MONTHLY SEMINAR SERIES

46TH Session:

HEARSAY: EVERYTHING YOU DIDN'T KNOW

Justice Stuart E. Palmer (Ret.)
Judge Jeffrey L. Warnick

November 17, 2016

JUDGE STUART E. PALMER

Justice Stuart Palmer was initially appointed to the Circuit Court of Cook County in 1994 and served in the Criminal Division until 2005, when he moved to the Chancery Division, presiding over a call of over 400 complex matters. In January 2012, the Illinois Supreme Court assigned him to the Appellate Court, where he served until his retirement in 2016. He is currently assisting parties as a mediator with JAMS in Chicago.

Justice Palmer frequently serves as a lecturer and faculty member for judicial education seminars and events. He also served as Chair of the Supreme Court Committee responsible for the writing and publication of the Illinois Judicial Benchbook on Criminal Law & Procedure, which was published in 2009. He was also appointed by the Supreme Court to the Special Supreme Court Committee on Capital Cases.

Prior to his judicial career, Justice Palmer worked as an Assistant State's Attorney in Cook County, serving as a felony trial assistant. In this capacity, he prosecuted several capital murder cases, as well as other violent felony cases.

Justice Palmer received his B.A. in 1976 from the University of Illinois, graduating *cum laude* and Phi Beta Kappa. He received his *juris doctor* from Northwestern University School of Law in 1979.

Judge Jeffrey L. Warnick

In 2009, Judge Warnick was appointed an Associate Judge and began serving downtown in traffic court. In 2010, he was transferred to the Chancery Division and heard substantial commercial litigation and mortgage foreclosure cases. In 2011, Judge Warnick was re-assigned to the Second Municipal District in Skokie and jointly assigned to Law Division where he typically handled civil and criminal bench and jury trials. In the last several years, Judge Warnick has also handled felony bond hearings, preliminary hearings, and summary suspension hearings. Since 2015, he has managed his own felony trial courtroom for all felonies that occur in the northern suburbs These include bench and jury trials of sexual offenses, violent and property crimes as well as a "cold case" murder that happened over 28 years ago and was solved with DNA.

Judge Warnick joined Crystal, Heytow & Warnick in 1988 and specialized in insurance coverage, liability defense and fire / construction related litigation. After 20 years of private practice, in 2008, Warnick became a partner at Prusik, Selby, Daley & Kezelis. Throughout his career in private practice for over 20 years. he developed an expertise in fraud, fire and construction litigation, insurance coverage cases in Chancery and Law Divisions, liability, subrogation litigation and investigations, He represented clients throughout the State of Illinois, Indiana, and was also a trial member of the federal bar and the Seventh Circuit Court of Appeals.

During his career in private practice, Warnick received numerous awards and recognition for his work in the fields of arson and fire litigation. For nearly 20 years, he taught seminars sponsored by IAAI, IACAP, Western Loss Association and Northwestern University to State's Attorneys, private attorneys, fire investigators, state fire marshals, and police regarding the prosecution and litigation of arson cases.

Warnick served as an Assistant State's Attorney from 1979 until 1988. Among his significant jury trials were *People v. Jang Bae* (the arson-triple murder of 3 Chicago firefighters), and *People v. Leonard Kidd*, (involving the murder of 10 children). As an ASA, he tried well over 50 felony jury trials and hundreds of bench trials . He served as supervisor of the Arson Unit in the Special Prosecutions Bureau following years as a first chair in the Felony Trial Division.

Judge Jeffrey L. Warnick graduated from the University of Illinois at Champaign-Urbana in 1975. He attended IIT-Kent College of Law and graduated in 1978. During law school, Warnick served as a law clerk for Mayor Richard J. Daley where he gained invaluable experience on the city of Chicago and it's municipal officials.

Years ago as a prosecutor, Warnick attended training for NITA trial advocacy instruction at Harvard Law School. He has taught trial advocacy at numerous seminars and as a judge, he has volunteered liberally for judging Moot Court competitions as well as practice sessions for the Loyola Law School National Moot Court team.

SECTION A

- *Illinois Hearsay, Etc.*, by Judges Stuart E. Palmer (Ret.) & Jeffrey L. Warnick, November 2016.

Illinois Hearsay, Etc.

Hon. Stuart E. Palmer (Ret.)
Hon. Jeffrey L. Warnick

Evidence Scenario

On February 14, two years ago, three pedestrians were standing on the sidewalk at the intersection of Main and Elm. Each was waiting to cross Main Street. Their names are AA, BB, and CC. The intersection is controlled by traffic light signals.

Each saw a white van traveling eastbound on Elm Street collide with a blue Chevrolet traveling northbound on Main Street. The driver of the Chevrolet, Sam Smith, suffered serious injury. The van was driven by Joe Jones. It had the words "Acme Quick Delivery" printed in large letters on both sides.

One of the pedestrians reported the collision to the police department. Officer Peter Patrick arrived at the scene about ten minutes after the collision. He talked to Joe Jones, AA, BB, and CC. Smith was unconscious and could not talk.

