the jury IPI 2.02 and 3.07

## Limited Purpose



## PRACTICE TIP #1

DECIDES IS ADMISSIBLE FOR A LIMITED PURPOSE **ARE OBJECTING TO EVIDENCE THAT THE JUDGE** EVIDENCE THAT IS NOT OTHERWISE ADMITTED HAVE "LIMITED PURPOSE" INSTRUCTIONS READY FOR IMMEDIATE USE BY A TRIAL JUDGE IF YOU DURING THE TRIAL (SEE IRE 703), USE IPI 2.02 WHEN AN EXPERT WITNESS TESTIFIES ABOUT AND 3.07. HINSHAW

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## **Contextual Completeness**



Require Contextual Completeness

- other parts of a writing or recorded statement Adverse party may require introduction of - IRE 106
- with adverse party's selected writing or statement. fairness" be considered contemporaneously This contextual completeness requirement applies if the other statements "ought in
- This requirement is not limited to one document or the same document.
- SCR 212(c) applies a similar principle for the use or reading of other parts of a deposition.



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## **Contextual Completeness**



## PRACTICE TIP #2

**YOUR OPPONENT IS SELECTING A STATEMENT** STATEMENTS OR DEPOSITION TESTIMONY IF BE PREPARED TO OFFER UP MORE COMPLETE **EXCERPTS FROM THE WITNESS' PRIOR OUT OF CONTEXT** 

## **Judicial Notice**



Short Cut Proof by Having Court Take Judicia Notice of Adjudicative Facts – IRE 201

- A fact not subject to reasonable dispute
- Generally known within the territorial jurisdiction of the Circuit Court
- whose accuracy cannot reasonably be determination by resort to sources Capable of accurate and ready questioned

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## **Judicial Notice**



- May be accepted by court / shall if party requests
- Opportunity to be heard and then have jury informed they shall accept it as conclusive

## **Judicial Notice**



## **PRACTICE TIP #3**

FACTS FOR WHICH THEY WILL SEEK JUDICIAL COURT AND YOUR OPPONENT IN ADVANCE NOTICE AND BE PREPARED TO ADVISE THE ADVANCE NOTICE OF ANY ADJUDICATIVE ASK YOUR TRIAL OPPONENTS TO PROVIDE OF ANY SUCH ADJUDICATIVE FACTS FOR WHICH YOU SEEK JUDICIAL NOTICE HINSHAW

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## **Different Purposes for Subsequent** Remedial Measures



Subsequent Remedial Measures Are Still Inadmissible Unless They Are

Offered to Prove:

- Ownership, if controverted
- Control, if controverted
- Feasibility or design/repair, if
- controverted
- 4. Impeachment

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# Subsequent Remedial Measures



Inadmissible to Prove Negligence, Culpable Conduct, Product Defect, Design Defect, Need for Warning or Instruction When Subsequent Remedial Measures Are Measures Are Taken

- 1. After an Injury/Harm
- After Manufacture But Prior to Injury

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## Mask or Redact



## **PRACTICE TIP #4**

THEN BE PREPARED TO USE EVIDENCE THAT IS **EXCLUSIONARY RULE HAS BEEN SATISFIED,** BE PREPARED TO MASK PHOTOGRAPHS OR **MEMORIALIZE A SUBSEQUENT REMEDIAL** MEASURE; BUT ONCE AN EXCEPTION TO REDACT DOCUMENTS THAT SHOW OR **UNMASKED OR NOT REDACTED** 

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## Settlement Negotiations – Different **Purpose**



Conduct/Settlements Made in Negotiations Regarding a Claim if Offered for a Different Evidence of Offers to Settle or Purpose - IRE 406

- Proving a witness' bias or prejudice
- Negating an assertion of undue delay
- 3. Establishing bad faith
- Proving an effort to obstruct

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# **Be Careful Mentioning Settlements**



## PRACTICE TIP #5

TESTIMONIAL OR DOCUMENTARY EVIDENCE ALWAYS SEEK ADVANCE RULING, SIDE BAR OR VOIR DIRE OF A WITNESS ON YOUR USE OF THAT WILL DISCLOSE SETTLEMENT **NEGOTIATIONS OR AGREEMENTS** 

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### **Different Purposes for Offering Evidence of Liability Insurance**



**Jnder IRE 411, Insurance Against Liability** when Offered to Prove:

1. Agency

Ownership

3. Control

4. Bias or Prejudice of the Witness

# **Avoid Mentioning Insurance**



## PRACTICE TIP #6

SURE YOU HAVE AN ADVANCE RULING, SIDE SINCE THIS EVIDENCE CAN BE INCENDIARY, BE CONCERNING LIABILITY INSURANCE **BAR OR VOIR DIRE OF A WITNESS** 

