The Illinois Rules of Evidence

A Color-Coded Guide Containing the New Rules,
The Committee’s General and Specific Comments,
A Comparison with the Federal Rules of Evidence,
And Additional Commentary

Including the Federal Rules of Evidence as
Amended Effective December 1, 2011

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Last Revised: January 1, 2012
Preface

On November 24, 2008, the Illinois Supreme Court announced the appointment of a broad spectrum of judges, lawyers, law professors, and legislators to serve on its newly created Special Supreme Court Committee on Illinois Evidence. The Court directed the Committee to draft a comprehensive code of evidence for the state based upon Illinois statutes, rules, and common law. After a year-long process, the Committee presented the Court its proposals for the codification of Illinois evidence rules.

The Court then invited written comments from the bar and scheduled public hearings for oral presentations in Chicago and Springfield in May 2010. After considering both the written comments and those made at the public hearings, the Committee reconvened to revise some of its initial proposals and to add comments to a few individual rules as well as a general commentary. These were then submitted to the Court. On September 27, 2010, the Court approved and promulgated the Committee’s proposals, setting January 1, 2011 as the effective date for the codified rules. Referred to in Rule 1102 as the Illinois Rules of Evidence, the new rules are modeled on and similar to, but not wholly identical to, the Federal Rules of Evidence. They contain the same numbering system and address evidence issues in similar fashion.

This guide begins with the Committee’s general commentary to the rules and provides all of the newly adopted rules – the Illinois Rules of Evidence (IRE) – including the individual comments that the Committee provided for five of the rules. It presents the new rules in a side-by-side comparison with the Federal Rules of Evidence (FRE), along with additional relevant commentary. The guide’s goals are to: (1) enable a direct comparison of the two evidence rules; (2) offer commentary concerning the new rules, with relevant case and statutory citations and explanations; (3) point out substantive and non-substantive differences between the federal and the Illinois rules; (4) indicate explicit rejection of certain federal rules or portions of them; and (5) highlight substantive changes from former Illinois evidence law. To achieve these objectives, the guide employs colored highlights:

- **Yellow** is used for the author’s commentary, in what is a work always in progress.
- **Pink** is used for comments provided by the Committee for five of the rules.
- **Blue underlining** is used to indicate both substantive and non-substantive differences between the FRE and the IRE that do not represent a change in Illinois law.
- **Red strikethrough** is used to indicate a federal rule or a portion of it that was not adopted. The strikethrough reflects non-adoption, not deletion.
- **Green** is used to indicate a substantive change from prior Illinois law, regardless of whether there is a difference between the FRE and the IRE. As stated above, mere differences between the FRE and the IRE – even those that are substantive but do not reflect a change in Illinois law – are shown with blue underlining.
Although the guide is intended to be viewed in color, a reader who does not have a color copy nevertheless will be able to discern the various types of highlighting from the context or style of the highlight. For example:

- **Commentary is in a different typeface, and the author’s commentary always is preceded by an appropriate title to distinguish it from the committee commentary.**
- **Rule differences not representing a change in Illinois law always are underlined.**
- **Federal rules that were not adopted always are marked with strikethrough.**
- **Substantive changes in Illinois law are the only shaded text in the Illinois rules themselves.**

Thus, the guide can be utilized even if printed in grayscale.

Every effort has been made to ensure that the rules and commentary in the guide are current as of the date stated below and as of the date of the last revision shown on the cover page. Note that there are minor variations in the various published editions of the Federal Rules of Evidence, mostly in the use of upper or lower case letters in subheadings. This guide follows the Federal Rules of Evidence printed for the use of the Committee on the Judiciary of the United States House of Representatives and dated December 1, 2009, which is currently available on the website of the United States federal courts.

In response to reader feedback, I have added appendices containing the full text of related statutes and Supreme Court Rules that are discussed in the commentary.

The guide is intended to assist legal practitioners to understand and apply the new rules. It is not a substitute for legal or other professional services. If legal or other professional assistance is required, the services of a competent attorney or other professional should be sought.

My partner Daniel Konieczny dedicated many hours and much-needed expertise to the difficult task of formatting these pages. I am deeply grateful for his significant contributions.

As stated above, my commentary is a work always in progress. For that reason, I welcome any comments related to the guide's accuracy and utility.

Gino L. DiVito  
Tabet DiVito & Rothstein LLC  
December 23, 2010

* Note that the cover page contains a “Last Revised” date that indicates the date of the most recent changes to this copy of the guide. The current version of the guide can always be found at the website of Tabet DiVito & Rothstein, www.tdrlawfirm.com, and it is recommended that the reader check for updates regularly.
Preface to the January 1, 2012 Edition

Effective December 1, 2011, the Federal Rules of Evidence have been revised.

Though significant, the revisions have been made only for stylistic purposes; they are intended to have no substantive effect. The revisions represent an effort to make the rules more understandable merely by adopting clear and concise style conventions, resulting in significant formatting changes and the elimination of inconsistent, ambiguous, repetitive, and archaic words. Also, most of the titles of the rules, as well as those for most of the subsections, have been altered (sometimes, just to correct inconsistent use of uppercase or lowercase letters). And many titles have been added for former and new subsections.

The Advisory Committee has provided a “Committee Note” to accompany each of the stylistically revised federal rules. Except for the comment to revised Rule 502, which notes that the only amendment to that rule (because it had been amended just the year before) was to change “the initial letter of a few words from uppercase to lowercase,” each of the comments reads substantially as follows: “The language of Rule ___ has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”

The revisions of the Federal Rules of Evidence of course have significance, but they have particular relevance both to the codified Illinois Rules of Evidence and to this guide. That is so because the Illinois rules closely parallel the language and the style of the pre-amended federal rules. Because of their obvious similarity, one of the goals of this guide was – and is – to illustrate both minor and significant differences between the Illinois rules and the Federal Rules of Evidence – as they existed at the time of Illinois’ codification. For that reason, a side-by-side comparison of the two rules – as of the date of their adoption in Illinois – made sense when this guide was conceived and, given that the revisions to the federal rules make no substantive changes, such a comparison continues to be relevant. Thus, the original side-by-side comparison of Illinois rules with the pre-amended felony rules remains in this edition of the guide, as it will in subsequent editions.

Another goal of the guide is to be relevant for users who practice either in federal court or in state court, or in both. To achieve that goal, ready access to the current version of each set of codified rules is essential. Thus, in this revised edition of the guide as well as in future editions, in addition to the current version of the Illinois rules, the current version of the Federal Rules of Evidence is provided.

To retain a side-by-side comparison of the two evidence codes, the guide continues to provide the pre-amended version of each federal rule as the first one in the left-hand
column (the FRE column) next to the Illinois rule in the column on the right (the IRE column), both with the color-coding described in the original preface. To achieve the goal of presenting rules that are current, the amended version of each federal rule also is provided just below the pre-amended federal rule in the left-hand FRE column, in blue-background coloring. Because these stylistic revisions include changes to titles of most of the federal rules, each of the revised rules also bears its title, whether that title has been altered or remains the same.

The overarching goal of this evidence guide is to provide a relevant and useful resource. I welcome suggestions that enhance the achievement of that goal.

Gino L. DiVito
Tabet DiVito & Rothstein LLC
January 1, 2012
# Table of Contents

**Preface** .......................................................... III

**Preface to the January 1, 2012 Edition** .................................. V

**Table of Contents** .................................................. VII

**September 23, 2010 Order of the Supreme Court of Illinois** ........... XI

**The Illinois Rules of Evidence** ........................................ 1

  general commentary by the Special Supreme Court
  Committee on Illinois Evidence ........................................ 1

**Article I. General Provisions**

  **Rule 101. Scope** .............................................. 11
  **Rule 102. Purpose and Construction** ................................ 12
  **Rule 103. Rulings on Evidence** .................................. 12
  **Rule 104. Preliminary Questions** .................................. 16
  **Rule 105. Limited Admissibility** .................................. 21
  **Rule 106. Remainder of or Related Writings or Recorded Statements** . 22

**Article II. Judicial Notice**

  **Rule 201. Judicial Notice of Adjudicative Facts** ..................... 23

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

  **Rule 301. Presumptions in General in Civil Actions and Proceedings** . 27
  [FRE 302 not adopted.] ............................................... 28

**Article IV. Relevancy and Its Limits**

  **Rule 401. Definition of “Relevant Evidence”** ........................ 29
  **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible** ........................................ 29
  **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time** .................................. 30
  **Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes** ...................................... 31
  **Rule 405. Methods of Proving Character** ................................ 38
  **Rule 406. Habit; Routine Practice** .................................. 40
RULE 407. Reserved. [Subsequent Remedial Measures] ....................... 40
RULE 408. Compromise and Offers to Compromise .......................... 42
RULE 409. Payment of Medical and Similar Expenses ..................... 44
RULE 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements. 44
RULE 411. Liability Insurance .................................................. 46
[FRE 412 not adopted.] ......................................................... 47
[FRE 413 not adopted.] ......................................................... 50
[FRE 414 not adopted.] ......................................................... 53
[FRE 415 not adopted.] ......................................................... 55

ARTICLE V. PRIVILEGES

RULE 501. General Rule .......................................................... 57
[FRE 502 not adopted.] ......................................................... 58

ARTICLE VI. WITNESSES

RULE 601. General Rule of Competency ...................................... 63
RULE 602. Lack of Personal Knowledge ....................................... 64
RULE 603. Oath or Affirmation .................................................. 64
RULE 604. Interpreters ............................................................. 65
RULE 605. Competency of Judge as Witness .................................. 65
RULE 606. Competency of Juror as Witness ................................. 65
RULE 607. Who May Impeach .................................................. 67
RULE 608. Evidence of Character of Witness ............................... 68
RULE 609. Impeachment by Evidence of Conviction of Crime .......... 71
RULE 610. Religious Beliefs or Opinions ..................................... 78
RULE 611. Mode and Order of Interrogation and Presentation .......... 78
RULE 612. Writing Used To Refresh Memory ................................ 80
RULE 613. Prior Statements of Witnesses ................................... 81
RULE 614. Calling and Interrogation of Witnesses by Court ............. 83
RULE 615. Exclusion of Witnesses ............................................. 84

ARTICLE VII. OPINIONS AND EXPERT WITNESSES

RULE 701. Opinion Testimony by Lay Witnesses ......................... 85
### RELATED STATUTES AND SUPREME COURT RULES

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>725 ILCS 5/115-7.3</td>
<td>161</td>
</tr>
<tr>
<td>B</td>
<td>725 ILCS 5/115-7.4</td>
<td>163</td>
</tr>
<tr>
<td>C</td>
<td>725 ILCS 5/115-20</td>
<td>164</td>
</tr>
<tr>
<td>D</td>
<td>735 ILCS 5/8-1901</td>
<td>165</td>
</tr>
<tr>
<td>E</td>
<td>725 ILCS 5/115-7</td>
<td>167</td>
</tr>
<tr>
<td>F</td>
<td>735 ILCS 5/8-2801</td>
<td>168</td>
</tr>
<tr>
<td>G</td>
<td>705 ILCS 405/5-150</td>
<td>169</td>
</tr>
<tr>
<td>H</td>
<td>735 ILCS 5/2-1102</td>
<td>170</td>
</tr>
<tr>
<td></td>
<td>SUPREME COURT RULE 238</td>
<td>170</td>
</tr>
<tr>
<td>I</td>
<td>725 ILCS 5/115-10.1</td>
<td>171</td>
</tr>
<tr>
<td>J</td>
<td>725 ILCS 5/115-12</td>
<td>172</td>
</tr>
<tr>
<td>K</td>
<td>725 ILCS 5/115-13</td>
<td>173</td>
</tr>
<tr>
<td>L</td>
<td>725 ILCS 5/115-5</td>
<td>174</td>
</tr>
<tr>
<td></td>
<td>SUPREME COURT RULE 236</td>
<td>175</td>
</tr>
<tr>
<td>M</td>
<td>725 ILCS 5/115-5.1</td>
<td>176</td>
</tr>
</tbody>
</table>
In the Supreme Court of the State of Illinois

MR 24138

In re Illinois Rules of Evidence

At the November 2008 Term, this Honorable Court established a Special Supreme Court Committee on Evidence and charged that committee with codifying the law of evidence in the state of Illinois. Through the dedication, active participation, and contributions of the members of the Special Committee, the law of evidence in the State of Illinois has now been codified. Trial proceeding for litigants and the judiciary will, as a result, become even more efficient. As Chief Justice of the Illinois Supreme Court, and on behalf of the Court, I hereby direct the Clerk of this Court to spread of record the Court's appreciation for the work of the Committee and acceptance of the Committee's rules and commentary.

Further, I hereby direct the Clerk of this honorable Court to enter into record the attached Illinois Rules of Evidence, to be effective in the courts of this state on January 1, 2011.

[Signature]

Honorable Thomas R. Fitzgerald
Chief Justice
Illinois Supreme Court

FILED
SEP 27 2010
SUPREME COURT CLERK
ILLINOIS RULES OF EVIDENCE

Committee Commentary

On January 1, 2011, by order of the Illinois Supreme Court, the Illinois Rules of Evidence will govern proceedings in the courts of Illinois except as otherwise provided in Rule 1101.

On November 24, 2008, the Illinois Supreme Court created the Special Supreme Court Committee on Illinois Evidence (Committee) and charged it with codifying the law of evidence in the state of Illinois.

Currently, Illinois rules of evidence are dispersed throughout case law, statutes, and Illinois Supreme Court rules, requiring that they be researched and ascertained from a number of sources. Trial practice requires that the most frequently used rules of evidence be readily accessible, preferably in an authoritative form. The Committee believes that having all of the basic rules of evidence in one easily accessible, authoritative source will substantially increase the efficiency of the trial process as well as expedite the resolution of cases on trial for the benefit of the practicing bar, the judiciary, and the litigants involved. The Committee further believes that the codification and promulgation of the Illinois Rules of Evidence will serve to improve the trial process itself as well as the quality of justice in Illinois.

It is important to note that the Illinois Rules of Evidence are not intended to abrogate or supersede any current statutory rules of evidence. The Committee sought to avoid in all instances affecting the validity of any existing statutes promulgated by the Illinois legislature. The Illinois Rules of Evidence are not intended to preclude the Illinois legislature from acting in the future with respect to the law of evidence in a manner that will not be in conflict with the Illinois Rules of Evidence, as reflected in Rule 101.