AA, BB, and CC each told Officer Patrick that the white van was traveling "at a high rate of speed," about 45-50 miles an hour; each said the white van went through a red signal light before striking the blue Chevrolet. At the time he spoke to Officer Patrick, AA was very upset, shaking, tearful, and speaking loudly. BB and CC seemed calm and composed. Officer Patrick filled out his report at the scene. It included the oral witness statements and the demeanor of the witnesses.

Officer Patrick then spoke to the van driver, Joe Jones. Jones said he entered the intersection on the green light and was not going more than 30 mph, the speed limit. He said he was employed by Acme to deliver packages. On the previous day the foreman at Acme told him he had to speed up his deliveries because he was taking too long and customers were complaining. He also said he was behind schedule at the time of the collision. All of this was written in Patrick's report.

Sam Smith filed a personal injury lawsuit against Joe Jones and Acme Quick Delivery. It contained counts alleging negligence by Acme's agent, Jones, that Acme is legally responsible for, and negligent hiring of Jones by Acme. Acme admitted Jones was its agent at the time of the collision, but denied all other allegations in the plaintiff's lawsuit.
After the lawsuit was filed, the following happened:

1) AA suffered a fatal stroke before being deposed or giving any other statement.
2) BB and CC were deposed six months before trial. Each was asked:

Q: What did you see just before the collision?

Each answered: "I saw the white van go through the red light at a high rate of speed, at about 45 miles an hour, and then hit the blue Chevrolet."

3) The van driver, Joe Jones was deposed five months before trial.
There were these questions and answers:

Q: How fast were you going just before the collision?

A: About 30 miles an hour, the speed limit.

Q: What color was the light when you entered the intersection?

A: It was green when I entered and green when I collided with the blue Chevrolet.

Q: Isn't it true that the day before the accident you received a ticket for speeding in that same area and that you pled guilty to that charge when you went to court?

A: That's true. I had to speed, I was behind schedule.

Q: And isn't it true that when you were hired by Acme three years ago you told the hiring manager that you had been convicted of speeding four times in the previous two years?

A: That's true.

Q: Did your foreman ever tell you that you had to speed up because customers were complaining about late deliveries?

A: No. He never said that.

At trial, the following happened:

1) The plaintiff calls Officer Patrick to the stand. After a foundation of time, place, and parties present is established he is asked:

Q: Before AA spoke, how did he appear to you?

A: He was very upset, shaking, tearful, and speaking loudly.

Q: What did he say?

P: Objection, calls for hearsay.

Ruling?

2) If Officer Patrick reviews his report but cannot remember what AA said. Can the plaintiff offer that portion of Patrick's report that contains AA's Statement?

P then asks:

Q: Do you remember what BB and CC told you?

A: Yes.

Q: Please tell the jury what each of them said?

D: Objection, calls for hearsay.

Ruling?

Can BB and CC take the stand and testify to what each one told
the police officer at the scene within 15 minutes after the collision?

Suppose that at his deposition CC testifies that just before the accident, BB calmly turned to him and said, "Look at that fool in the white van, he's going through a red light at about 45 miles per hour."

The defendant's file a motion in limine to bar that testimony. Ruling?

See: Rules 801, 803(2), 803(5), 803(8) and Supreme Court Rule 236(b)

3) P asks Officer Patrick:

Q: What did your dispatcher say to you when he directed you to the scene of the collision?

A: He said someone was injured when a white van went through a red light at a high rate of speed.

P: I object. That's hearsay.

Ruling?

4) During Officer Patrick's testimony he is asked:

Q: When you spoke to the van driver, Joe Jones, did you observe his appearance?
A: I can't remember that. It was too long ago.

In Patrick's report, written at the scene, there is a portion that asks: "Condition of drivers."
Patrick wrote: "Driver of Chevrolet is unconscious. Driver of white van appears tired and

fatigued, his eyes close on occasion."
Patrick is shown that portion of the report, but still cannot remember Jones' condition at the time. He is asked:

Q: Is that portion of the report based directly on your personal observation?

A: Yes.

Q: Is that the kind of observation you would generally make when investigating a traffic collision?

A: Yes. It is.

P: Your Honor, I offer into evidence as Plaintiff's Exhibit 5 that portion of Officer Patrick's report that refers to Jones' condition at the scene.

D: I object. That's hearsay and there is no proper foundation and police accident reports are not admissible in evidence in civil cases.

Ruling?

See: Rules 403, 803(5), 803(6), 803(8), Supreme Court Rule 236(b)

5) While Officer Patrick is on the stand, P asks:

Q: Did you talk to Joe Jones at the scene of the collision?

A: Yes.

Q: Did he tell you anything about his delivery schedule?

A: Yes. He said on the previous day his foreman at Acme told him he had to speed up his deliveries, that he was taking too long, and customers were complaining. He also said he was behind schedule at the time of the collision.