## Settlement Negotiations



Conduct, Statements, Offers or Acceptances in Settlement Negotiations when Offered to Prove - IRE 408:

- 1. Liability for injury
- 2. Invalidity
- Amount of disputed claim, or
- Impeach with prior inconsistent statements

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## Settlement Negotiations



## PRACTICE TIP #7

SINCE RAISING THE OBJECTION DURING TRIAL **EVIDENCE THROUGH MOTIONS IN LIMINE** CHALLENGE THE ADMISSIBILITY OF SUCH WILL ONLY BRING ATTENTION TO THE **INADMISSIBLE EVIDENCE** 

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## Liability Insurance



### PRACTICE TIP #8

INADVERTENT OR INTENTIONAL BLURTING OUT OF THIS EVIDENCE CAN RESULT IN A STOCK MOTIONS IN LIMINE WILL USUALLY HANDLE THIS PROBLEM; HOWEVER, WITNESSES MUST BE ADVISED THAT MISTRIAL

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## Foundation Questions



### PRACTICE TIP #9

**USE EVIDENTIARY FOUNDATION OUTLINES OR** TESTIMONY, ESPECIALLY DOCUMENTS AND SUFFICIENT FOUNDATION FOR A WITNESS' HANDBOOKS TO ENSURE YOU HAVE LAID **PHOTOGRAPHS** 

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## **Testimonial Evidence**



## PRACTICE TIP #10

2.04 AND 3.07 TO INSTRUCT JURY THAT BASES AS INDICATED IN PRACTICE TIP #1, USE IPI 2.02, OF EXPERT OPINIONS ARE NOT ADMITTED SUBSTANTIVELY

## Jurors' Affidavits



### **Jurors - IRE 606**

- a. Jurors may not testify at trial
- Post-Verdict Rules: Jurors' affidavit testimony may include -
- Extraneous prejudicial informationjury
- Extraneous prejudicial informationjuror
- iii. Verdict mistake



### The "13th" Juror



## PRACTICE TIP #11

IN VOIR DIRE/JURY SELECTION, ALWAYS ASK OR **COMMENT UPON THE REQUIREMENT THAT** JUROR" – ANOTHER PERSON, INTERNET, JURORS NOT CONSULT WITH ANY "13TH SCENE VISIT, OR OTHER REFERENCES

### **HINDHAW**

## Attacking Testimony



Credibility of Witness May Be Attacked with Conviction of a Crime – IRE 609

- a. More than 10 years
- b. Felony- death or more than 1 year
- c. Dishonesty/false statement
- Unless prejudice outweighs probative value

# **Discovery About Testimony**



## PRACTICE TIP #12

ASK OPPONENT TO DISCLOSE WHETHER ANY WITNESS HAS A CONVICTION THAT SATISFIES IN SCR 213, SCR 214, AND SCR 237 REQUESTS, IRE 609 OR IF THERE IS ANY WITNESS WHO WILL OFFER ANY OPINION OR REPUTATION **TESTIMONY** 

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# **Documents and Testimonial Evidence**



Use of Documents in Testimonial Evidence

- 1.W<u>riting</u> to refresh recollection/memory must cross exam or admission by adverse party be produced at the hearing for inspection, **IRE 612**
- needs to be shown or disclosed to witness but statement, neither statement nor its contents on request opposing counsel may be shown 2.When examining witness about a prior statement - IRE 613(a)

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# **Documents and Testimonial Evidence**



## PRACTICE TIP #13

STATEMENT; USE SCR 214 REQUEST BEFORE PRODUCE ANY PRIOR STATEMENT BEFORE IN SCR 237 REQUEST, ASK THAT OPPONENT STATEMENTS OF ANY OF YOUR EXPERT **EXAMINING THE WITNESS ABOUT THE** TRIAL TO OBTAIN COPIES OF PRIOR WITNESSES PURSUANT TO IRE 613

## Extrinsic Evidence of Prior Inconsistent Statements



Statement Not Admissible - IRE 613(b) -**Extrinsic Evidence of Prior Inconsistent** Unless

- Witness explains or denies
- Opposing party can question the witness
- c. Justice requires



### **Extrinsic Evidence of Prior** Inconsistent Statement



## **PRACTICE TIP #14**

**QUESTION AND ALLOW WITNESS TO EXPLAIN** STATEMENT OF A WITNESS, ENSURE YOU IF YOUR OPPONENT TRIES TO OFFER INTO SEEK A HEARING TO ALLOW YOU TO EVIDENCE A PRIOR INCONSISTENT OR DENY THE STATEMENT