Based upon the charge and mandate to the Committee, and consistent with the above considerations, the Committee drafted the Illinois Rules of Evidence in accordance with the following principles:

(1) Codification: With the exception of the two areas discussed below under “Recommendations,” the Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years. Thus, Rule 702 retains the Frye standard for expert opinion evidence pursuant to the holding in Donaldson v. Central Illinois Public Service Co., 199 Ill. 2d 63, 767 N.E.2d 314 (2002). The Committee reserved Rule 407, related to subsequent remedial measures, because Appellate Court opinions are sufficiently in conflict concerning a core issue that is now under review by the Supreme Court. Also reserved are Rules 803(1) and 803(18), because Illinois common law does not recognize either a present sense impression or a learned treatise hearsay exception.
(2) Statute Validity: The Committee believes it avoided affecting the validity of existing statutes promulgated by the Illinois legislature. There is a possible conflict between Rule 609(d) and section 5–150(1)(c) of the Juvenile Court Act (705 ILCS 405/5–150(1)(c)) with respect to the use of juvenile adjudications for impeachment purposes. That possible conflict, however, is not the result of promulgation of Rule 609(d) because that rule simply codifies the Illinois Supreme Court’s adoption of the 1971 draft of Fed. R. Evid. 609 in People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971). As noted in the Comment to Rule 609(d), the present codification is not intended to resolve the issue concerning the effect of the statute. Moreover, the Illinois Rules of Evidence permit the Illinois legislature to act in the future with respect to the law of evidence as long as the particular legislative enactment is not in conflict with an Illinois Supreme Court rule or an Illinois Supreme Court decision. See Ill. R. Evid. 101.

(3) Modernization: Where there was no conflict with statutes or recent Illinois Supreme Court or Illinois Appellate Court decisions, and where it was determined to be beneficial and uniformly or almost uniformly accepted elsewhere, the Committee incorporated into the Illinois Rules of Evidence uncontroversial developments with respect to the law of evidence as reflected in the Federal Rules of Evidence and the 44 surveyed jurisdictions. The 14 instances of modernization of note are as follows:

(1) Rule 106. Remainder of or Related Writings or Recorded Statements.

Rule 106 permits the admission contemporaneously of any other part of a writing or recording or any other writing or recording which “ought in fairness” be considered at the same time. Prior Illinois law appears to have limited the concept of completeness to other parts of the same writing or recording or an addendum thereto. The “ought in fairness” requirement allows admissibility of statements made under separate circumstances.

(2) Rule 406. Habit; Routine Practice.

Rule 406 confirms the clear direction of prior Illinois law that evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(3) Rule 408. Compromise and Offers to Compromise.

Prior Illinois law did not preclude admissibility of statements made in compromise negotiations unless stated hypothetically. Because they were considered a trap for the unwary, Rule 408 makes such statements inadmissible without requiring the presence of qualifying language.

Rule 613(a) provides that a prior inconsistent statement need not be shown to a witness prior to cross-examination thereon. Illinois Central Railroad v. Wade, 206 Ill. 523, 69 N.E. 565 (1903), was to the contrary.


Rule 801(d)(1)(A) codifies an Illinois statute (725 ILCS 5/115–10.1) that applies only in criminal cases. It makes admissible as “not hearsay” (rather than as a hearsay exception) a prior inconsistent statement of a declarant who testifies at a trial or a hearing and is subject to cross-examination, when the prior inconsistent statement was given under oath at a trial, hearing, or other proceeding, or in a deposition, or under other specified circumstances. The rule does not apply in civil cases. Rule 801(d)(1)(B) also codifies an Illinois statute (725 ILCS 5/115–12). It makes admissible as “not hearsay” a declarant’s prior statement of identification of a person made after perceiving that person, when the declarant testifies at a trial or hearing in a criminal case and is subject to cross-examination concerning the statement. Rule 801(d)(2) provides substantive admissibility, as “not hearsay,” for admissions of a party-opponent.

(6) Rule 801(d)(2)(D). Statement by a Party’s Agent or Servant.

Rule 801(d)(2)(D) confirms the clear direction of prior Illinois law that a statement by a party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, constitutes an admission of a party-opponent.

(7) Rule 803(13). Family Records.

The requirement that the declarant be unavailable and that the statement be made before the controversy or a motive to misrepresent arose, Sugrue v. Crilley, 329 Ill. 458, 160 N.E. 847 (1928), have been eliminated.

(8) Rule 803(14), (15), (19), (20) and (23).

With respect to records of or statements in documents affecting an interest in property, reputation concerning personal or family history, and concerning boundaries or general history, and judgments as to personal, family or general history or boundaries, Illinois law in each area was sparse or nonexistent.

(9) Rules 803(16) and 901(b)(8). Statements in Ancient Documents.

The 30-year limitation to real property, Reuter v. Stuckart, 181 Ill. 529, 54 N.E. 1014 (1899), is relaxed in favor of 20 years without subject matter restriction.
(10) Rule 804(b)(3). Statement Against Interest.

Rule 804(b)(3) makes applicable to the prosecution as well as the defense the requirement that in a criminal case a statement tending to expose the declarant to criminal liability is not admissible as a hearsay exception unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(11) Rule 806. Attacking and Supporting Credibility of Declarant.

Rule 806 dispenses with the requirement of an opportunity to deny or explain an inconsistent statement or conduct of an out-of-court declarant under all circumstances when a hearsay statement is involved. Whether Illinois law had already dispensed with the requirement with respect to a deposition was unclear.


Self-authentication of business records is provided by Rule 902(11), following the model of Fed. R. Evid. 902(11) and 902(12) and 18 U.S.C. 3505.

(13) Rule 1004. Admissibility of Other Evidence of Contents.

Rule 1004 does not recognize degrees of secondary evidence previously recognized in Illinois. Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 (1874). In addition, it is no longer necessary to show that reasonable efforts were employed beyond available judicial process or procedure to obtain an original possessed by a third party. Prussing v. Jackson, 208 Ill. 85, 69 N.E. 771 (1904).

(14) Rule 1007. Testimony or Written Admission of Party.

The Rule 1007 provision that testimony or a written admission may be employed to prove the contents of a document appears never before to have been the law in Illinois. Bryan v. Smith, 3 Ill. 47 (1839).

(4) Recommendations: The Committee recommended to the Illinois Supreme Court a limited number of changes to Illinois evidence law (1) where the particularized evidentiary principle was neither addressed by statute nor specifically addressed in a comprehensive manner within recent history by the Illinois Supreme Court, and (2) where prior Illinois law simply did not properly reflect evidentiary policy considerations or raised practical application problems when considered in light of modern developments and evidence rules adopted elsewhere with respect to the identical issue. The Committee identified, and the Illinois Supreme Court approved, recommendations in only two areas:

(a) Opinion testimony is added to reputation testimony as a method of proof in Rule 405, when character evidence is admissible, and in Rule 608 with respect to character for truthfulness:
Rule 405.

METHODS OF PROVING CHARACTER

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

(b) Specific Instances of Conduct.

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct; and

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim’s prior violent conduct.

Rule 608.

EVIDENCE OF CHARACTER WITNESS

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

(b) Rule 803(3) eliminates the requirements currently existing in Illinois law, that do not exist in any other jurisdiction, with respect to statements of then existing mental, emotional, or physical condition, that the statement be made by a declarant found unavailable to testify, and that the trial court find that there is a “reasonable probability” that the statement is truthful:

RULE 803.

HEARSAY EXCEPTIONS;
AVAILABILITY OF DECLARANT 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), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or

(B) a statement of declarant’s then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.

The initial reference in Illinois to “unavailability” and “reasonable probability” occurred in People v. Reddock, 13 Ill. App. 3d 296, 300 N.E.2d 31 (1973), adopting the position taken by the North Carolina Supreme Court in State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), when dealing with statements of intent by a declarant to prove conduct by the declarant consistent with that intent. Subsequent cases simply incorporated the two qualifications without analysis, evaluation, critique, or discussion. No reference has been made to the fact that the two requirements were initially adopted solely to deal with the Mutual Life Ins. v. Hillmon, 145 U.S. 285 (1892), issue as to whether a statement of an out of court declarant expressing her intent to perform a future act was admissible as evidence to prove the doing of the intended act. Interestingly, the North Carolina version of Rule 803(3) in the North Carolina Rules of Evidence is in substance the same as Rule 803(3), i.e., neither a requirement of “unavailability” nor “reasonable probability” is included.

Rule 803(3) permits admissibility of declarations of intent to do an act as evidence to establish intent and as evidence to prove the doing of the intended act regardless of the availability of the declarant and without the court finding a reasonable probability that the statement is truthful. Consistent with prior Illinois law, Rule 803(3)(B) provides that the hearsay exception for admissibility of a statement of intent as tending to prove the doing of the act intended applies only to the statements of intent by a declarant to prove her future conduct, not the future conduct of another person.

(5) Structural Change: A hearsay exception in Illinois with respect to both business and public records is recognized in civil cases by Illinois Supreme Court Rule 236, excluding police accident reports, and in criminal cases by section 115 of
the Code of Criminal Procedure (725 ILCS 5/115), excluding medical records and police investigative records. The Illinois Rules of Evidence in Rule 803(6), records of regularly conducted activity (i.e., business records), and in Rule 803(8), public records and reports, while retaining the exclusions described above, removes the difference between civil and criminal business and public records in favor of the traditional and otherwise uniformly accepted division between business records, Rule 803(6), and public records and reports, Rule 803(8), both applicable in civil and criminal cases.

**RULE 803(6)-(10).**

**HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL**

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

* * *

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics.** Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(6) **Referenced Statutes:** Numerous existing statutes, the validity of which are not affected by promulgation of the Illinois Rules of Evidence, Ill. R. Evid. 101, relate in one form or another to the law of evidence. The Committee felt it was inappropriate, unnecessary and unwise to refer specifically to the abundance of statutory authority in an Appendix or otherwise. Reference is, however, made in the body of the text of the Illinois Rules of Evidence to certain statutes by citation or verbatim incorporation. Such references and the reasons therefor are as follows:

(1) Rule 404(a)(2): Character testimony of the alleged victim offered by the accused is specifically made subject to the limitations on character evidence contained in the rape shield statute, 725 ILCS 5/115–7.

(2) Rule 404(b): The bar to evidence of other crimes, wrongs, or acts to prove character to show conformity is made subject to the provisions of 725 ILCS 5/115–7.3, dealing with enumerated sex-related offenses, along with 725 ILCS 5/115–7.4 and 725 ILCS 5/115–20, dealing with domestic violence and other enumerated offenses, all of which allow admissibility of other crimes, wrongs, or acts under certain circumstances.

(3) Rule 409: The parallel protection afforded by 735 ILCS 5/8–1901 with respect to payment of medical or similar expenses is specifically referenced in Rule 409 to preclude any possibility of conflict.
(4) Rule 611(c): 735 ILCS 5/2–1102 provides a definition of adverse party or agent with respect to hostile witnesses as to whom interrogation may be by leading questions.


(6) Rule 803(4)(B): 725 ILCS 5/115–13, dealing with statements by the victim to medical personnel in sexual abuse prosecutions, is included verbatim in recognition that the statute admits statements to examining physicians while the generally applicable provisions of Rule 803(4)(A) do not.

(7) Redundancy: Where redundancy exists between a rule contained in the Illinois Rules of Evidence and another Illinois Supreme Court rule, reference should be made solely to the appropriate Illinois rule of evidence.

Respectfully Submitted,
Honorable Donald C. Hudson, Chair
Honorable Warren D. Wolfson (retired), Vice-Chair
Professor Ralph Ruebner, Reporter
Professor Michael H. Graham, Advisor
Honorable Robert L. Carter
Honorable Tom Cross, Illinois State Representative
Honorable John J. Cullerton, President of the Illinois State Senate
Honorable Gino L. DiVito (retired)
Honorable Nathaniel R. Howse, Jr.
Honorable Heidi Ladd
Eileen Letts, Esquire
Shannon M. McNulty, Esquire
Robert Neirynck, Esquire
Honorable Dennis J. Porter
Michael Scodro, Solicitor General
Todd Smith, Esquire
Brian K. Trentman, Esquire
Michael J. Warner, Esquire
Honorable Arthur J. Wilhelm, Illinois State Senator

-9-
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Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in Rule 1101.

Amended as of December 1, 2011:

Rule 101. Scope; Definitions

(a) Scope. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

1. “civil case” means a civil action or proceeding;
2. “criminal case” includes a criminal proceeding;
3. “public office” includes a public agency;
4. “record” includes a memorandum, report, or data compilation;
5. a “rule prescribed by the Supreme Court” means a rule adopted by the Supreme Court under statutory authority; and
6. a reference to any kind of written material or any other medium includes electronically stored information.

Rule 101. Scope

These rules govern proceedings in the courts of Illinois to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court.

Committee Comment to Rule 101

Rule 101 provides that a statutory rule of evidence is effective unless in conflict with an Illinois Supreme Court rule or decision. There is no current statutory rule of evidence that is in conflict with a rule contained in the Illinois Rules of Evidence, with the possible exception of the statute discussed in the commentary to Rule 609(d) below.

Author’s Commentary to Rule 101

IRE 101 is identical to the pre-amended federal rule, except for the changes required due to the difference in federal court proceedings and the acknowledgement that statutory rules of evidence are effective unless they are in conflict with a rule or a decision of the Illinois Supreme Court. The Illinois rule does not contain the definitions provided by FRE 101(b), which was added effective December 1, 2011.

Regarding the ability of the General Assembly to provide for rules of evidence by statutory enactment, see First National Bank of Chicago v. King, 165 Ill. 2d 533, 542 (1995) (holding that “the legislature has the power to prescribe new rules of evidence and alter existing ones,” and that such “action does not offend the separation-of-powers clause of our constitution”), and People v. Orange, 121 Ill. 2d 364, 381 (1988) (holding that the
### Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**Amended as of December 1, 2011:**

#### Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

### Rule 103. Rulings on Evidence

(a). **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by

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**supreme court’s previous refusal “to allow the substantive use of prior inconsistent statements [citation] did not preclude the legislature from doing so.”**

The Dead-Man’s Act (735 ILCS 5/8-201) is an example of a statutory rule of evidence, as are many of the statutes contained in the Evidence Act (735 ILCS 5/8-101, et seq.) and in Article 115 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-1, et seq.).

### Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**Author’s Commentary to Rule 102**

IRE 102 is identical to the pre-amended federal rule.

### Rule 103. Rulings on Evidence

(a). **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of Proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by
offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Amended as of December 1, 2011:

Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Author’s Commentary to Rule 103(a)

IRE 103(a) is identical to the pre-amended federal rule, except for the omission of what was the last sentence of pre-amended FRE 103(a), the subject of which, through amendment effective December 1, 2011, is now addressed in FRE 103(b). The sentence is omitted because it is inconsistent with Illinois law, which requires the renewal of an objection or an offer of proof to preserve an error for appeal. See, e.g., Simmons v. Graces, 198 Ill. 2d 541, 569 (2001); Thornton v. Garcini, 237 Ill. 2d 100 (2009); Snelson v. Kamm, 204 Ill. 2d 1, 23 (2003); Ill. State Toll Highway Auth. v. Heritage Standard Bank and Trust Co., 163 Ill. 2d 498, 502 (1994); Sinclair v. Berlin, 325 Ill. App. 3d 458, 471 (2001); Romanek-Golub & Co. v. Anvan Hotel Corp., 168 Ill. App. 3d 1031 (1988). The standard for renewal of an objection, however, may be more liberal in criminal cases. See, e.g., People v. Williams, 161 Ill. 2d 1 (1994) (defendant’s testifying about his prior conviction and incarceration, after denial of his motion in limine made to prevent evidence of his prior conviction, did not constitute waiver on appeal of the alleged error concerning the court’s denial of his motion in limine).