D: I object. That is hearsay, irrelevant, and unfairly prejudicial.

Ruling?

See: Rules 401 403, 801

6) When the defense cross-examination of Officer Patrick begins, D says:

"Your Honor, I would like to read to the jury the following question and answer from Jones' deposition:

Q: Did your foreman ever tell you that you had to speed up because customers were complaining about late deliveries?
A: No. He never said that."
P: I object. That is hearsay and irrelevant.
Ruling?
See: Rules 401, 801, 106 and 806

7) Joe Jones left Acme two months before trial began. He cannot be found. P voluntarily dismisses him from the lawsuit before trial.

The plaintiff offers that part of Joe Jones' deposition where he admits receiving a ticket for speeding on the day before the collision in the same area and that he pled guilty to it. P also offers the court record of Jones' guilty plea to that speeding charge. The record shows an Acme-retained lawyer represented him in the traffic court.

D: I object. That is irrelevant and hearsay as to Acme, and improper character evidence.

Ruling? Does D have any other good faith objection the trial judge ought to consider?

8) P calls BB to the stand. He is asked:

Q: On February 14, two years ago, were you at the intersection of Elm and Main just before a two-car collision?

A: I don't remember.

Q: What?

A: I don't remember anything about that day.

Q: Well, when you testified at your deposition six months ago were you asked this question and did you give this answer under oath:

"Q: What did you see just before the collision?

A: I saw a white van go through the red light at a high rate of speed, at about 45 miles an hour, and then hit the blue Chevrolet."?

D: I object. That is hearsay and there is no foundation for it.

Ruling?
See: Rules 801(d) (1) (A), 607, 701

9) P calls CC to the stand. He is asked whether he saw the collision at Main and Elm streets on February 14, two years ago. His answer:

"Yes, and I saw the white van go through the intersection at a high rate of speed and through the red light when he collided with the blue Chevrolet."

On cross-examination, D asks CC:

Q: Isn't it true that four weeks ago the plaintiff invited you and your wife to spend the weekend at his vacation home in Cancun, Mexico, at no cost to you - - including air fare?
A: Yes, that is true. And we had a fine time.

On redirect P asks CC questions about his statement to Officer Patrick at the scene of the collision and his testimony at his deposition, both statements consistent with his trial testimony on direct examination.

D: I object. This is inadmissible hearsay.

Rulings?
Would it make a difference if the Cancun weekend took place a month before CC's deposition?

See: Rule 801, Proposed Rule 613(c) (to be provided), 701, 607

10) a. While testifying to his injuries the plaintiff says:

"At times I can hardly move. Just the other day I said to my wife: 'My legs hurt so much I cannot get out of bed,'"

D: I object. That is hearsay.
Ruling?

b. P calls the emergency room doctor, Dr. Bloodsoak, who treated Sam Smith on the night of the accident. Dr. Bloodsoak testifies that Smith regained consciousness in the hospital. He asked Smith how he had received his injuries, and Smith responded:

"I was driving very carefully and as I entered the intersection of Main and Elm, a white van ran the red light at a high rate of speed and hit me."

See Rules 803(3), 803(4).

11) Plaintiff calls to the stand Sydney Stern, a highly qualified accident reconstruction expert. Notice has been given that he will testify as follows:

a. When reaching his opinions, he relied on portions of Officer Patrick's police report, skid marks on the eastbound lane of Elm Street leading up to the collision, portions of the depositions of BB and CC and Joe Jones, and the Interstate Commerce Commission finding of Acme's falsified delivery records. He will testify that other experts in his field reasonably rely on this kind of information when reaching opinions.

On direct, P will ask Stern to tell the jury the contents of those parts of the police report, depositions, and Interstate Commerce Commission report he relied on.

D: I object. This is inadmissible hearsay.
Ruling?

See: Rules 105, 702, 703, 705

b. In reaching his opinion Stern relied on a treatise entitled: "The Art of Reconstruction," 7th edition, 2012, written by Kenneth Black, a highly renowned reconstruction expert. The book is "the most authoritative and reliable existing publication dealing with accident reconstruction."

On direct, P will show the Kenneth Black treatise to the witness and ask:

Q: Please read to the jury the words in this treatise that you relied on to reach your opinions in this case?

D: I object. This is hearsay and unfairly prejudicial.

See: Rules 403, 803-18, 703, 705

12) On cross-examination D shows Stern the Kenneth Black treatise and asks:

On page 222 of this treatise does Kenneth Black say this: "Accident reconstruction experts should refrain from testifying to opinions or conclusions that are not based on their own first-hand observations."

P: I object. This is based on hearsay and speculation and is beyond the scope of the direct examination.

Ruling?

See: Rule 803-18

13) Before resting, P offers into evidence a document obtained from Acme's files during discovery. It is a letter signed by Michael Mullen, who cannot be found. The letter, dated three days before the collision, states:

"I live right near Main and Elm. For the past several days I saw your white van going way above the speed limit and going through red lights. I am writing this because yesterday I saw the van speeding through a school zone where kids were walking. You ought to do something about that."