# Mode and Order of Interrogation



## Mode and Order of Interrogation

- Court control IRE 611(a)
- . Ascertain truth
- b. Avoid needless time
- Protect witnesses harassment/embarrassment
- Direct/Cross/Additional Cross as if on Direct if Beyond Scope - IRE 611(b)
- Leading questions on cross, not on direct unless necessary to develop testimony - IRE 611(c)
- Hostile/unwilling/adverse witness may be lead IRE

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## PRACTICE TIP #15

YOUR PARTY OPPONENT AS AN ADVERSE WITNESS, YOUR OPPONENT MUST ASK REMEMBER THAT AFTER YOU EXAMINE **QUESTIONS AS IF ON DIRECT EXAMINATION** 

# Jurors' Questions To Witnesses



## **PRACTICE TIP #16**

QUESTIONS OF WITNESSES — SEE IPI 1.01 (Par. 15), 7<sup>TH</sup> CIRCUIT PROCEDURE AND JUSTICE **CONSIDER ALLOWING JURORS TO ASK WOLFSON'S PROCEDURE** 

## Witness Exclusion



**Exclusion of Witnesses at Request of a Party** or On Court's Own Order - IRE 615 - Unless

- 1. Party is a natural person
- Officer or employee of party
- Person shown to be essential to party's
- Person authorized by law to be present

## Persons at Counsel Table



## PRACTICE TIP #17

IF YOU ARE REPRESENTING AN ORGANIZATION BUT THE KEY PERSON WITH KNOWLEDGE IS NO LONGER AN EMPLOYEE, ASK FOR PERMISSION TO ALLOW HIS/HER ATTENDANCE DURING TRIAL

# Lay and Expert Opinion Testimony



# Lay and Expert Opinion Testimony

Juxtaposed with SCR 213(f) (1), (2) and (3) The 700 Series Rules Should Be

## Lay Opinion Testimony



## Lay Opinion Testimony - IRE 701

- Rationally based on witness'
- perception
- Helpful to clear understanding of witness' testimony or factua determination
- Not based on IRE 702 (Expert testimony)

## **Expert Opinion Testimony**



Expert May Testify in Form of Opinion

understand evidence or determine a If knowledge will assist jury to fact in issue But if opinion based on "new or novel scientific methodology or principle" then the *Frye - Donaldson* General Acceptance Rule applies

## Voir Dire A Weak Expert



## PRACTICE TIP #18

WITNESS ON HIS/HER QUALIFICATIONS AFTER YOUR OPPONENT PROFFERS THE WITNESS AS QUALIFICATIONS ARE WEAK AND WILL HELP CONSIDER CONDUCTING A VOIR DIRE OF THE AN EXPERT IF YOU BELIEVE THE EXPERT'S CAST DOUBT ON EXPERT'S OPINIONS

### *Frye-Donaldson* General Acceptance Rule



based on a new or novel scientific methodology based is sufficiently established to have gained or principle, the proponent of the opinion has Where an expert witness testifies to an opinion general acceptance in the particular field in the burden of showing the methodology or scientific principle on which the opinion is which it belongs. HINSHAW

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# **Bases of Opinion Testimony**



# Bases of Opinion Testimony - IRE 703

- perceived by or made known to the expert at or before the hearing Facts or data may be those
- If of type reasonably relied upon by be admissible in evidence - IRE 703 experts in the field, they need not

## **IRE 703 and IRE 403**



## PRACTICE TIP #19

SEEK AN IRE 403 HEARING AND TENDER IPI 2.04 OR MODIFIED IPI 2.04 INSTRUCTION ABOUT HOW AND WHY THE BASES OF AN EXPERT'S **TESTIMONY SHOULD NOT BE DISCLOSED** AND/OR CONSIDERED AS SUBSTANTIVE EVIDENCE

### Ultimate Issue



### Opinion or Inference Testimony on an Ultimate Issue - IRE

ultimate issue to be decided by the trier of "Testimony in the form of an opinion or objectionable because it embraces an inference otherwise admissible is not

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# What An Ultimate Issue Is Not



Who should win the lawsuit

Violations of the Law

Law and Fact – See Professor Graham's Treatise Certain Questions of Law or Mixed Questions of

# What Does IRE 704 Mean?



Can an Expert opine about anything else?

outright, should there be any limitation on an Since a jury can reject an expert's opinion expert's expressed opinions? Can an expert ever usurp the role of the jury or the judge in the expression of his or her opinions?