But see People v. Gomez, 402 Ill. App. 3d 945 (2010), (defendant’s failure to call a witness, who he claimed would have corroborated his affirmative defense, after denial of his motion in limine seeking to prevent the State from questioning the witness about his threat against her, forfeited his right to raise the issue on appeal concerning the denial of his motion in limine).

The rule provides requirements for preserving a claim of error: a timely objection or a motion to strike when evidence is admitted; an offer of proof when evidence is excluded. For a rule and a statute relevant to preserving error for appeal, see Illinois Supreme Court Rule 366(b) (2)(iii) and section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202(b)) (both requiring that in a civil jury
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<th><strong>Federal Rules of Evidence</strong></th>
<th><strong>Illinois Rules of Evidence</strong></th>
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| **(b). Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. | **trial, to preserve error for appeal, the grounds must be specified in a post-trial motion).**

Regarding the requirement to state a specific ground of objection, an objection based upon a specified ground waives all grounds not specified, and a ground of objection not presented at trial will not be considered on review. *People v. Stewart*, 104 Ill. 2d 463, 489-90 (1984); *People v. Canaday*, 49 Ill. 2d 416, 423-24 (1971). Regarding the requirement to make an offer of proof, see *People v. Peeples*, 155 Ill. 2d 422 (1993) (need for offer of proof when evidence refused). |
| **Amended as of December 1, 2011:** | **(b). Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. |
| **(c) Court’s Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form. | **Author’s Commentary to Rule 103(b)**

IRE 103(b) is identical to pre-amended FRE 103(b), the subject matter of which is now addressed in FRE 103(c), through amendment effective December 1, 2011. The rule authorizes the court to make a relevant statement about its ruling, and to direct an offer of proof through questions and answers. |
| **(c). Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. | **(c). Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. |
| **Amended as of December 1, 2011:** | **Author’s Commentary to Rule 103(c)**

IRE 103(c) is identical to pre-amended FRE 103(c), the subject matter of which is now addressed in FRE 103(d), through amendment effective December 1, 2011. The rule requires the court to take action to prevent the jury from hearing inadmissible evidence. |
| **(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means. | |
(d). Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Amended as of December 1, 2011:

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Author's Commentary to Federal Rule 103(d)

See Rule 52(b) of the Federal Rules of Criminal Procedure. See also U.S. v. Olano, 507 U.S. 725 (1993) (holding that forfeited error may be noticed if there was (1) an error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings); see also Johnson v. U.S., 520 U.S. 461 (1997) (same).

(d). Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Author's Commentary to Rule 103(d)

IRE 103(d) is identical to pre-amended FRE 103(d), the subject matter of which is now addressed in FRE 103(e), through amendment effective December 1, 2011. For relevant information regarding plain-error review, see Illinois Supreme Court Rule 615(a) (insubstantial error will be ignored on appeal, plain error will be addressed in terms substantially similar to the rule's provisions), and People v. Piatowski, 225 Ill. 2d 551, 565 (2007) (citing People v. Herron, 215 Ill. 2d 167 (2005), providing the standard for applying plain error review where an issue has been forfeited: “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.”) See also People v. Lewis, 234 Ill. 2d 32 (2009) (a reviewing court must initially determine whether an error actually occurred; but see People v. White, 2011 IL 109689, ¶148, where the supreme court held that “[w]hen it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred”), and People v. Naylor, 229 Ill. 2d 584 (2008) (burden of persuasion as to the two prongs is on party seeking plain-error review and, if burden cannot be carried, procedural default must be honored).

In a case involving whether reversible error had been committed because of an Apprendi violation, the supreme court noted that, in addition to the threshold determination concerning the applicability of plain error or harmless error analysis depending on whether the defendant did or did not make a timely trial objection based on the alleged error, “[a]n important difference between the two analyses lies in the burden of proof: in harmless-error analysis, the State must prove that the jury verdict would have been the same absent the error to avoid reversal, whereas under plain-error analysis, a
Rule 104. Preliminary Questions

(a). Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Amended as of December 1, 2011:

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Author's Commentary to Federal Rule 104(a)

Although it does not refer to Rule 104(a), the Seventh Circuit decision in Cobige v. City of Chicago, et al., 651
IRE 104

Federal Rules of Evidence

IRE 104

Illinois Rules of Evidence

F.3d 780 (7th Cir. 2011), is instructive regarding the application of evidentiary rules generally to determine the admissibility of evidence under both federal and Illinois rules. In that case, a jury awarded $5 million in compensatory damages and $4,000 in punitive damages to the plaintiff, who sued as the son and special representative of the estate of his mother. While she was held in a police lockup before court presentation, his mother had been arrested on a drug charge and was allowed by police to suffer untreated pain, ultimately leading to her death. The Seventh Circuit affirmed the jury’s finding on liability, but vacated the damages award, ruling that the district court’s evidentiary rulings had prejudiced the defendants’ efforts to counter the plaintiff’s testimony related to damages for loss of companionship and for loss of the enjoyment of life.

The plaintiff, who was 27 years old when his mother died, testified that “she had been a friend as well as a parent, a bulwark of support and a role model throughout his life.” He also testified that “she provided wise advice and support” to him and that “she taught me mostly everything I know. Everything she knew she tried to instill in me.” The defendants (the city of Chicago and four police officers) sought to counter that evidence by introducing proof that the mother had been a drug addict who had been in trouble with the law for much of her adult life and had spent multi-year stretches in prison. The district court admitted the evidence of one of the mother’s convictions, but excluded evidence of other convictions and about her drug addiction and arrest record. As a result, the jury did not learn that the plaintiff’s mother had been sentenced to four years’ imprisonment for two drug offenses in 1998, and that shortly after her release she was arrested again and convicted in 2001 for another drug offense, for which she was sentenced to three years’ imprisonment. Her death occurred in 2006, while she was in custody for a drug offense.

The Seventh Circuit rejected the district court’s refusal to allow evidence of the mother’s convictions, drug addiction, and arrests based on the district court’s reliance on FRE 609(b), 404(b), and 403. The Seventh Circuit held that the proffered evidence was necessary to undermine the plaintiff’s testimony, and that the three rules relied upon by the district court to deny admissibility were inapplicable.

As for the district court’s invocation of FRE 609(b) (related to the inadmissibility, for impeachment purposes, of last sentence. The rule requires the court to decide preliminary questions relating to the admissibility of evidence and, except for rulings on privilege, provides that the court is not bound by the rules of evidence in doing so.

Given modern advances in technology, the supreme court’s decision in People v. Taylor, 2011 IL 110067, is worthy of note. In that case, the court reversed the appellate court’s holding that a surveillance videotape recording had been improperly admitted at trial (under the “silent witness” theory) because a proper foundation had not been laid. The appellate court had reached this determination based on its conclusion that, for many reasons, the State had failed to establish the reliability of the process that produced the tape. In its analysis, the supreme court first held that, as in other admission-of-evidence determinations, the proper standard of review is abuse of discretion, not de novo. It then approved of the six factors that the appellate court had applied in determining the reliability of the videotape, but emphasized that “this list of factors is nonexclusive.” Because one of them “may not be relevant or additional factors may be needed to be considered.” Taylor, at ¶ 35. In short, the individual circumstances involved in each case need to be considered by the trial court to determine the accuracy and reliability of the process that produces a recording. Id. The supreme court then found fault with much of the appellate court’s analysis, noting among other things, the provisions of IRE 104(a) that a preliminary question such as the admissibility of evidence “is not constrained by the usual rules of evidence.” Taylor, at ¶ 40. Thus, the court held, the appellate court erred in not considering a police report that, though not admitted in evidence at trial, was relevant on the questions related to the copying process of the videotape (from DVR to VHS tape) and to the sufficiency of its chain of custody. Taylor, at ¶¶ 40, 41. Regarding the appellate court’s determination that the videotape was inadmissible because of chain-of-custody problems, the supreme court stated that, as “this court has repeatedly stated … gaps in the chain of custody go to the weight of the evidence, not its admissibility.” Taylor, at ¶ 41. Next, the supreme court disagreed with the appellate court’s holding that the tape was inadmissible because the original recording had not been preserved. The court pointed out that, under IRE 1001(2), a videotape copy of another recording qualifies as an original. Taylor, at ¶¶ 42, 43. Finally, the supreme court held that the appellate court’s conclusion that the tape should not have been
a conviction more than 10 years old) the Seventh Circuit pointed out that the defendants did not seek admission of the mother’s conviction “for the purpose of attacking the character or truthfulness of a witness,” for the simple reason that the mother was not a witness. The rule therefore could not be used as a basis for exclusion of the evidence.

As for FRE 404(b), the Seventh Circuit pointed out that the defendants “did not offer the evidence about imprisonment, arrests, and addiction to show that [the mother] acted ‘in conformity therewith’ on a different occasion.” In other words, the defendants did not offer the evidence of the commission of a crime to establish the mother’s propensity to commit another crime, but rather to show “how much [the mother’s] estate and son suffered by her death.” In short, because the mother’s character and life prospects were placed in issue by her son’s testimony, the defendants were entitled to introduce evidence to counter that evidence.

As for FRE 403, the Seventh Circuit stated: “When the law makes damages depend on matters such as the emotional tie between mother and son, the defendant is entitled to show that the decedent’s character flaws undermined the quality of advice and support that she could have supplied.” This, the court held, did not constitute “prejudice” at all. And it certainly was not “unfair prejudice.”

The Seventh Circuit concluded that the exclusion of evidence “that could have significantly reduced the award of damages cannot be called harmless.” It therefore vacated the damages awarded and remanded the case to the district court for a new trial solely on the issue of damages. In December 2011, the Chicago City Council approved a settlement in this case in the amount of $2.02 million.

admitted because “the State failed to establish that no alterations, deletions or changes had been made when the original DVR recording was copied to the videotape” was an “overly restrictive” requirement. Taylor, at ¶44 (emphasis in original). The court noted that “some editing may be necessary to make the evidence admissible in the first place” and that “most editing will not render evidence inadmissible but rather will go to the weight of that evidence.” Id. The court concluded: “The more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording. In other words, the edits cannot show that the recording was tampered with or fabricated.” Id.
(b). Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**Amended as of December 1, 2011:**

(b) Relevancy That Depends on a Fact. When the relevancy of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c). Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

**Amended as of December 1, 2011:**

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

1. the hearing involves the admissibility of a confession;
2. a defendant in a criminal case is a witness and so requests; or
3. justice so requires.

(b). Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**Author's Commentary to Rule 104(b)**

IRE 104(b) is identical to the pre-amended federal rule. The rule, which is easier to understand through the federal rule’s revised wording, allows admissibility of evidence based upon the subsequent production of evidence that establishes the relevancy of the evidence earlier admitted. See Marvel Eng’g Co. v. Commercial Union Ins. Co., 118 Ill. App. 3d 844 (1983) (applying FRE 104(b)).

(c). Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

**Author's Commentary to Rule 104(c)**

IRE 104(c) is identical to the pre-amended federal rule. It requires that the jury not hear matters concerning the admissibility of confessions, those matters involving the testimony of a criminal defendant who requests such a hearing, and those matters that justice requires to be out of the jury’s hearing.
**Federal Rules of Evidence**

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<td>(d). Testimony by accused.</td>
<td>The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.</td>
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<td>Amended as of December 1, 2011:</td>
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<td>(d) Cross-Examining a Defendant in a Criminal Case.</td>
<td>By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.</td>
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<td>(e). Weight and credibility.</td>
<td>This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.</td>
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<td>(e) Evidence Relevant to Weight and Credibility.</td>
<td>This rule does not limit a party’s right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.</td>
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**Illinois Rules of Evidence**

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<td>(d). Testimony by Accused.</td>
<td>The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.</td>
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<td>Author’s Commentary to Rule 104(d)</td>
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<tr>
<td>IRE 104(d), which is identical to the pre-amended federal rule, provides subject-matter protection to a defendant in a criminal case.</td>
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<tr>
<td>(e). Weight and Credibility.</td>
<td>This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.</td>
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<td>Author’s Commentary to Rule 104(e)</td>
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<td>IRE 104(e) is identical to the pre-amended federal rule. In allowing evidence related to the weight of admitted evidence, it is consistent with the principle that admissibility of evidence is separate from considerations concerning the weight or credibility of the evidence.</td>
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**Rule 105. Limited Admissibility**

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

**Amended as of December 1, 2011:**

**Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes**

If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

**Author's Commentary to Rule 105**

IRE 105 is identical to the pre-amended federal rule, except for the addition of “purpose or” near the end of the sentence, for clarity. For relevant cases, see *People v. Lucas*, 132 Ill. 2d 399 (1989) (opposing party entitled to a limiting instruction); *People v. Gacho*, 122 Ill. 2d 221, 253 (1988) (generally, court has no duty to give a limiting instruction on its own).
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<th>Rule 106. Remainder of or Related Writings or Recorded Statements</th>
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<td>When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.</td>
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**Amended as of December 1, 2011:**

**Rule 106. Remainder of or Related Writings or Recorded Statements**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

**Author's Commentary to Rule 106**

IRE 106 is identical to the pre-amended federal rule. See Ill. S. Ct. R. 212(c), which provides for the use or reading of other parts of a deposition, and Lawson v. G.D. Searle & Co., 64 Ill. 2d 543, 556 (1976), regarding the principle in general (but without reference to “any other writing”). Note that IRE 106 does not limit the rule of completeness to the same writing or recorded statement. See section (1) under the “Modernization” discussion in the Committee’s general commentary on page 2 of this guide.
# Rule 201. Judicial Notice of Adjudicative Facts

## (a). Scope of rule.  This rule governs only judicial notice of adjudicative facts.

### Amended as of December 1, 2011:

**Rule 201. Judicial Notice of Adjudicative Facts**

(a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

## (b). Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

### Amended as of December 1, 2011:

**Amended as of December 1, 2011:**

(b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

1. is generally known within the trial court's territorial jurisdiction; or
2. can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

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**Author's Commentary to Rule 201(a)**

IRE 201(a) is identical to the pre-amended federal rule. The rule does not address legislative facts. See generally 735 ILCS 5/8-1001 et seq. See specifically section 8-1003 of the Code of Civil Procedure (735 ILCS 5/8-1003), which addresses both legislative facts and common law: "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

## (b). Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

### Amended as of December 1, 2011:

**Author's Commentary to Rule 201(b)**

IRE 201(b) is identical to the pre-amended federal rule. See *Murdy v. Edgar*, 103 Ill. 2d 384 (1984) (providing the same standards contained in the rule).
### Federal Rules of Evidence

(c). **When discretionary.** A court may take judicial notice, whether requested or not.