D: I object. That is hearsay and there is no exception to it.

Ruling?

See: Rule 801, 803(6)

14) P offers a certified copy of a finding by the Interstate Commerce Commission that during the first six months of the year before the collision Acme had falsified its delivery records to reflect sufficient time between deliveries.

D: I object. This is hearsay, and it's irrelevant and improper character evidence.

Ruling?

See: Rules 401, 403, 404(a), 404(b), and 803(8)

15) Acme maintains an in-house investigative office to look into any incidents that might lead to claims or litigation. Reports made by an Acme investigator are maintained in Acme's files and are relied on to determine the cause of any personal injury or property damage involving Acme. The defense calls Robert Taylor, Acme's investigative supervisor and a former FBI agent, to testify about the making and keeping of his unit's reports. The report made in this case contains a statement from AA made one day after the accident which says the white van had the green light and was traveling at about 30 miles per hour at the time of the collision. Taylor is asked:

Q: Are your unit's investigative reports made and kept in the ordinary course of business of Acme Quick Delivery?
A: Yes.

Q: And is it in the ordinary course of Acme's business to make and keep such records?
A: Yes.

Q: I show you Defendant's Exhibit 16 for identification. What is it?
A: That's the report our unit prepared concerning the collision at Main and Elm Streets on February 14, two years ago.

D: Your Honor, I offer Defendant's Exhibit 16 into evidence as a business record of Acme Quick Delivery.

P: I object. The report contains hearsay and there is no foundation for it.

Ruling?

See: Rules 803(6), 902(11)

16) P says to jury in his final argument:

"There is no question that Joe Jones went through a red light at a high rate of speed just before he crashed into the Chevrolet driven by Sam Smith. Sydney Stern, a highly qualified accident reconstruction expert, told you about the facts he relied on to reach his opinions. He told you what AA, BB, and CC said to Officer Patrick at the scene, minutes after the collision, each one of them had watched. Each one told the officer that the white van went through the red light at a high rate of speed. What more do you need?"

D: I object. That's not the evidence.

Ruling?

See: Rules 703, 705

17) P calls the plaintiff, Sam Smith to the stand.

He testifies he cannot remember the collision. He is asked:

Q: How long have you been driving a car on the streets of this city?
A: Forty years.

Q: During those forty years, have you had occasion to approach an intersection that is controlled by a traffic light?
A: Hundreds, maybe thousands of times.

Q: Is there something you do on those occasions?
A: Yes.

Q: What do you do?
A: I slow down to make sure the light is green when I enter the intersection. I always do that.

D: I object. This is irrelevant and lacks a proper foundation.
Ruling?

See: Rules 401, 406

18) Assume that Sam Smith died as a result of this accident. Also, assume that there were no eyewitnesses. At trial, a friend of Sam Smith is called and is asked:

Q: Do you have an opinion as to whether Sam Smith was a careful person?
A: Yes, I do.

Q: What is your opinion as to whether Sam was a careful person?

D: I object, this is improper character evidence.
P: Your honor, we rely on IPI Civil No. 10.08 and the IPI committee comments.

IPI Civil (2006) No. 10.08 provides as follows:

IPI Civil (2006) No. 10.08, "Careful Habits as Proof of Ordinary Care,":
"If you decide there is evidence tending to show that the decedent was a person of careful habits, you may infer that she] was in the exercise of ordinary care for [his] own safety 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, you may consider this inference and any other evidence upon the subject of the decedent's care."

Ruling?

See: Rule 404 (a), IPI Civil (2006) No. 10.08

SECTION B

- *Powell v. Dean Foods Co., 2013 IL App (1st) 082513-B, Justice Palmer's specially concurring opinion.*

Justice PALMER, specially concurring:

¶ 145 I concur in the judgment of this court in all respects. *Inter alia*, this court holds today that the trial court abused its discretion and committed error when it gave to the jury the "careful habits" instruction found in IPI Civil (2006) No. 10.08. We held that the instruction misled the jury by instructing that they could infer that the driver exercised due care, despite the admission that she was contributorily negligent. See *supra* ¶¶ 118–28.

¶ 146 I write separately, however, to express some doubts that I have concerning the continued viability of the concept of "careful habits" evidence and thus the use of IPI Civil (2006) No. 10.08 in any case.

¶ 147 In his treatise on Illinois evidence, Professor Graham traces the historical roots of "careful habits" testimony:

"The Illinois requirement, now abolished * * *, that plaintiff in a negligence action plead and prove freedom from *contributory negligence* was applied to wrongful death actions. Accordingly, a plaintiff personal representative was confronted with a difficult problem of proof if there were no eyewitnesses to the occurrence. As a means of coping with the problem, case law evolved a procedure of allowing plaintiff to introduce evidence of careful habits of her decedent." (Emphasis added.) Michael H. Graham, Graham's Handbook of Illinois Evidence § 406.2, at 287–88 (10th ed. 2010).