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### Are certain words or expressions permissible or impermissible?



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"Failed to yield the right of way"

"Caused the collision/plaintiff's damages"

"Unreasonably Dangerous product"

"Defective Product"

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# What about these words?



Negligent

**Proximate Cause** 

Remote Cause

Coincidental Cause

Foreseeable

Probable

Likely

Cause in Fact

Legal Cause

Responsible Cause

**But For Cause** 

Unforeseeable

Improbable

Unlikely

## No Party Owns An Expert



# Although IRE Did Not Adopt FRE 706(d)

choose, disclose and abandon their Illinois case law allows parties to own experts With caveat that no one "owns" an expert witness – *People v. Speck* 

### Obtain Hearsay Statements in Discovery



## PRACTICE TIP #20

### ASK FOR NON-HEARSAY STATEMENTS OR "ADMISSIONS" IN DISCOVERY REQUESTS

### Learned Treatise Exception (IRE 803(18) is "Reserved")



Admissible as an Exception to Hearsay Rule If:

- (A) Called to the attention of expert on crossexamination (or relied upon on direct/redirect)
- (B) The Treatise/Publication is established as "Reliable" by:
- (1) Expert's testimony
- Another expert's testimony (2)
- (3) Judicial notice

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# What Is A "Learned Treatise"



- Publication is primarily for experts
- .. Publication is impartial
- Publication is subject to scrutiny or
- exposure for inaccuracy
- Reputation of the publication's author is at stake
- The publication is a treatise, article, study, website reference, or videotape

### HINSHAW

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### When Is A Journal Article or Website or Other **Publication Not A Learned Treatise?**



- It's Advice from Grandma in a Collection of **Guidelines or Comments on Behavior**
- a caveat that the "Rules of the Road" Do Not State DMV Driver's Handbook Pamphlet with Supercede Motor Vehicle Laws
- Website's Statements Are Addressed to the **General Public**
- Reliability and Authorship of Website Statements **Cannot Be Independently Established**

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## Examine with Learned Treatise Statement? What Foundation Must Be Laid in Order to



- Expert must be on the witness stand
- Proving Statement Is Reliable Subject to Proponent of Statement Has Burden of IRE 104(a) and possibly IRE 403
- Publications Must Be Established Separate from the Editor's or Collector's Publication "Articles" or "Statements" within
- Expert on Cross or Direct/Judicial Notice

### HINSHAW

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# What Does the Jury Hear and See?



The jury can hear the statement.

The statement is not published.

The statement does not go into the jury deliberation room.

### Limiting Instruction – Learned Treatises



## PRACTICE TIP #21

MMEDIATE LIMITING INSTRUCTION WHEN INSTRUCTION AFTER YOU CROSS EXAMINE YOUR OPPOSING EXPERT WITNESS WITH A INFORMATION APPEARING IN A LEARNED TREATISE; BE PREPARED FOR SUCH AN AN OPPOSING EXPERT TESTIFIES ABOUT ONCE AGAIN, CONSIDER THE USE OF AN LEARNED TREATISE

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## **Certified Business Records**



## PRACTICE TIP #22

**DISCOVERY REQUESTS AND NON-PARTIES IN** FOR SELF AUTHENTICATED, CERTIFIED AND INTERROGATORIES (AS IS DONE IN TEXAS) READILY ADMISSIBLE BUSINESS RECORDS **CONSIDER ASKING OPPOSING PARTIES IN DEPOSITIONS UPON WRITTEN** 

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# IRE 1001 Definitions in Discovery



## PRACTICE TIP #23

USE IRE 1001 DEFINITIONS IN DISCOVERY REQUESTS

### Writings, Recordings, Photographs **Originals and Duplicates**



## PRACTICE TIP #24

REACH A RECIPROCAL AGREEMENT WITH YOUR THERE IS A QUESTION OF THE AUTHENTICITY **AUTHENTICATE ANY RECORDS – UNLESS** OPPONENT ABOUT NO NEED TO OF PARTICULAR DOCUMENTS

## **Summaries of Writings**



Summaries May Prove Up the Contents of Writings – IRE 1006 Consider Using Them for Voluminous Records such as Medical Records or Other Business Records



## Word to the Wise



## PRACTICE TIP #25

IN THE WORDS OF THE DESK SERGEANT ON HILL STREET BLUES AT THE CONCLUSION OF THE MORNING ROLL CALL -

"LET'S BE CAREFUL OUT THERE"