(d). **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

#### Amended as of December 1, 2011:

(c) **Taking Notice.** The court:

1. may take judicial notice on its own; or
2. must take judicial notice if a party requests it and the court is supplied with the necessary information.

(e). **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f). **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

#### Author’s Commentary to Rules 201(c) and 201(d)

IRE 201(c) and 201(d) are identical to the pre-amended federal rules, which, through amendment effective December 1, 2011, have been combined into a newly worded FRE 201(c). Regarding IRE 201(c), see People v. Barham, 337 Ill. App. 3d 1121 (2003) (court may take sua sponte judicial notice, but is not required to do so if not requested, and should satisfy certain requirements when doing so).

### Illinois Rules of Evidence

(c). **When Discretionary.** A court may take judicial notice, whether requested or not.

(d). **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

#### Author’s Commentary to Rule 201(e)

IRE 201(e) is identical to the pre-amended federal rule. See People v. Barham, 337 Ill. App. 3d 1121 (2003) (discussing the principles generally and emphasizing that a court, like a jury, should not rely upon facts within its knowledge that have not been admitted). The second sentence of the rule entitles a party to be heard if the court takes judicial notice without notifying the parties.

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

#### Author’s Commentary to Rule 201(f)

IRE 201 (f) is identical to pre-amended FRE 201(f), the content of which, through amendment effective December 1, 2011, is now addressed in FRE 201(d).
<table>
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<tr>
<td>If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.</td>
<td><strong>(g). Informing the Jury.</strong> In a civil action or proceeding, the court shall inform the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.</td>
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**Amended as of December 1, 2011:**

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<tr>
<td>(f) <strong>Instructing the Jury.</strong> In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.</td>
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**Author's Commentary to Rule 201(g)**

IRE 201(g) is identical to pre-amended FRE 201(g) (the provisions of which, through amendment effective December 1, 2011, are now addressed in FRE 201(f)), except for the modification of the title and the substitution of “inform” for “instruct” in both sentences, thus permitting more informal direction from the court to the jury. |

**Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.
ARTICLE III
PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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 nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Amended as of December 1, 2011:

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Author's Commentary to Rule 301

IRE 301 is identical to the pre-amended federal rule, except for the adjustment because of the difference from the federal courts. For relevant cases, see Franciscan Sisters Health Care Corporation v. Dean, 95 Ill. 2d 452 (1983); McElroy v. Force, 38 Ill. 2d 528 (1967).
### Federal Rules of Evidence

**Rule 302. Applicability of State Law in Civil Actions and Proceedings**

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

**Amended as of December 1, 2011:**

**Rule 302. Applying State Law to Presumptions in Civil Cases**

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

### Illinois Rules of Evidence

[FRE 302 not adopted.]

**Author’s Commentary to Non-Adoption of Federal Rule 302**

Because the *Erie* doctrine does not apply to actions pending in Illinois state courts, the principle contained in FRE 302 is not required in Illinois. If a choice of law issue arises on an evidentiary issue in Illinois, the issue is to be decided pursuant to principles contained in Restatement (Second) of Conflicts of Law. See *Esser v. McIntrye*, 169 Ill. 2d 292 (1996) (recognizing that Illinois follows the Restatement (Second)'s most significant relationship test).

**Article IV**
**Relevancy and Its Limits**

**Rule 401. Definition of “Relevant Evidence”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Amended as of December 1, 2011:**

**Rule 401. Test for Relevant Evidence**

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

**Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Amended as of December 1, 2011:**

**Rule 402. General Admissibility of Relevant Evidence**

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or

**Author’s Commentary to Rule 401**

IRE 401 is identical to the pre-amended federal rule. See People v. Monroe, 66 Ill. 2d 317 (1977), where the supreme court adopted FRE 401. The rule provides the test for determining whether evidence is relevant. Plainly stated, evidence is relevant if it has any tendency to make more or less probable a fact that is of consequence in determining the action.

**Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.

**Author’s Commentary to Rule 402**

IRE 402 is identical to the pre-amended federal rule, except for the deletion from FRE 402 of all the bases for the exception, which are encompassed in IRE 402 by “except as otherwise provided by law” in its first sentence. See People v. Monroe, 66 Ill. 2d 317 (1977); People v. Cruz, 162 Ill. 2d 314, 348 (1994).
## Federal Rules of Evidence

- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

### 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.

### Amended as of December 1, 2011:

#### Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

## Illinois Rules of Evidence

### Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

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

### Author’s Commentary to Rule 403

IRE 403 is identical to the pre-amended federal rule. See *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993) (applying principles provided in the rule in reviewing trial court’s ruling on admission of evidence). Note that the rule allows the exclusion of relevant evidence if its probative value is substantially outweighed by one or more of the dangers it lists. The test for exclusion of relevant evidence provided by the rule is frequently referred to as the “Rule 403 balancing test.” Probably the most invoked and applied part of the rule is that which provides for exclusion of relevant evidence based on the danger of unfair prejudice.
Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a). Character evidence generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

Amended as of December 1, 2011:

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

Author’s Commentary to Rule 404(a)(1)

The first part of IRE 404(a)(1), which allows evidence of a pertinent trait of character offered by a defendant in a criminal case, or by the prosecution to rebut such evidence, is identical to pre-amended FRE 404(a)(1). See People v. Lewis, 25 Ill. 2d 442 (1962) (whether or not he testifies at trial, defendant may offer proof as to a pertinent trait of his character); People v. Holt, 398 Ill. 606 (1948) (where defendant offers evidence of his character trait, the State may offer evidence regarding the same character trait on rebuttal). The second part of pre-amended FRE 404(a)(1) (now addressed in FRE 404(a)(2)(B)(ii), through amendment effective December 1, 2011) was not adopted because there is no Illinois authority that permits prosecution evidence to rebut a defendant-offered character trait of the victim by admitting evidence concerning the same trait of character of the defendant.
(2) **Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

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<td><strong>(2) Exceptions for a Defendant or Victim in a Criminal Case.</strong> The following exceptions apply in a criminal case:</td>
<td><strong>(2) Character of Alleged Victim.</strong> In a criminal case, and subject to the limitations imposed by section 115-7 of the Code of Criminal Procedure (725 ILCS 5/115-7), evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;</td>
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<tr>
<td>(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;</td>
<td><strong>Author's Commentary to Rule 404(a)(2)</strong></td>
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<tr>
<td>(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:</td>
<td>IRE 404(a)(2) is identical to pre-amended FRE 404(a)(2), except for two differences: (1) The Illinois rule is limited by the provisions of the criminal statute that substantially incorporates the provisions of FRE 412. That statute, entitled “Prior sexual activity or reputation as evidence” (commonly referred to as the “rape shield statute”), prohibits, in specified sexual offenses and in other specified offenses involving sexual conduct, evidence of the prior sexual conduct or the reputation of the alleged victim or corroborating witness. (For more information on the statute, see the author's commentary related to FRE 412 infra.) (2) To codify Illinois law, “battery” is added to the Illinois rule. Note that Illinois does not require the defendant to be aware of the alleged victim’s violent character at the time of the alleged offense. See People v. Lynch, 104 Ill. 2d 194 (1984).</td>
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<td>(i) offer evidence to rebut it; and</td>
<td>Regarding the prosecution’s right to rebut character evidence of a victim, see People v. Knox, 94 Ill. App. 2d 36 (1968) (defendant’s attack on the character of the victim of a murder offense, through the cross-examination of two State witnesses, allowed the State to provide evidence of the victim’s good reputation during the State’s case-in-chief).</td>
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<td>(ii) offer evidence of the defendant’s same trait; and</td>
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<td>(C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.</td>
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Amended as of December 1, 2011:
### Federal Rules of Evidence

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<th>(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</th>
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<tr>
<td><strong>Amended as of December 1, 2011:</strong></td>
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<tr>
<td>(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.</td>
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### Illinois Rules of Evidence

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<th>(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</th>
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<td><strong>Author's Commentary to Rule 404(a)(3)</strong></td>
</tr>
<tr>
<td>IRE 404(a)(3) is identical to the pre-amended federal rule.</td>
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### (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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

**Amended as of December 1, 2011:**

(b) Crimes, Wrongs, or Other Acts.

1. **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

2. **Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

   (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

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IRE 404(b) is identical to the first part of pre-amended FRE 404(b), except for the exclusion provided by specific criminal statutes in the Code of Criminal Procedure of 1963, which allow proof of prior offenses “to show action in conformity therewith” (i.e., propensity evidence). In sum, (1) consistent with common-law principles, the rule generally prohibits other-crime evidence designed to show propensity; (2) despite that general prohibition, however, the rule abrogates the common law by exempting from the general rule of exclusion propensity evidence that is allowed for the offenses and under the procedures provided in the specified statutes; and (3) consistent with common-law principles, the rule allows other-crime evidence for non-propensity purposes such as those enumerated.

Regarding the subject matter of the statutes the rule cites, section 115-7.3 allows evidence of certain prior sex offenses in prosecutions for specified sex-related of-
(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

fenses; section 115-7.4 allows evidence of prior domestic violence offenses in prosecutions for domestic violence offenses; and section 115-20 allows evidence of prior convictions in prosecutions for certain enumerated offenses. The three statutes are provided in the appendix to this guide. Section 115-7.3 is at Appendix A; section 115-7.4 is at Appendix B; and section 115-20 is at Appendix C. (These statutes parallel some of the subject matter and virtually all the procedures provided by FRE 413 and FRE 414. For more on the three statutes, in addition to their availability in the appendix, see the author's commentary related to the discussion of FRE 413.) Each of the statutes allows evidence of prior specific instances of conduct of the defendant. (Regarding section 115-20, see People v. Chambers, 2011 IL App (3d) 090949 (August 12, 2011), where the appellate court held admissible not only a conviction for the prior offenses it lists, but also the evidence underlying the conviction.) The statutes also allow expert opinion testimony, as well as reputation testimony when the opposing party has offered reputation testimony.

The Illinois Supreme Court’s decision in People v. Dabbs, 239 Ill. 2d 277 (2010), predates the effective date of Illinois’ codified evidence rules by less than six weeks, but refers to the rules generally and to IRE 404(b) in particular. It succinctly summarizes supreme court cases that have allowed admissibility of other-crime evidence for non-propensity purposes, and it upholds the validity and applicability of section 115-7.4, which allows other-crime evidence for propensity purposes, based on its findings that the statute respects traditional rules relevant to the admissibility of evidence and that it meets constitutional muster.

In its succinct summary, the court said this about the common-law principles embodied in the rule related to the admission of other-crimes evidence for reasons other than propensity:

“As a common law rule of evidence in Illinois, it is well settled that evidence of other crimes is admissible if relevant for any purpose other than to show a defendant’s propensity to commit crimes. People v. Wilson, 214 Ill. 2d 127, 135-36 (2005). Such purposes include but are not limited to: motive (People v. Moss, 205 Ill. 2d 139, 156 (2001) (evidence that defendant previously sexually assaulted child properly admitted to show his motive for murder of child and her mother)), intent (Wilson, 214 Ill. 2d at 141 (evidence that teacher previously touched
other students in similar manner properly admitted to show intent in prosecution for aggravated criminal sexual abuse of students)), identity (People v. Robinson, 167 Ill. 2d 53, 65 (1995) (evidence that defendant previously attacked other similar victims in similar manner properly admitted under theory of *modus operandi* to show identity of perpetrator in prosecution for armed robbery and armed violence)), and accident or absence of mistake (Wilson, 214 Ill. 2d at 141 (evidence that teacher previously touched other students in similar fashion properly admitted to show lack of mistake in prosecution for aggravated criminal sexual abuse of students))."

The central issue in the *Dabbs* case involved the validity of the propensity exception in section 115-7.4 of the Code of Criminal Procedure (725 ILCS 5/115-7.4). During his trial for the offense of domestic violence on his girlfriend, evidence was admitted, pursuant to the statute, of the defendant's domestic violence on his former wife. On review, the supreme court first noted that it had previously upheld the constitutionality of section 115-7.3 (involving evidence of similar offenses in sexual assault cases) in *People v. Donoho*, 204 Ill. 2d 159 (2003). It then considered whether section 115-7.4 meets threshold requirements related to admissibility of evidence. It concluded that, not only does the statute not abrogate the principle that the decision regarding the admission of evidence is within the sound discretion of the trial court, it does not alter the principle that, to be admissible, evidence must be relevant, and it does not abrogate the need for the trial court to balance probative value with the risk of undue prejudice.

The court then upheld section 115-7.4's constitutionality, rejecting the defendant's due process claim based on its conclusions that there is no constitutional prohibition against propensity evidence, that the common-law prohibition of propensity evidence is an evidence rule that is subject to exceptions, and that the relevant statute bore a rational relationship to a legitimate legislative purpose. The court therefore held that the statute “permits the trial court to allow the admission of evidence of other crimes of domestic violence to establish the propensity of a defendant to commit a crime of domestic violence.”

Note that, in criminal cases, because of the combination of common law and statutory provisions, a review solely of the language of IRE 404(b) would not fully disclose that there are circumstances that allow (and sometimes mandate) proof of other crimes. The following evidence
is specifically admissible (a) under the rule (bolstered by common law), or (b) separately admissible pursuant to the provisions of various statutes: (1) As the rule makes clear (and as confirmed by the quote from the Dabbs case above), other-crimes evidence that is not presented to prove propensity, such as evidence presented “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” is admissible. (2) Statutes, such as sections 115-7.3 and 115-7.4 of the Code of Criminal Procedure of 1963, allow admissibility of specific instances of conduct to prove propensity. (3) A statute, such as section 115-20 of the Code of Criminal Procedure of 1963, allows admissibility of evidence of specified prior convictions in prosecutions for specified offenses to prove propensity. (4) Apart from the principles provided by IRE 404(b), statutes that make a conviction for specified offenses an element of a specified offense require proof of the prior conviction in order to prove that element of the offense. (See, e.g., People v. Zimmerman, 239 Ill. 2d 491 (2010) (evidence of a prior juvenile adjudication for an act that would have been a felony if committed by an adult was necessary to prove the element in prosecution for the offense of aggravated use of a firearm); People v. Davis, 405 Ill. App. 3d 585 (2010) (evidence of a prior conviction for one of the offenses specified by statute necessary to prove element in prosecution for offense of armed habitual criminal).