¶ 148 Professor Graham, however, goes on to note that the necessity for this special procedure no longer exists with the abolition of the bar to recovery upon a finding of contributory negligence and the advent of our current system of comparative negligence:

"The decision of the Illinois Supreme Court in *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886 (1981), abolishing contributory negligence * * *, removed the necessity of plaintiff's offering careful habits testimony in its case in chief in order to avoid a directed verdict." Graham, *supra* § 406.2, at 289.

¶ 149 That being said, I believe that the term "careful habits" is actually a misnomer. This type of evidence is actually more akin to character evidence as opposed to habit evidence. Graham points out that "[w]hile habit, in contrast to character, may be defined as a settled way of doing a particular thing, [citation], the dividing line between habit and character is far from distinct." Graham, *supra* § 406.1, at 286.

" 'Habit' is more specific than 'character.' Character is a generalized description of one's disposition or of one's disposition in respect to a particular trait, such as honesty, temperance, or peacefulness." Graham, *supra* § 406.1, at 287.

¶ 150 I would add to that list of generalized dispositions the trait of carefulness. Professor Graham goes on to say:

"Evidence of a person's character or a trait of his character for the purpose of proving that he acted in conformity therewith on a particular occasion is not admissible in civil cases * * *." Graham, *supra* § 406.1, at 287.

***713 **875** Indeed, our now-adopted Illinois Rules of Evidence provide that "[e]vidence 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." Ill. R. Evid. 404(a) (eff. Jan. 1, 2011).

¶ 151 Professor Graham contrasts habit evidence as follows:

"On the other hand, * * * a person's habit or the routine practice of an organization is admitted as tending to establish that conduct on a particular occasion was in conformity therewith. Habit describes one's regular response to a repeated *specific* situation so that doing the habitual act becomes semiautomatic and extremely regular." (Emphasis added.) Graham, *supra* § 406.1, at 287.

¶ 152 Our now-adopted Illinois Rules of Evidence provide for habit evidence as follows:

"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." Ill. R. Evid. 406 (eff. Jan. 1, 2011).

¶ 153 Of importance here, Professor Graham goes on to note that "[e]vidence that one is a 'careful man' is lacking the specificity of the act becoming semiautomatic and extremely regular; it goes to character rather than habit." Michael H. Graham, Graham's Handbook of Illinois Evidence § 406.1, at 287 (10th ed. 2010).

¶ 154 Always putting a stamp on an envelope after addressing it and before mailing it is a habit, a response to a repeated *specific* situation. I believe that being a careful driver is not a response to a repeated *specific* situation but rather a more generalized description of a person's character trait. As character evidence I believe it should be inadmissible under our Rule 404(a). Therefore, as the special circumstances that spawned the concept of "careful habits" evidence no longer exist, and as I feel that this is simply character evidence, I believe the concept to no longer be viable and further that IPI Civil (2006) No. 10.08 should be discarded.

¶ 155 However, I must add that as this issue was not raised, briefed or argued by the parties, it has not entered into my decision to concur in this court's judgment.

Course Evaluation Form

Title of Course: "HEARSAY: EVERYTHING YOU DIDN'T KNOW"

Date of Course: November 17, 2016 Location: The Thompson Center Assembly Hall

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

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

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

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

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

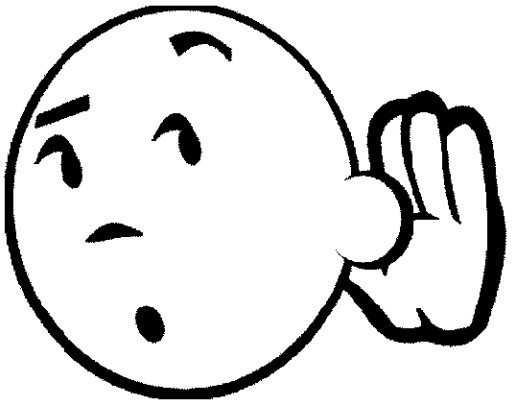
Please rate the faculty using the same 1 – 5 scale:

	Overall Teaching Effectiveness	Effectiveness of Teaching Methods	Significant Current Intellectual or Practical Content
Name: JUSTICE STUART E. PALMER(Ret.)	5 4 3 2 1	5 4 3 2 1	5 4 3 2 1
Comments:_____			
Name: JUDGE JEFFREY L. WARNICK	5 4 3 2 1	5 4 3 2 1	5 4 3 2 1
Comments:_____			

SUGGESTIONS FOR FUTURE

SEMINARS:_____

Hearsay in Illinois
and some other stuff



Hon. Stuart E. Palmer (Ret.)
JAMS
Hon. Jeffrey L. Warnick
Circuit Court of Cook County, IL