The last part of pre-amended FRE 404(b) (now FRE 404(b)(2)(A) and (B), through amendment effective December 1, 2011), which provides a notice requirement, is incorporated into new subdivision (c). See IRE 404(c), immediately below, and the author’s commentary following that subdivision.
(c). In a criminal case in which the prosecution intends to offer evidence under subdivision (b), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

**Author’s Commentary to Rule 404(c)**

FRE 404 does not have a subdivision (c), but IRE 404(c), like the last part of pre-amended FRE 404(b) (now FRE 404(b)(2)(A) and (B), through amendment effective December 1, 2011), provides a notice requirement, except, unlike the federal rule, the Illinois rule requires notice even if not requested by the accused and it more specifically provides what is to be disclosed—consistent with and identical to the requirements of subsection (d) of each of the statutes specified in IRE 404(b).

**Committee Comment to Rule 404**

Evidence of character or a trait of character of a person for the purpose of proving that the person acted in conformity therewith on a particular occasion is not admissible, except in a criminal case to the extent provided for under Rule 404(a)(1) (regarding the character of the accused), and under Rule 404(a)(2) (regarding the character of the alleged victim). Rule 404(b) renders inadmissible evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, but allows proof of other crimes, wrongs, or acts where they are relevant under statutes related to certain criminal offenses, as well as for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
|---------------------------|---------------------------|

### Rule 405. Methods of Proving Character

(a). **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

*Amended as of December 1, 2011:*

#### Rule 405. Methods of Proving Character

(a) **By Reputation or Opinion.** When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.

(b). **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

*Amended as of December 1, 2011:*

(b) **By Specific Instances of Conduct.** When a person’s character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person’s conduct.

### Rule 405. Methods of Proving Character

(a). **Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

#### Author’s Commentary to Rule 405(a)

IRE 405(a) is identical to pre-amended FRE 405(a), but for the deletion of the second sentence regarding cross-examination on specific acts of conduct, which is not allowed in Illinois except as permitted through direct and cross-examination by IRE 405(b)(1) when character or a trait of character is an essential element, or by IRE 405(b)(2) through direct or cross-examination about an alleged victim’s prior violent conduct, when self-defense is raised in homicide or battery cases.

Note that, though it is consistent with FRE 405(a), the ability to prove character by opinion evidence represents a change in Illinois law, which, before the codified rule, permitted character evidence only by reputation testimony. See the “Recommendations” section of the Committee’s general commentary at the bottom of page 4 of this guide.

(b). **Specific Instances of Conduct.**

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct; and

#### Author’s Commentary to Rule 405(b)(1)

There is no FRE 405(b)(1), but IRE 405(b)(1) is identical to pre-amended FRE 405(b). The codified Illinois rule is consistent with Illinois law, which permits evidence of specific instances of conduct in causes of action where evidence of character or a trait of character is an es-
(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim’s prior violent conduct.

Author’s Commentary to Rule 405(b)(2)

There is no FRE 405(b)(2). IRE 405(b)(2), however, codifies Illinois common law in homicide and battery cases. See People v. Lynch, 104 Ill. 2d 194, 200-01 (1984).

Committee Comment to Rule 405

Specific instances of a person’s conduct as proof of a person’s character or trait of character are not generally admissible as proof that the person acted in conformity therewith. Specific instances of a person’s conduct are admissible, however, under Rule 405(b)(1), as proof of a person’s character or a trait of character only in those limited cases (such as negligent entrustment, negligent hiring, and certain defamation actions), when a person’s character or a trait of character is an essential element of a charge, claim, or defense. Specific instances of conduct are also admissible under Rule 405(b)(2) in criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor.
### 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.

**Author's Commentary to Rule 406**

IRE 406 is identical to the pre-amended federal rule. For a case allowing evidence of the routine practice of an organization even in the absence of corroboration, see Grewe v. West Washington County Unit District No. 10, 303 Ill. App. 3d 299, 307 (1999).

Illinois cases had been inconsistent on whether eyewitness testimony prohibits habit testimony, with a trend in recent cases towards the admissibility of such evidence regardless of the presence of eyewitness testimony. IRE 406 removes any doubt concerning the issue. See also section (2) under the “Modernization” discussion in the Committee’s general commentary on page 2 of this guide.

### Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, 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 impeachment.

**Author's Commentary to Reserved Rule 407**

IRE 407 is reserved because of a conflict in the decisions of the appellate court relating to whether subsection (2) in the draft rule originally submitted by the Committee represents the law in Illinois. The draft rule is presented below with disputed subsection (2) in bold. That subsection excludes evidence related to the taking of remedial measures “after the manufacture of a product but prior to an injury or harm allegedly caused by that product.” When the Committee drafted the rule, it was unaware of issues pending in a case before the appellate court. Since then, Jablonski v. Ford Motor Co., 398 Ill. App. 3d 222 (2010), was decided in a manner arguably inconsistent with other appellate court decisions on the issue. The supreme court granted review in Jablonski and, on September 22, 2011, it reversed the judgments of the circuit and appellate courts. See Jablonski v. Ford Motor Co., 398 Ill. App. 3d 222 (2010).
### Federal Rules of Evidence

**Amended as of December 1, 2011:**

**Rule 407. Subsequent Remedial Measures**

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

### Illinois Rules of Evidence

**IR 406**

Co., 2011 IL 110096 (2011). The court’s opinion, however, was based on the insufficiency of the plaintiffs’ evidence related to negligent design, the plaintiffs’ reliance on a non-cognizable postsale duty to warn, and their faulty theory concerning the defendant’s alleged voluntary undertaking. As a result, the court explicitly found it unnecessary to address various evidentiary rulings, “including whether the trial court erred in admitting evidence related to postsale remedial measures.” Thus, the core issue involving subsection (2) in the rule originally proposed was not addressed.

Note that, in this guide, pre-amended FRE 407 has not been stricken through in red (which would have shown rejection), nor has it been underlined in blue (which would have shown a difference from Illinois law). That is so because, through the common law, the principles stated in the federal rule apply in Illinois. The only open question is whether subsection (2) of the draft rule should be included in IRE 407.

**Draft Rule 407. Subsequent Remedial Measures (as originally drafted, before withdrawn by the Committee):**

When, (1) after an injury or harm allegedly caused by an event, or (2) after manufacture of a product but prior to an injury or harm allegedly caused by that product, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures or design, if controverted, or for purposes of impeachment.
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**Rule 408. Compromise and Offers to Compromise**

(a) **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

1. furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

2. conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of its regulatory, investigative, or enforcement authority.

Amended as of December 1, 2011:

**Rule 408. Compromise Offers and Negotiations**

(a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

1. furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

2. conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

**Author’s Commentary to Rule 408(a)**

IRE 408(a) is identical to the pre-amended federal rule, except for the deletion of the last portion of pre-amended FRE 408(a)(2), which therefore does not provide that specific exception to prohibited uses in an Illinois criminal case. This rule alters the holdings of prior Illinois appellate decisions that held that admissions of fact were not excluded merely because they were made in the course of settlement or compromise negotiations. See Niehuss v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 143 Ill. App. 3d 444 (1986); Khatib v. McDonald, 87 Ill. App. 3d 1087 (1980). See also section (3) under the “Modernization” discussion in the Committee’s general commentary on page 2 of this guide.
**Federal Rules of Evidence**

<table>
<thead>
<tr>
<th>(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.</th>
</tr>
</thead>
</table>

| **Illinois Rules of Evidence** |
| (b) Permitted Uses. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’ bias or prejudice; negating an assertion of undue delay; establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution. |

**Amended as of December 1, 2011:**

| (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. |

**Author’s Commentary to Rule 408(b)**

IRE 408(b) is identical to pre-amended FRE 408(b), except for the addition of the first sentence, to make it clear that evidence otherwise admissible is not excluded merely because it was used in settlement discussions; and except for adding “establishing bad faith” as an example of a permissible purpose, and substituting “an assertion” for “a contention.”
<table>
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<tr>
<td><strong>Rule 409. Payment of Medical and Similar Expenses</strong></td>
<td><strong>Rule 409. Payment of Medical and Similar Expenses</strong></td>
</tr>
<tr>
<td>Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.</td>
<td>In addition to the provisions of section 8-1901 of the Code of Civil Procedure (735 ILCS 5/8-1901), evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.</td>
</tr>
</tbody>
</table>

**Amended as of December 1, 2011:**

**Rule 409. Offers to Pay Medical and Similar Expenses**

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

**Author's Commentary to Rule 409**

IRE 409 is identical to the pre-amended federal rule, except for the incorporation of the Illinois statute in the first clause. That statute excludes evidence of an offer to pay or payment for medical expenses (and expressions of grief, apology, sorrow, or explanations from health care providers in the portion of the amendment to the statute made by Public Act 94-677, which was found unconstitutional, because of an inseverability provision, in Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217 (2010)). The statute (735 ILCS 5/8-1901), in its pre-amended form and amended form, is provided in the appendix as Appendix D.

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not admissible in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

1. a plea of guilty which was later withdrawn;
2. a plea of nolo contendere;
3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not admissible in any criminal proceeding against the defendant who made the plea or was a participant in the plea discussions:

1. a plea of guilty which was later withdrawn;
2. a plea of nolo contendere;
3. any statement made in the course of any proceedings under Illinois Supreme Court Rule 402 regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

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**Amended as of December 1, 2011:**

**Rule 410. Pleas, Plea Discussions, and Related Statements**

**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

1. a guilty plea that was later withdrawn;
2. a nolo contendere plea;
3. a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
4. a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

**(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4):

1. in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

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**Author’s Commentary to Rule 410**

IRE 410 is based on Illinois Supreme Court Rule 402(f) and is identical to the pre-amended federal rule, except (1) it is modified to distinguish Illinois from federal proceedings; (2) the rule applies only to criminal and not to civil proceedings; and (3) it makes inadmissible any statements made during plea discussions (such as to a police officer or investigator, not only those made during plea discussions with a prosecutor—see *People v. Friedman*, 79 Ill. 2d 341, 351-52 (1980)—except for those exempted in the last sentence of the rule. Friedman’s two prong test for determining the non-admissibility of a plea-related statement is whether: (1) the defendant exhibited a subjective expectation to negotiate a plea, and (2) the expectation was reasonable under the totality of the objective circumstances. For a recent case applying the test and finding the defendant’s statements to police inadmissible as plea-related, see *People v. Rivera*, 409 Ill. App. 3d 122 (2011), appeal allowed, No. 112467 (September 28, 2011).
**Rule 411. Liability Insurance**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**Amended as of December 1, 2011:**

**Rule 411. Liability Insurance**

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

**Author's Commentary to Rule 411**

IRE 411 is identical to the pre-amended federal rule. See *Imparato v. Rooney*, 95 Ill. App. 3d 11 (1981) (evidence that a party has insurance is generally inadmissible because being insured has no bearing on the question of negligence and may result in a higher award); *Lenz v. Julian*, 276 Ill. App. 3d 66 (1995) (improper to inform the jury, either directly or indirectly, that a defendant is or is not insured against a judgment that might be entered against him in a negligence action).
### Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition

#### (a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

1. Evidence offered to prove that a victim engaged in other sexual behavior; or
2. Evidence offered to prove a victim’s sexual predisposition.

**Amended as of December 1, 2011:**

**Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition**

- **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
  1. Evidence offered to prove that a victim engaged in other sexual behavior; or
  2. Evidence offered to prove a victim’s sexual predisposition.

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**Author’s Commentary to Federal Rule 412(a)**

FRE 412 was not adopted, but the same subject matter is addressed in the Rape Shield Statute. See Appendix E.

**Section 115-7** of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7), which limits the admissibility of the prior sexual activity or reputation of a victim of a sexual offense and is commonly referred to as the “rape shield statute,” is the counterpart to FRE 412. The statute is provided in the appendix to this guide as Appendix E. Similar to FRE 412(a), in prosecutions for specified sexual offenses and specified offenses involving sexual penetration or sexual conduct, the statute prohibits evidence of the prior sexual activity or of the reputation of an alleged victim or corroborating witness, with limited exceptions. The supreme court has ruled that the statute applies both to the State and to the defense and that it is unambiguous in prohibiting admissibility of a victim’s prior sexual history, except for the exceptions (given below) that it explicitly provides. See People v. Santos, 211 Ill. 2d 395 (2004); People v. Sandoval, 135 Ill. 2d 159 (1990).

In civil cases, Public Act 96-0307, effective January 1, 2010, created section 8-2801 of the Code of Civil Procedure (735 ILCS 5/8-2801). That statute provides provisions similar to those in section 115-7 of the Code of Criminal Procedure of 1963 regarding inadmissibility of evidence of prior sexual activity and reputation. The statute is provided in the appendix as Appendix F.
(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

Amended as of December 1, 2011:

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone
### (c). Procedure to Determine Admissibility.

1. A party intending to offer evidence under subdivision (b) must—
   - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
   - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.

2. Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

### Author's Commentary to Federal Rule 412(c)

Section 115-7(b) of the Code of Criminal Procedure of 1963 requires the defendant to make an offer of proof, at a hearing held in camera, concerning the past sexual conduct or reputation of the alleged victim or corroborating witness, in order to obtain a ruling concerning admissibility. That section identifies the type of information required for the offer of proof. It also provides that, to admit the evidence, the court must determine that the evidence is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice.

In a civil case, section 8-2801(c) of the Code of Civil Procedure (735 ILCS 5/8-2801(c); see Appendix F) requires the defendant to file a written motion at least 14 days before trial describing the evidence and the purpose for which it is offered, and it requires the court to conduct an in camera hearing, with the record kept under seal, before allowing admission of the evidence.
Amended as of December 1, 2011:

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim’s guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Amended as of December 1, 2011:

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other

[FRE 413 not adopted.]
Section 115-7.3, which allows propensity evidence, has been determined not to violate equal protection by the supreme court in *People v. Donoho*, 204 Ill. 2d 159, 177 (2003). Although that decision did not directly rule on whether the statute violated due process, the appellate court in *People v. Beaty*, 377 Ill. App. 3d 861 (2007), stated that the supreme court implicitly held that it did not violate that protection. In any case, *Beaty* and *People v. Everhart*, 405 Ill. App. 3d 687 (2010), explicitly held that the statute did not violate due process. In *People v. Ward*, 389 Ill. App. 3d 757 (2009), the appellate court, citing United States and Illinois Supreme Court precedent, upheld admission of evidence of a prior sex offense, as propensity evidence under section 115-7.3, even though the defendant had been acquitted by a jury of that offense. In its review of the appellate court decision in *People v. Ward*, 2011 IL 108690, noting that it had previously upheld the constitutionality of section 115-7.3 in *Donoho*, and that the defendant had not challenged either the constitutionality or the admissibility of the propensity evidence for its review, the supreme court determined that it did not need to address the appellate court’s holding regarding the admission of evidence of the prior sex offense but, addressing the issue squarely before it, held that the trial court’s ruling barring the evidence of the acquittal was improper.