“Evidence”
2AM CLUB

Out of sight, out of mind

Finally leaving you behind

I’m doing the one thing that makes sense

And getting rid of all the Evidence

Scenarios - Background

- 2-14-2012
- AA, BB, CC: sidewalk Main and Elm, intersection controlled by traffic light signals
- Each saw white van EB Elm collide with blue Chevy NB Main
- Chevy=Sam Smith, seriously injured
- Van=Joe Jones, (Acme Quick Delivery)

Background (continued)

- Officer Patrick interviews: Jones, AA, BB, CC on scene (Smith unconscious)
- AA, BB, CC all say Van "at a high rate of speed", about 45-50 mph, went through red light and hit Chevy
- AA very upset, shaking, tearful, speaking loudly
- BB, CC calm and composed

Background (continued)

- Jones, Van driver tells Off. Patrick:
- Entered on green light, not more than 30 mph.
- Employed by Acme to deliver packages
- Day before foreman told Jones, speed up, taking too long, customers complaining
- Behind schedule
- Officer Patrick writes report at scene including statements and demeanor of witnesses

Background (continued)

- Smith sues Jones and Acme
- Negligence by Acme's agent, Jones and Negligent hiring of Jones by Acme
- Acme admits Jones agent at the time
- AA now deceased, never deposed, no other statements
- BB, CC deposed 6 mos. b/4 trial: Van "at a high rate of speed", about 45 mph, went through red light and hit Chevy

Background (continued)

- Jones deposed 5 mos. b/4 trial:
- 30 mph/speed limit
- Day before speeding ticket same area, later pled G, had to speed, behind schedule
- Told Acme, 3 yrs ago when hired, convicted speeding 4xs previous 2 yrs.
- Foreman never told me to speed up because customers complaining re late deliveries.

"Hearsay"
Alexander O'Neal

Hearsay, it's nothin' but hearsay

Because a lie's not the truth

Until you can prove it

Where'd you get that information from?

IRE 801

(c) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101.

1. Can Off. Patrick testify to what AA told him?

RULE 803.

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

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

(2) Excited Utterance. A statement relating to a *startling event or condition* made ***while*** the declarant was *under the stress of excitement* ***caused by the event or condition***.

2. P offers Off. Patrick's report for AA's forgotten statement. Ruling?

803(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies,... **excluding**, however, police accident reports.

(**S.Ct. Rule 236(b)** also excludes police accident reports from business records)

803(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

Hearsay within Hearsay

- **RULE 805.**

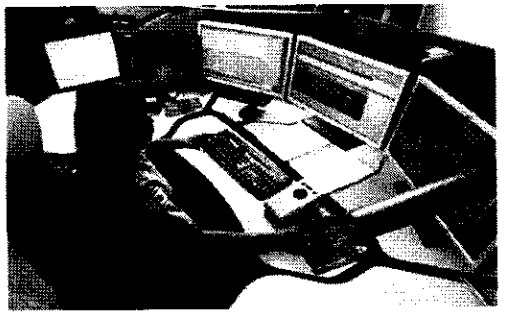
- **HEARSAY WITHIN HEARSAY**
- Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.
-

Present Sense Impression

- IRE 803 (1) is reserved! Illinois has not adopted the FRE 803(1) Present Sense Impression exception to the hearsay rule!
- (FRE 803(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.)
- But See: *P. v. Alsup*, 373 Ill. App. 3d 745 (2007)
- But But See: *P. v. Stack*, 311 Ill. App. 3d 162 (1999), DiVito, Ill. Rules of Ev. 2016, *U.S. v. Boyce*, 742 F. 3^{d} 792 (7th. Cir.)J. Posner, specially concurring.

3. P offers radio dispatch to Off. Patrick. Ruling?

- **801**(c) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, ***offered in evidence to prove the truth of the matter asserted***.
- If offered for some other purpose, such as to explain the course of investigation, how he came to the scene, then not offered for the truth of the matter asserted and thus not hearsay.



Rule 403.
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

- "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
- Too much information for the purpose it is offered can be solved by redaction.

4. P offers accident report to show D driver's condition

- Public record? Business record?
- Refresh recollection?
- Recorded recollection?
  - Foundation?
    - Once had knowledge, but now can't recollect
    - Made or adopted when fresh in memory
    - Reflects knowledge correctly.

5. P asks Off. Patrick what D said about his delivery schedule. Ruling?

- 801(d) **Statements Which Are Not Hearsay**. A statement is not hearsay if
- (2) ~~**Admission**~~ **Statement by Party-Opponent**. The statement is offered against a party and is
- (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship,

6. D then wants to read to the jury from D driver's deposition. Ruling?

RULE 806.

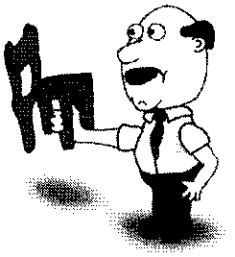
ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined ***in Rule 801(d)(2)(C), (D),*** (E), or (F), has been admitted in evidence, ***the credibility of the declarant may be attacked***, and if attacked may be supported, ***by any evidence which would be admissible for those purposes if declarant had testified as a witness.***

Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, ***is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.*** If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The Absent Declarant

The Empty Chair



7. Jones has fled to Aruba. P offers his deposition re a speeding ticket the day before. Ruling?

- 801(d) **Statements Which Are Not Hearsay**. A statement is not hearsay if
- (2) ~~**Admission**~~ **Statement by Party-Opponent**. The statement is offered against a party and is
- (D) a statement by the party's agent or servant *concerning a matter within the scope of the agency or employment, made during the existence of the relationship,*

Rule 404.
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(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 ... 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.