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**Author's Commentary to Federal Rule 413(b)**

Section 115-7.3(d) of the Code of Criminal Procedure of 1963 provides that when “the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.”
prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Amended as of December 1, 2011:

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

1. any conduct proscribed by chapter 109A of title 18, United States Code;
2. contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person;
3. contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;
4. deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
5. an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Amended as of December 1, 2011:

(d) Definition of “Sexual Assault.” In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

Author’s Commentary to Federal Rule 413(d)

Section 115-7.3 applies to criminal cases in which the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV. It also applies where the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder, when the commission of the offense involves sexual penetration or sexual conduct. It applies, too, where the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

Note that, in addition to the sex-related offenses described above, section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4; see Appendix B) extends the admissibility of evidence provided by FRE 413 concerning sex offenses, to allow evidence of a non-sex offense, specifically, another offense or offenses of domestic violence in a prosecution for domestic violence. In People v. Dabbs, 239 Ill. 2d 277 (2010), the supreme court held that evidence of the defendant’s domestic violence on his former wife, admitted during his trial for domestic violence on his girlfriend, was proper. For an appreciation of the impact of the Dabbs decision on other-crimes evidence, see the discussion concerning that decision in the author’s commentary related to IRE 404(b).

Section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-20; see Appendix C) also broad-
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(1) any conduct prohibited by 18 U.S.C. chapter 109A; | ens the provisions of FRE 413, for it allows evidence of a prior conviction for domestic battery, aggravated battery committed against a family or household member, stalking, aggravated stalking, or violation of an order of protection “in a later prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant.” Note that in People v. Chambers, 2011 IL App (3d) 090949 (August 12, 2011), the appellate court concluded that language in section 115-20 reflected the legislature’s intent to make admissible not only a conviction for the prior offenses it lists, but also the evidence underlying the conviction. The court noted that, in any event, section 115-7.4 specifically allows evidence related to a prior domestic violence offense in a subsequent prosecution for domestic violence, which was the offense under review in Chambers.
(2) contact, without consent, between any part of the defendant’s body — or an object — and another person’s genitals or anus; | [FRE 414 not adopted.]
(3) contact, without consent, between the defendant’s genitals or anus and any part of another person’s body; | 
(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or | 
(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4). |

**Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, “child” means a person below the age of four.

*Author’s Commentary to Federal Rule 414*

FRE 414 was not adopted, but the same subject matter is addressed by statute.

Although Illinois has not adopted FRE 414, section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3), which is discussed above in relation to FRE 413 and is in the appendix as Appendix A, applies to prosecutions for predatory criminal sexual assault of a child, as well as to other sexual offenses that may have children as victims.

FRE 414, which addresses only child molestation cases, is identical to the provisions of FRE 413, except that the latter applies to sexual offenses generally. The provisions of section 115-7.3 of the Code of Criminal Procedure, which are explained above, apply equally to adults and to children who are victims of sexual offenses.
Amended as of December 1, 2011:

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of “Child” and “Child Molestation.” In this rule and Rule 415:

(1) “child” means a person below the age of 14; and

(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

[FRE 415 not adopted.]
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Amended as of December 1, 2011:

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party’s alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses’ statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.
Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Amended as of December 1, 2011:

Rule 501. Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

· the United States Constitution;
· a federal statute; or
· rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Author's Commentary to Rule 501.

IRE 501 is identical to the pre-amended federal rule, except for changes to distinguish Illinois proceedings from federal proceedings.

Examples of statutory privileges include: physician and patient privilege (735 ILCS 5/8-802); privilege for statements made by a victim of a sexual offense to rape crisis personnel (735 ILCS 5/8-802.1); privilege for statements made by victims of violent crimes to counsellors of such victims (735 ILCS 5/8-802.2); informant’s privilege (735 ILCS 5/8-802.3); clergy privilege (735 ILCS 5/8-803); union agent and union member privilege (735 ILCS 5/8-803.5); reporter’s privilege (735 ILCS 5/8-901); voter’s privilege (735 ILCS 5/8-910); interpreter’s privilege (735 ILCS 5/8-911); interpreter for the deaf and hard of hearing privilege (735 ILCS 5/8-912).

The attorney-client privilege is an example of a rule prescribed by the supreme court through the Rules of Professional Conduct (RPC Rule 1.6).
**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

[FRE 502 not adopted.]
Federal Rules of Evidence

(c) Disclosure made in a State proceeding.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal-court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.—In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications;
and-

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or trial.

Amended as of December 1, 2011:

<table>
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<tr>
<th><strong>Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver</strong></th>
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<tr>
<td>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</td>
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</table>

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and

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<tr>
<th><strong>Author’s Commentary to Non-Adoption of Federal Rule 502</strong></th>
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<tr>
<td>FRE 502 was not adopted because Illinois law on the effect of disclosure of privileged communications is relatively undeveloped, and the time was therefore not ripe for codification.</td>
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</table>

Subsequent to the adoption of these rules, however, the Committee submitted a proposed Rule 502 to the Illinois Supreme Court Rules Committee, which has scheduled it for public hearing on January 23, 2012. The proposed rule, which closely parallels FRE 502 as adapted to fit Illinois purposes, reads as follows:

**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection. 

(a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any federal or state proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
### (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

#### (c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a federal proceeding; or
2. is not a waiver under the law of the state where the disclosure occurred.

#### (d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

#### (e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

#### (f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

#### (g) Definitions. In this rule:

1. “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
2. “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

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Also pending before the Rules Committee is a **proposed supreme court rule** designed to complement proposed IRE 502. It is substantially identical to Federal Rule of Civil Procedure 26(b)(5)(B), which complements the federal rule and is cited at FRE 502(b)(3). The number of that rule is intended to be inserted in the blank at the end of proposed IRE 502(b)(3). The proposed supreme court rule reads as follows:
Supreme Court Rule ____. Asserting Privilege or Work Product Following Discovery Disclosure

If information produced in discovery is subject to a claim of privilege or of work product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.
Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Amended as of December 1, 2011:

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.

Author’s Commentary to Rule 601

The first part of IRE 601 is virtually identical to the first sentence of the pre-amended federal rule. The second sentence of pre-amended FRE 601 is deleted as unnecessary in Illinois state proceedings. The Illinois rule is adjusted to accommodate statutory provisions such as the prohibition of witness testimony under a statute such as the Dead Man's Act (735 ILCS 5/8-201).

For a statute providing criteria for judging witness competency, see section 115-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-14). See also section 115-16 of the same Code (725 ILCS 5/115-16) as well as section 8-801 of the Code of Civil Procedure (735 ILCS 5/8-801), both of which make admissible evidence from an interested witness or a witness with a criminal conviction, such status being relevant only to the weight of the evidence. Both section 115-16 of the Code of Criminal Procedure and section 8-101 of the Code of Civil Procedure (735 ILCS 5/8-101) address the spousal privilege. See also People v. Garcia, 97 Ill. 2d 58, 74 (1983) (degree of intelligence and understanding of a child, and not the child’s chronological age, determines capacity to testify as a witness).
Rule 602. Lack of Personal Knowledge

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

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

IRE 602
IRE 603
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<td><strong>Rule 604. Interpreters</strong></td>
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<td>An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.</td>
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<tr>
<td>An interpreter must be qualified and must give an oath or affirmation to make a true translation.</td>
<td>IRE 604 is identical to the pre-amended federal rule. Interpreters are provided for by statute in civil cases (735 ILCS 5/8-1401); in criminal cases (725 ILCS 140/0.01 et seq.); and for deaf persons (735 ILCS 5/8-1402).</td>
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<td><strong>Rule 605. Competency of Judge as Witness</strong></td>
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<tr>
<td><strong>Rule 605. Judge’s Competency as a Witness</strong></td>
<td><strong>Author's Commentary to Rule 605</strong></td>
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<td>The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.</td>
<td>IRE 605 is identical to the pre-amended federal rule. See People v. Ernest, 141 Ill. 2d 412, 420 (1990) (upholding contempt finding on attorney who issued a subpoena for the discovery deposition of a judge presiding over a matter in which the attorney was appearing as counsel).</td>
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<td><strong>Rule 606. Competency of Juror as Witness</strong></td>
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<td><em>(a). At the trial.</em> A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.</td>
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<td><strong>Author's Commentary to Rule 606(a)</strong></td>
</tr>
<tr>
<td><em>(a) At the Trial.</em> A juror may not testify as a witness before the other jurors at the trial. If a juror is called</td>
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<td>IRE 606(a) is identical to the pre-amended federal rule.</td>
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(b). Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Amended as of December 1, 2011:

(b). Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify (1) whether any extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received concerning a matter about which the juror would be precluded from testifying.

Author’s Commentary to Rule 606(b)

IRE 606(b) is identical to pre-amended FRE 606(b), except for the deletion of the word “about,” the addition of the word “any,” and the substitution of “concerning” for “on.” See People v. Holmes, 69 Ill. 2d 507, 516 (1978) (adopting FRE 606(b)); People v. Hobley, 182 Ill. 2d 404 (1998).
<table>
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<tr>
<th><strong>Federal Rules of Evidence</strong></th>
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<td>(B) an outside influence was improperly brought to bear on any juror; or</td>
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<td>(C) a mistake was made in entering the verdict on the verdict form.</td>
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**Author’s Commentary to Federal Rule 606(b)**

See *Tanner v. U.S.*, 483 U.S. 107 (1987) (noting that “Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences,” and holding that juror intoxication is not an “outside influence” about which jurors may testify to impeach their verdict).

**Rule 607. Who May Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

**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.

**Amended as of December 1, 2011:**

**Rule 607. Who May Impeach a Witness**

Any party, including the party that called the witness, may attack the witness’s credibility.

**Author’s Commentary to Rule 607**

The first two clauses of IRE 607 are identical to all of pre-amended FRE 607. They are also identical to Illinois Supreme Court Rule 238(a). The addition of the exception providing the requirement to show affirmative damage when there is impeachment by a prior inconsistent statement that is not admissible for substantive purposes is added to codify Illinois common law. Its intent is to prevent the ploy of calling a witness for the purpose of presenting to the jury a favorable prior inconsistent statement that is not admissible substantively. The rule prohibits doing that in the absence of a showing of affirmative damage, which, however, is not necessary when the prior inconsistent statement is admissible substantively.
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<tr>
<td><strong>Rule 608. Evidence of Character and Conduct of Witness</strong></td>
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<tr>
<td>(a). <strong>Opinion and reputation evidence of character.</strong> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.</td>
<td>The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.</td>
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</table>

*Amended as of December 1, 2011:*

**Rule 608. A Witness’s Character for Truthfulness or Untruthfulness**

(a) **Reputation or Opinion Evidence.** A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.

**Author’s Commentary to Rule 608**

Except for the title, IRE 608 is identical to pre-amended FRE 608(a). FRE 608(b) has not been adopted. There therefore is no subsection (a) or (b) in IRE 608.

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

Note that IRE 608 is identical to the wording of pre-amended FRE 608(a), a rule that addresses “evidence of character.” The rule (in its pre-amended and amended forms) relates to testimony concerning the character for truthfulness or untruthfulness of another witness. It is consistent with Illinois common law, except that allowing opinion evidence concerning character represents a substantive change in Illinois law. That is so because Illinois law formerly allowed proof of character only through reputation testimony. See People v. Cookson, 215 Ill. 2d 194, 213 (2005) (noting that the supreme court has “consistently held” that only reputation evidence and not opinion evidence or evidence of specific past instances of untruthfulness could be used to impeach a witness’ reputation for truthfulness).
|---------------------------|---------------------------|
| **(b). Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’s privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. |

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**Amended as of December 1, 2011:**

(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

1. the witness; or
2. another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

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**Author’s Commentary to Non-Adoption of Federal Rule 608(b)**

FRE 608(b) (known as the impeachment by “prior bad acts rule” to distinguish it from FRE 609’s impeachment by “prior criminal conviction rule”) has not been adopted in Illinois.

Note that FRE 608(b) allows proof of “specific instances of conduct,” as such conduct relates to the character of a witness for truthfulness or untruthfulness. Under the federal rule, a testifying witness may be cross-examined (1) about specific instances of the witness’s own conduct related to truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Nevertheless, it should be noted that, for the purpose of attacking general credibility, Illinois does allow inquiry concerning a witness’s prior wrongdoings that may be related to a possible motive for giving false testimony, such as where a prosecution witness expects to receive a lesser sentence for his testimony. Such inquiry also is allowed concerning a witness’s disreputable occupation (see People v. Winchester, 352 Ill. 237, 244 (1933) (allowing cross-examination regarding witness’ operation of a “house of prostitution”), and a witness’s narcotics addiction either at the time of testifying or at the time an event occurred (see People v. Collins, 106 Ill. 2d 237, 270 (1985) (inquiry is proper because it goes to the witness’ credibility and the ability of the witness to recall)). Consistent, however, with the federal rule and the discussion in the paragraph just below, Illinois requires that an answer to a question concerning a collateral matter (i.e., one not relevant to a material issue in the case) must be accepted and the impeachment may not be completed by the presentation of extrinsic evidence (i.e., evidence other than the witness’ testimony). See Esser v. McIntyre, 169 Ill. 2d 292, 304-05 (1996) (failure to
IRE 608 does not incorporate FRE 608(b). But inquiry into specific instances of conduct, to attack and support a witness’ character for truthfulness, is a frequent occurrence in federal trials, particularly in criminal cases. The ability of federal prosecutors to inquire into specific instances of conduct often results in a defendant opting not to testify. And such examination is utilized frequently by defense attorneys in federal criminal cases, particularly where alleged co-offenders or co-conspirators testify for the government and against the defendant. The trial of William Cellini for attempted extortion illustrates its use in such cases. There, defense attorney Dan Webb cross-examined an admittedly corrupt Stuart Levine after his direct testimony on behalf of the government. According to a newspaper account (see “Corruption witness grilled,” Chicago Tribune, October 15, 2011, page 4), Webb questioned Levine “about how he felt about it all.” When Levine did not answer Webb’s inquiry about how many “acts of dishonesty” he engaged in, Webb said, “I’ll take an estimate,” asking whether it was a number “over 500.” When Levine said he didn’t know how to “quantify it,” Webb asked, “Is it fair to say there has been so many you can’t give an estimate of a total?” And this was just within the first hour of the cross-examination concerning the witness’ specific instances of conduct, an examination that lasted approximately three days. Again, this type of inquiry is not permitted under Illinois’ version of Rule 608.

In addition to not permitting inquiry concerning specific instances of conduct (except for the limited circumstances described above), Illinois, consistent with FRE 608(b), does not permit proof of specific instances of conduct by extrinsic evidence to support or attack a witness’ character for truthfulness. See People v. West, 158 Ill. 2d 155 (1994) (rejecting the argument that evidence of specific acts of untruthfulness should be admitted to impeach a child witness because the child was too young to have developed a reputation in the community); People v. Williams, 139 Ill. 2d 1 (1990) (complainant’s seventh and eighth grade teachers could not testify at trial that she was an “inveterate liar”); Podolsky and Assocs. L.P. v. Discipio, 297 Ill. App. 3d 1014 (1998) (rejecting adoption of FRE 608(b) and holding that the trial court properly refused to allow evidence of a lawyer’s suspension from the practice of law).