Rule 403.
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

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

8. P calls BB who promptly loses his memory. P wants to impeach his own witness with deposition. Ruling?

Rule 607.
WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement ***only upon a showing of affirmative damage***. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803.

The Affirmative Damage Rule, Some History

- Illinois Supreme Court Rule 238(a): The credibility of a witness may be attacked by any party, including the party calling him. (Common law voucher rule abolished). Applied to criminal cases through Ill. S. Ct. Rule 433.
- Common law imposed the requirement that affirmative damage be shown prior to impeaching one's own witness. This rule requires that the witness' testimony must affirmatively damage the case of the party that called this witness rather than simply failing to support it, in order to justify impeaching that witness with a prior inconsistent statement. The testimony must hurt the case rather than simply be disappointing.
- Affirmative damage rule now adopted by IRE 607.

What's Affirmative Damage?

Examples: Witness tells police, I saw the shooting and the deft. did it.

In court: Witness testifies he didn't see the shooting. Failure to support: disappointment that will not justify impeachment of the State's own witness.

In court: Witness testifies he saw the shooting and it wasn't the defendant. Affirmative damage that will allow the State to impeach its own witness.

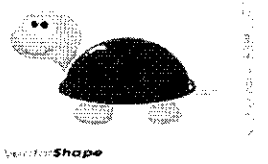
Why the requirement for affirmative damage?

- A court's witness, or any witness for that matter cannot be impeached by prior inconsistent statements unless his testimony has damaged, rather than failed to support the position of the impeaching party. The reason for this is simple: No possible reason exists to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the attention of the jury.
- Impeachment is supposed to cancel out the witness' testimony. It is only when the witness' testimony is more damaging than his complete failure to testify would have been that impeachment is useful. *People v. Weaver*, 92 Ill. 2d 545 (1982).

To Avoid the Wrongful Admission of Hearsay

To attempt to impeach your own witness simply because he failed to support your case is an attempt to bring inadmissible hearsay before the jury disguised as impeachment. The risk here is that the jury, even if instructed not to, will ascribe substantive value to this testimony.

The Turtle has to move backwards before you can move it forwards.



People v. Rolando Cruz, 162 Ill. 2d 314 (1994) *Cruz II*. Affirmed the requirement of affirmative damage, citing *Weaver*.

Also see, People v, McCarter, 385 Ill. App. 3d 919 (2008). (Combined analysis of 115-10.1 and affirmative damage rule.)

IRE 607 is not limited to criminal cases, the affirmative damage requirement applies in all cases.

What is exempted from the affirmative damage requirement?

725 ILCS 5/115-10.1 – Admissibility of Prior Inconsistent Statements – Now incorporated into IRE 801(d)(1).

Inconsistent and subject to cross and either under oath OR re an event the witness has personal knowledge (no 3rd party confessions)and signed, acknowledged under oath or recorded.

801(d)(1) - Substantively admitted inconsistent stmts, (criminal cases only)

801(d)(2) – Statements of a party opponent,

803- Exceptions to Hearsay Rule

Affirmative Damage is not required if the statement is otherwise admissible as either non-hearsay or within an exception. The risk of hearsay being snuck in under the guise of impeachment is not present.

9. P takes CC to Cancun!

Rule 613.

PRIOR STATEMENTS OF WITNESSES

- **(c) Evidence of Prior Consistent Statement of Witness.** A prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an ***express or implied charge*** that:
- (i) the witness acted **from *an improper influence or motive to testify falsely***, if that influence or motive ***did not exist*** when the statement was made; or
- (ii) the witness's testimony was ***recently fabricated***, if the statement was made ***before*** the alleged fabrication occurred.

10a.My legs hurt so much I can hardly get out of bed!

RULE 803.

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

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

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)

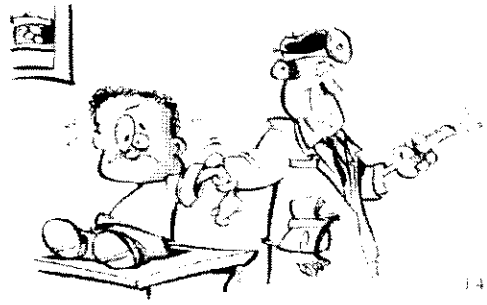
10b. Smith tells Dr. Bloodsoak what happened. Ruling?

RULE 803.

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

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

4) Statements for Purposes of Medical Diagnosis or Treatment. (A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof ***insofar as reasonably pertinent to diagnosis or treatment...***



11a. Accident reconstruction expert asked by P what he relied upon. Ruling?