That Illinois permits proof of specific instances of conduct pursuant to certain criminal statutes should not be confused with the fact that Illinois does not permit such evidence for establishing the truthfulness or untruthfulness of a witness. Examples of statutes that permit inquiry into specific instances of conduct, for propensity purposes, include those cited in IRE 404(b) and discussed in the author’s comments to that rule, and those discussed in the author’s comments related to FRE 413 and 414.
### Federal Rules of Evidence

#### Rule 609. Impeachment by Evidence of Conviction of Crime

(a). General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

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#### Illinois Rules of Evidence

#### Rule 609. Impeachment by Evidence of Conviction of Crime

(a). General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3), in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

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#### Author's Commentary to Rule 609(a)

Illinois has adopted the standard provided by *People v. Montgomery*, 47 Ill. 2d 510 (1971), for impeachment by evidence of the prior conviction of a crime. That standard adopted the 1971 draft version of Federal Rule of Evidence 609. The result is that IRE 609 is not identical to FRE 609. Concerning Rule 609(a), dissimilarities relate to the balancing test applied to prior felony convictions of the accused and to prior crimes that involved dishonesty or false statement:

(1) For proof of a prior felony conviction, both the pre-amended and amended versions of FRE 609(a)(1), like IRE 609(a), apply the balancing test of FRE 403 to a mere witness, but a different test if the evidence of conviction is to be introduced against the accused. **When the witness is the accused**, the standard applied
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness’s admitting — a dishonest act or false statement.

by FRE 609(a)(1) allows admission of the evidence of the conviction if the probative value of admitting it outweighs the danger of unfair prejudice. The Illinois standard (applying the balancing test provided by IRE 403), in contrast, allows admission of the evidence of the prior conviction if the danger of unfair prejudice does not substantially outweigh its probative value.

(2) Both the pre-amended and amended versions of FRE 609(a)(2), unlike IRE 609(a), allow admission of evidence of the conviction of a crime that involved dishonesty or false statement without regard to considerations of probative value and prejudicial effect. In contrast, IRE 609(a) applies the IRE 403 balancing test to such convictions.

In sum, IRE 609(a) applies the same balancing test regarding the admission of evidence of prior convictions that is supplied by IRE 403 (and FRE 403) (i.e., it prohibits the admission of evidence only where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice), without distinguishing between a mere witness and a witness who is the accused, and without regard for whether the prior conviction was for a felony offense or an offense involving dishonesty or false statement.

Note that IRE 609 (like FRE 609) allows proof of a prior offense only for impeachment purposes, i.e., to challenge the credibility of a witness. Such evidence is not permitted to prove propensity. Nevertheless, Illinois has a statute, section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-20), that permits proof of prior convictions in specified criminal cases to prove the propensity of a defendant to commit any of the types of offenses listed in the statute against the same victim. The statute, not to be confused with the provisions of IRE 609, allows evidence of a prior conviction for domestic battery, aggravated battery committed against a family or household member, stalking, aggravated stalking, or violation of an order of protection “in a later prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant.”

Most appellate and supreme court cases that address the proper application of the principles contained in what is now codified in IRE 609(a) deal with the admissibility for impeachment purposes of prior convictions of defendants in criminal cases.
Illinois decisions require that, in a criminal case, evidence of a prior conviction of the defendant for impeachment purposes must be proved through the introduction of a certified copy of the judgment of conviction, and not through cross-examination of the defendant. See People v. Coleman, 158 Ill. 2d 317, 337 (1994). Thus, it would be improper for a prosecutor in an Illinois trial court to ask the defendant in a criminal case a question similar to that propounded by the federal prosecutor of the former governor of Illinois: “Mr. Blagojevich, you are a convicted liar, correct?” In People v. Bey, 42 Ill. 2d 129 (1969), however, the supreme court approved the cross-examination of the defendant, where he had given incomplete testimony on direct examination concerning his convictions. See also People v. Nastasio, 30 Ill. 2d 51 (1963). On the other hand, in People v. Harris, 231 Ill. 2d 582 (2008), where the defendant's testimony on direct examination opened the door to admission of his prior juvenile adjudication, the supreme court reiterated its preference for proof by certified documents in response to the defendant's contention on appeal that he should have been cross-examined about the matter to allow him the opportunity to explain the apparent inconsistency in his testimony.

In People v. Patrick, 233 Ill. 2d 62 (2009), the supreme court held that a trial court's arbitrary ruling (as a blanket policy) not to rule on a defendant's pre-trial motion in limine concerning the admissibility of prior convictions constitutes an abuse of discretion. A Patrick violation (where a trial court, with sufficient information to make a ruling, delays ruling on a defendant's motion in limine to bar admission of a prior conviction) is not a structural error, and is therefore subject to harmless error analysis. People v. Mullins, 242 Ill. 2d 1 (2011); People v. Averett, 237 Ill. 2d 1 (2010); Patrick. The factors that are considered in harmless error analysis are (1) the defendant's need to testify; (2) the type of reference, if any, to the defendant's conviction in closing argument; (3) the strength of the evidence against the defendant. Mullins.

Averett and Patrick are authority for the principle that, to preserve appellate review concerning error in the court's denial of the defendant's motion in limine to exclude proof of a prior conviction, the defendant must testify – even where, as in Averett, the court erred in arbitrarily refusing to consider a motion in limine.

In People v. Atkinson, 186 Ill. 2d 450 (1999), and in People v. Cox, 195 Ill. 2d 378 (2001), the supreme court
(b). Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Amended as of December 1, 2011:

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

1. its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
(c). Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Amended as of December 1, 2011:

(c). Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

Author’s Commentary to Rule 609(c)

Although worded differently, IRE 609(c) is similar to pre-amended FRE 609(c). The only difference is that the Illinois rule does not explicitly provide that conviction of a subsequent felony is a basis for precluding evidence of a prior conviction. (Note that Illinois generally uses terms such as “clemency,” “pardon,” “commutation,” and “reprieve” (see, e.g., 730 ILCS 5/3-3-13), rather than “annulment” and “certificate of rehabilitation,” which are used in other states.)
(d). Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

**Amended as of December 1, 2011:**

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

1. it is offered in a criminal case;
2. the adjudication was of a witness other than the defendant;
3. an adult’s conviction for that offense would be admissible to attack the adult’s credibility; and
4. admitting the evidence is necessary to fairly determine guilt or innocence.

**Author’s Commentary to Rule 609(d)**

IRE 609(d) is identical to the pre-amended federal rule, except for the deletion of “in a criminal case,” because the exception under Illinois common law applies to civil and criminal cases.

Note that in People v. Harris, 231 Ill. 2d 582 (2008), the supreme court held that juvenile adjudications are admissible for impeachment purposes against a testifying defendant when the defendant opens the door to such evidence. Because its holding was based on the defendant’s own misleading testimony, the court declined to consider whether section 5-150(1)(c) of the Juvenile Court Act of 1987 (705 ILCS 405/5-150(1)(c)), which is statutory authority for use of juvenile adjudications against mere witnesses and has been interpreted as statutory authority for such use against a testifying criminal defendant, overrides the common law prohibition against such use. (The statute is provided in its entirety in this guide as Appendix G.)

Recently, in People v. Villa, 2011 IL 110777 (December 1, 2011), a case in which it granted leave to appeal two days after adopting these rules, the supreme court, in a 4-to-3 opinion, resolved a conflict in the holdings of two districts of the appellate court by concluding that the common law rule, as provided by the Montgomery decision, presents the applicable evidentiary rule. The court reached that conclusion by considering the history of the statute, with particular emphasis on the fact that the statute makes juvenile adjudications admissible against a testifying criminal defendant “only for purposes of impeachment and pursuant to the rules of evidence for criminal trials.” The court concluded that the retention of that language in the statute represented the General Assembly’s intention to allow “the admission of
(e). Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Amended as of December 1, 2011:

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Comment to Rule 609

Rule 609 represents a codification of a draft of Fed.R.Evid. 609, as adopted by the Illinois Supreme Court in People v. Montgomery, 48 Ill. 2d 510, 268 N.E.2d 695 (1971). Rule 609(d) is a codification of the Montgomery holding related to the admissibility of juvenile adjudications for impeachment purposes. Rule 609(d) may conflict with section 5-150(1)(c) of the Juvenile Court Act (705 ILCS 405/5–150(1)(c)), which arguably makes such adjudications admissible for impeachment purposes. Concerning that issue, it should be noted that in People v. Harris, 231 Ill. 2d 582 (2008), the Supreme Court held that juvenile adjudications are admissible for impeachment purposes when a defendant opens the door to such evidence (in that case, by testifying that “I don’t commit crimes”). Because of its holding, which was based on the defendant’s own testimony, the court declined to consider whether section 5-150(1)(c) overrides the common law prohibition against such use. The codification of Montgomery in Rule 609(d) is not intended to resolve this issue.
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**Federal Rules of Evidence**

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<tr>
<th>(b). <strong>Scope of cross-examination.</strong> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.</th>
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_Amended as of December 1, 2011:_

| (b) **Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility. The court may allow inquiry into additional matters as if on direct examination. |

**Illinois Rules of Evidence**

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_Author's Commentary to Rule 611(b)_

IRE 611(b) is identical to the pre-amended federal rule. See People v. Terrell, 185 Ill. 2d 467 (1998).

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<th>(c). <strong>Leading questions.</strong> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.</th>
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_Amended as of December 1, 2011:_

| (c) **Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness’s testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile or an unwilling witness or an adverse party or an agent of an adverse party as defined by section 2-1102 of the Code of Civil Procedure (735 ILCS 5/2-1102), interrogation may be by leading questions. |

**Author's Commentary to Rule 611(c)**

IRE 611(c) is almost identical to the pre-amended federal rule, except that FRE 611(c)’s “a witness identified with an adverse party” has been deleted because its inclusion would represent an expansion of Illinois law, which is capsulized in section 2-1102 of the Code of Civil Procedure (735 ILCS 5/2-1102), entitled “Examination of adverse party or agent.” A “witness identified with an adverse party” is broader than the concept of “party” or the “agent of a party,” as defined in the statute. Acceptance of that phrase also would have altered the provisions of Supreme Court Rule 238(b), which allows questions as if under cross-examination of a “hostile or unwilling” witness, without any reference to “a witness identified with an adverse party.” The statute and Rule 238 are provided in the appendix to this guide as **Appendix H**.
Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Amended as of December 1, 2011:

Rule 612. Writing Used to Refresh a Witness’s Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

Author’s Commentary to Rule 612

IRE 612 is identical to pre-amended FRE 612, except for (1) the deletion of the first phrase, which does not apply in Illinois, (2) the deletion of the phrase that grants discretion to the court when a witness refreshes his or her memory before testifying, and (3) the addition of the phrase “for the purpose of impeachment,” in order to
(1) while testifying; or
(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Rule 613. Prior Statements of Witnesses

(a). Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

**Author's Commentary to Rule 613(a)**

IRE 613 is identical to the pre-amended federal rule. The highlighted portion arguably represents a change in Illinois law (but not necessarily in practice), because in *Illinois Central Railroad Co. v. Wade*, 206 Ill. 523 (1903), the supreme court required that written statements be shown to the cross-examined witness. See section (4) under the “Modernization” discussion in the Committee's general commentary on page 3 of this guide. Contrary to the contention that the added language represents a change in Illinois law, however, note that IRE 613(a) addresses merely the method of questioning a witness.

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<tr>
<td><strong>Rule 613. Witness's Prior Statement</strong></td>
<td>limit admission of the refreshing document only for that purpose.</td>
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<td><strong>(a) Showing or Disclosing the Statement During Examination.</strong> When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.</td>
<td>Note that the rule does not address the right to have memory refreshed (which is a well accepted common-law rule); rather, it addresses the options of an adverse party when a witness uses a writing to refresh memory.</td>
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Amended as of December 1, 2011:
(b). *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the **opposite** party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

**Author’s Commentary to Rule 613(b)**
IRE 613(b) is identical to the pre-amended federal rule, except for the addition of the word “first,” for clarification purposes, and the substitution of “opposing” party for “opposite” party. Note that the last sentence of the rule is consistent with the provisions of IRE 806.

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about a prior statement, while IRE 613(b) addresses the prerequisites for admitting the extrinsic evidence in order to complete the impeachment of the witness, which includes affording the witness an opportunity to explain or deny the prior statement, and affording the opposing party an opportunity to question the witness about it.

(b). *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is **first** afforded an opportunity to explain or deny the same and the **opposing** party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

**Amended as of December 1, 2011:**
(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party’s statement under Rule 801(d)(2).
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<td>(a). <strong>Calling by court.</strong> The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.</td>
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<tr>
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<td>(a) Calling. The court may call a witness on its own or at a party’s request. Each party is entitled to cross-examine the witness.</td>
<td>(b). <strong>Interrogation by Court.</strong> The court may interrogate witnesses, whether called by itself or by a party.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Author's Commentary to Rule 614(b)</strong></td>
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<tr>
<td>(b) Examining. The court may examine a witness regardless of who calls the witness.</td>
<td>IRE 614(b) is identical to the pre-amended federal rule. See People v. Falaster, 173 Ill. 2d 220, 231-32 (1996) (court must avoid conveying to jury its views regarding merits of the case, veracity of witness, and weight of evidence).</td>
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<td>(c). <strong>Objections.</strong> Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Author's Commentary to Rule 614(c)</strong></td>
</tr>
<tr>
<td>(c) Objections. A party may object to the court’s calling or examining a witness either at that time or at the next opportunity when the jury is not present.</td>
<td>IRE 614(c) is identical to the pre-amended federal rule. See People v. Westpfahl, 295 Ill. App. 3d 327 (1998).</td>
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</table>
Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause, or (4) a person authorized by statute to be present.

Amended as of December 1, 2011:

Rule 615. Excluding Witnesses

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or

(d) a person authorized by statute to be present.