Rule 703.

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. ***If of a type reasonably relied upon by experts in the particular field*** in forming opinions or inferences upon the subject, the facts or data ***need not be admissible in evidence.***

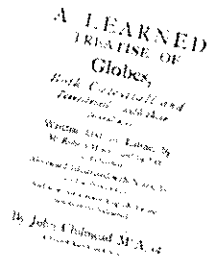
Rule 705.

DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

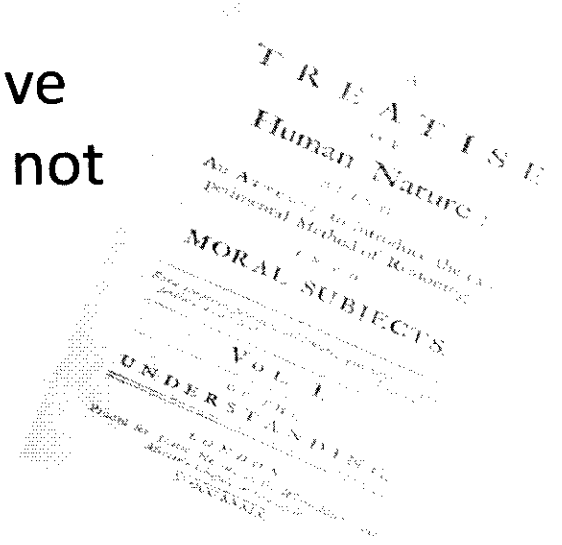
11b. P asks his expert to read from a learned treatise he relied upon. Ok?

- Illinois common law rejects a hearsay exception for learned treatises. See IRE 803(18) Reserved. [Learned Treatises] Also see FRE 803(18).
- Illinois courts are not uniform on the question of whether the contents of a learned treatise relied upon can be disclosed on direct examination. Those that allow it, do so only as non-hearsay basis of opinion with a limiting instruction.
- Let's ask Judge Lynn Egan how she handles this!



12. D crosses P's expert with the text of a learned treatise. Ruling?

Not offered on cross-examination as substantive evidence but rather for impeachment and thus not hearsay. Opponent could ask for a limiting instruction.



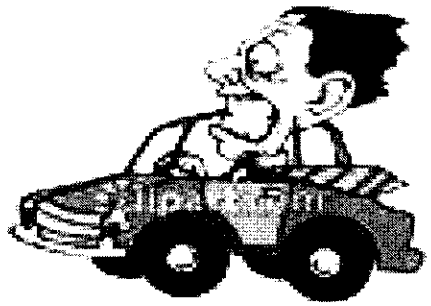
13. P offers letter from ACME files, absent citizen complained about Jones driving. Ruling?

801(d) **Statements Which Are Not Hearsay**. A statement is not hearsay if (2) ~~**Admission**~~ **Statement by Party-Opponent**. The statement is offered against a party and is (B) a statement of which the party has manifested an adoption or belief in its truth,...

Is this an adoptive admission?

Is it offered for the truth of the matter asserted or for some other purpose?

Is it fair under Rule 403?



14. P offers ICC finding of record falsifications. Ruling?

- **803(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ...
- **404(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... 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.
- **403?**

15. D offers ACME investigative report containing AA statement. Ruling?

803(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, ...***unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness,...***

Is a record made in anticipation of litigation made in the regular course of business and considered trustworthy?

Did AA have a business duty to report to the investigator and do so accurately?

Is this hearsay within hearsay?

See: Graham, *Handbook of Illinois Evidence*, Sec. 803.6, at pp. 892-895.

16. P argues that Jones ran the light based on what expert said the witnesses said. Ruling?

Rule 703.

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. ***If of a type reasonably relied upon by experts in the particular field*** in forming opinions or inferences upon the subject, the facts or data ***need not be admissible in evidence.***

Basis of opinion evidence is not admitted for the truth of the matter asserted. Therefore, this evidence must not be argued as proof of the underlying assertions. *In Re Commitment of Butler*, 2013 IL App (1st) 113606, *Wilson v. Clark*, 84 Ill. 2d 186 (1981).

17. P testifies he always slows down at an intersection. Ruling?

Rule 406.

HABIT; ROUTINE PRACTICE

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

18. P's friend testifies that P was a careful person. Ruling?

Rule 404.

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

- **(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,...
- I.P.I Civil No. 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.
- See *Powell v. Dean Foods*, 2013 IL App (1st) 082513-B, J. Palmer, specially concurring, Graham, *Handbook of Illinois Evidence*, Sec. 406.2 at pp. 287-289,DiVito, *The Illinois Rules of Evidence*, Rule 406 at pp. 585-59.

Thanks for Listening

THIS STUFF IS HARD

YOU COULD TAKE THIS THING TO TRIAL

OR

GO TO MEDIATION AND SETTLE

spalmer@jamsadr.com

jwarnick@cookcountyil.gov