Author’s Commentary to Rule 615

IRE 615 is identical to the pre-amended federal rule, except for the substitution of “law” for “statute” at the end. See People v. Dixon, 23 Ill. 2d 136 (1961).
ARTICLE VII
OPINIONS AND EXPERT WITNESSES

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Amended as of December 1, 2011:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness’s perception;

(b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent
<table>
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<th><strong>Federal Rules of Evidence</strong></th>
<th><strong>Illinois Rules of Evidence</strong></th>
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<td>(3) the witness has applied the principles and methods reliably to the facts of the case.</td>
<td>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.</td>
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**Amended as of December 1, 2011:**

**Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

**Committee Comment to Rule 702**


**Author's Commentary to Federal Rule 702**

The proper starting point for understanding the application of the Federal Rules of Evidence as they relate to expert opinion evidence is a consideration of three key decisions of the United States Supreme Court.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that Frye's general acceptance test was superseded by the adoption of FRE 702. Interpreting the rule as providing a “screening” or “gate-keeping” role for the trial court, the Court held that, “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” The trial court must therefore make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”

In People v. Becker, 239 Ill. 2d 215 (2010), the court held that the trial court had properly excluded expert opinion testimony by an expert witness concerning the credibility of a child witness because of the impropriety of asking one witness to comment directly on the credibility of another (see People v. Kokoraleis, 132 Ill. 2d 235 (1989)), and because “the observation that this young child, like any young child, might be influenced by suggestive questioning and improper investigative techniques, is not a matter beyond the ken of the average juror.” The court went on to express its belief that “it is a matter of common understanding that children are subject to suggestion, that they often answer in a way that
The considerations that bear on the trial court's inquiry in determining “whether a theory or technique is scientific knowledge that will assist the trier of fact will be [1] whether it can be (and has been) tested” (i.e., whether the methodology has been tested or is testable); (2) “whether the theory or technique [i.e., methodology] has been subjected to peer review and publication;” (3) whether the methodology has a “known or potential rate of error, *** and the existence and maintenance of standards controlling the technique's operation;” and (4) whether the methodology has general acceptance within the relevant scientific community (i.e., the Frye test). The Supreme Court stressed that the inquiry is a flexible one, and that the focus “must be solely on principles and methodology, not on the conclusions they generate.”

In General Electric Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court held that abuse of discretion, which is the standard ordinarily used to review evidentiary rulings, is the proper standard for review of a trial court's admission or exclusion of expert scientific evidence. Applying standards provided by Daubert, the Court approved the trial court's exclusion of the expert's opinions because studies cited by the expert about experiments on infant mice were dissimilar to what allegedly occurred to the adult human plaintiff, and the epidemiological studies relied upon by the expert did not constitute a sufficient basis for his conclusions.

In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the Court held that, although Daubert referred only to scientific testimony because that was the expertise at issue in that case, the trial court's gatekeeping responsibility regarding relevance and reliability applies not only to “scientific” testimony but to all expert testimony -- that involving technical and other specialized knowledge as well. Pointing out Daubert's description of the Rule 702 inquiry as a “flexible one” that allows consideration of other specific factors as well as non-application of some of those provided in Daubert, the Court stressed that the factors mentioned in Daubert do not constitute a “definitive checklist or test,” and that the gatekeeping inquiry must be tied to the facts of a particular case.

they believe will please adults, and that they are inclined to integrate fictional notions with reality as we know it.”

In People v. McKown, 236 Ill. 2d 278 (2010), the supreme court, though reversing the defendant's conviction for DUI, affirmed the finding of the trial court that the State had satisfied its burden of establishing that horizontal gaze nystagmus (HGN) testing “is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired.” The court held that the “admissibility of HGN evidence in an individual case will depend on the State's ability to lay a proper foundation and to demonstrate the qualifications of its witness, subject to the balancing of probative value with the risk of unfair prejudice.”

Some cases that approved exclusion of expert testimony, because the offered evidence was not beyond the understanding of ordinary people and was not difficult to understand or explain, include: People v. Gilliam, 172 Ill. 2d 484 (1996) (expert testimony properly excluded as to whether the defendant falsely confessed to protect his family); People v. Polk, 407 Ill. App. 3d 80 (2010) (trial court properly excluded expert testimony about whether defendant's low IQ and police interrogation techniques could have resulted in a false confession); People v. Bennett, 376 Ill. App. 3d 554 (2007) (proper for trial court to exclude expert testimony that defendant was susceptible to police interrogations and suggestions based on his intellectual abilities); People v. Wood, 341 Ill. App. 3d 599 (2003) (proper to exclude expert testimony that defendant was easily coerced and susceptible to intimidation to support claim that his confession was involuntary).
Rule 703. Bases of 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

Amended as of December 1, 2011:

Rule 703. Bases of an Expert’s Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Author’s Commentary to Rule 703.

The first sentence of IRE 703 is identical to pre-amended FRE 703, as is the second sentence except for the deletion of the last phrase. The third sentence of the pre-amended federal rule, which was not present when the Illinois Supreme Court adopted it in Wilson v. Clark, 84 Ill. 2d 186 (1981), and which reverses the balancing standard provided by FRE 403 (thus providing a presumption of nondisclosure), has not been adopted. Thus, the provisions of FRE 403 apply. Therefore, in determining whether to allow or exclude the disclosure of inadmissible facts or data that the expert reasonably relied upon, an Illinois court must determine whether or not the probative value of the disclosure is substantially outweighed by the danger of unfair prejudice. For more on this reasonable-reliance standard and why it does not violate the rule against hearsay, see the supreme court’s discussion in People v. Lovejoy, 235 Ill. 2d 97 (2009), where a medical examiner properly relied on a toxicologist’s determination through blood tests that six different types of drugs were in the deceased’s body.

Worthy of note concerning the second sentence of IRE 703 are two Illinois Supreme Court cases involving DNA experts. In People v. Sutherland, 223 Ill. 2d 187 (2006), the expert witness was an employee of the laboratory that performed the DNA analysis. She did not complete any of the actual laboratory “bench work” on the evidence. The supreme court rejected the defendant’s contention that the witness’ testimony regarding the DNA results was improper without the lab technician’s testimony, holding that it was sufficient that the witness relied upon data reasonably relied upon by other experts in her field.
In *People v. Williams*, 238 Ill. 2d 125 (2010), the expert witness was a forensic biologist employed by the Illinois State Police Crime Lab. She matched the defendant’s DNA profile, created at her laboratory from a blood sample taken from him, to the DNA profile created by Cellmark Diagnostic Laboratory from sperm taken from the victim’s vagina. No one from Cellmark testified about the process that created the latter DNA profile. Based upon the expert’s testimony that Cellmark was an accredited laboratory and that its testing and analysis methods were generally accepted in the scientific community, the supreme court rejected the defendant’s contentions of a violation of his Sixth Amendment right to confrontation as well as his arguments concerning lack of evidentiary foundation (both of which included allegations concerning no evidence about the proper functioning and calibration of Cellmark’s equipment), holding that her use of the DNA profile created by Cellmark constituted use of facts or data reasonably relied upon by experts in her field, and that there was therefore a sufficient foundational basis for her reliance on the Cellmark profile. The court noted that the expert did not merely regurgitate facts from the Cellmark profile, but relied upon it to conduct her own independent comparison of the defendant’s DNA profile with that of the sperm. It should be noted that the United States Supreme Court granted *certiorari* in this case (*Williams v. Illinois*, No. 10-8505) and heard oral argument on December 6, 2011. The Supreme Court will therefore determine whether, in a criminal case, the right to confrontation guaranteed by the Sixth Amendment trumps the evidentiary provisions of FRE and IRE 703 that allow an expert’s reasonable reliance on facts or data that have not been admitted as substantive evidence.
Rule 704. Opinion on Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue to be decided by the trier of fact.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Amended as of December 1, 2011:

Rule 704. Opinion on an Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Author's Commentary to Rule 704

IRE 704 is identical to pre-amended FRE 704(a), except for the first phrase referring to “subdivision (b),” which has not been adopted. See Freeding-Skokie Roll-Off Serv., Inc. v. Hamilton, 108 Ill. 2d 217 (1985) (adopting FRE 704 related to lay opinion evidence); Zavala v. Powermatic, Inc., 167 Ill. 2d 542 (1995) (citing prior Illinois cases allowing expert opinion evidence on ultimate issues, and approving accident reconstruction evidence even when an eyewitness was present).

FRE 704(b) has not been adopted. In Illinois, if the expert is qualified to give an opinion and it will assist the trier of fact, the expert may give an opinion regarding the mental state of the defendant at the time of the alleged crime. See, e.g., People v. Hope, 137 Ill. 2d 430, 489-90 (1990) (noting that experts testified whether or not defendant’s intoxication prevented him from acting intentionally when he shot a police officer); People v. Sojack, 273 Ill. App. 3d 579, 584-585 (1995) (defense expert testified as to sanity of defendant).
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<td>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.</td>
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**Amended as of December 1, 2011:**

**Rule 705. Disclosing the Facts or Data Underlying an Expert’s Opinion**

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

**Rule 706. Court Appointed Experts**

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness’ findings, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. |

**Author’s Commentary to Rule 705**

IRE 705 is identical to the pre-amended federal rule. See Wilson v. Clark, 84 Ill. 2d 186 (1981), where the supreme court adopted FRE 705, as well as pre-amended FRE 703. Note that, pursuant to the rule and the holding in Wilson, 84 Ill. 2d at 194, the burden is placed upon the adverse party to elicit facts underlying the expert opinion.

[FRE 706 not adopted.]
Amended as of December 1, 2011:

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert’s Role. The court must inform the expert of the expert’s duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

Author’s Commentary to
Non-Adoption of Federal Rule 706

Author’s Commentary to Federal Rule 706(a)

Although FRE 706 has not been adopted, Illinois statutes and rules give the court power to appoint experts in certain situations. See Illinois Supreme Court Rule 215(d) (appointment of impartial medical examiner); 725 ILCS 5/115-6 (defense of insanity); 725 ILCS 205/4 (sexually dangerous persons); 405 ILCS 5/3-804 (commitment of mentally ill); 750 ILCS 45/11 (blood test in paternity actions).
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<th><strong>Federal Rules of Evidence</strong></th>
<th><strong>Illinois Rules of Evidence</strong></th>
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<td><strong>(b). Compensation.</strong> Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.</td>
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| **Amended as of December 1, 2011:**  
| **(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:  
| **(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and**  
| **(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.**  |
| **(c). Disclosure of appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.  |
| **Amended as of December 1, 2011:**  
| **(d) Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.  |
| **Author’s Commentary to Federal Rule 706(b)**  
In Illinois, where the court has discretion to appoint an expert, the inherent power of the court allows for appropriate compensation to be paid.  |
| **Author’s Commentary to Federal Rule 706(c)**  
(d) Parties’ experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Amended as of December 1, 2011:

(e) Parties’ Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Author's Commentary to Federal Rule 706(d)

Illinois gives parties discretion to choose their own experts. See McAlister v. Schick, 147 Ill. 2d 84, 99 (1992).
Rule 801. Definitions

The following definitions apply under this article:

(a). Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b). Declarant. A “declarant” is a person who makes a statement.

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

Amended as of December 1, 2011:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Author’s Commentary to Rule 801(c)

IRE 801(c) is identical to the pre-amended federal rule. See People v. Carpenter, 28 Ill. 2d 116 (1963). Note that the fact that the witness is both the out-of-court declarant and the witness is not relevant in hearsay analysis, except where Rule 801(d)(1) is implicated. That is so because under the first part of Rule 801(d)(1) the witness is both the out-of-court declarant and the witness.

For a recent case discussing why the testimony of declarants of police radio messages who testified at trial and those who heard them and testified about them did not violate either the hearsay rule or the right to confrontation, see People v. Hammonds, 409 Ill. App. 3d 838 (2011). The case also discusses and distinguishes other cases.
(d). Statements which are not hearsay. A statement is not hearsay if—

(1). Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person; or

(d). Statements Which Are Not Hearsay. A statement is not hearsay if

(1). Prior Statement by Witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant’s testimony at the trial or hearing, and

(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and

(a) the statement is proved to have been written or signed by the declarant, or

(b) the declarant acknowledged under oath the making of the statement either in the declarant’s testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or

(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording; or

(B) one of identification of a person made after perceiving the person.
Amended as of December 1, 2011:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

Author’s Commentary to Rule 801(d)(1)

FRE 801(d)(1)(B) has not been adopted, because Illinois allows such consistent statements to be admitted, but only for their corroborative value, not substantively. See further commentary below.

FRE 801(d)(1)(A) applies both to civil and criminal cases. IRE 801(d)(1)(A)(1) is identical to pre-amended FRE 801(d)(1)(A), but it does not apply to civil cases. The Illinois rule applies only to criminal cases. Both IRE 801(d)(1)(A)(1) and IRE 801(d)(1)(A)(2) represent a codification of section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1), which is provided in the appendix to this guide as Appendix I. Although IRE 801(d)(1)(A)(2) broadens the scope of FRE 801(d)(1)(A) in criminal cases, it does not represent a change in Illinois law.

In criminal cases, IRE 801(d)(1)(A)(1), like FRE 801(d)(1)(A), allows substantive admissibility for prior inconsistent statements made under oath. That is so because they are admissible as “not hearsay.” In criminal cases, IRE 801(d)(1)(A)(2) also gives substantive weight, as “not hearsay,” to a prior inconsistent statement of a witness who narrates, describes, or explains events or conditions about which he had personal knowledge, when (a) the statement is proved to have been written or signed by the witness, or (b) the witness acknowledges at the relevant proceeding or another proceeding or deposition having made the prior statement, or (c) the witness’ prior statement is proved to have been accurately electronically recorded. Note that, to be admitted substantively, the IRE 801(d)(1)(A)(2) prior statements of the witness must narrate, describe or explain events or conditions about which the witness had “personal knowledge,” not statements narrating what was told to him about an event by another. See People v. Morgason, 311 Ill. App. 3d 1005 (2000) (though all other requirements of the statute were met, the witness’ recorded statement did not narrate events within her personal knowledge, but what was told to her by defendant, and was therefore improperly admitted).

The effect of these IRE 801(d)(1)(A) rules is to provide, when the rules’ provisions are satisfied in criminal cases, not only impeachment value to prior inconsistent statements, but also substantive weight to such statements. In plain terms, application of each rule means that the trier of fact is permitted to go beyond solely believing or
(2). Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject,

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<td>disbelieving the witness' testimony at the relevant proceeding (which is the consequence of evidence that has only impeachment value), because the trier of fact may give substantive weight even to the witness' prior inconsistent statement. It thus permits the prosecutor, in some cases where such evidence has been admitted, to avoid a directed verdict; and, in all cases where such evidence has been admitted, to argue that evidence substantively in encouraging the trier of fact to base its decision upon the prior inconsistent statement.</td>
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<td>Note that FRE 801(d)(1)(B), which makes prior consistent statements of witnesses substantively admissible when “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive,” has not been adopted. That is so because Illinois allows such statements to be admitted, but only for their corroborative value, not substantively. See People v. Harris, 123 Ill. 2d 113 (1988) (to rebut a charge of recent fabrication, consistent statement made prior to the time when the witness had a motive to fabricate is admissible); People v. Walker, 211 Ill. 2d 317, 344 (2004) (prior consistent statement is not admissible substantively, but only for the limited purpose of rebutting inferences that the witness is motivated to testify falsely or that the testimony is of recent fabrication). The common-law rule continues to apply in Illinois.</td>
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<td>IRE 801(d)(1)(B), though bearing a different number designation, is identical to pre-amended FRE 801(d)(1)(C). It does not represent a change in Illinois law because section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12), which is provided in the appendix to this guide as Appendix J, also gives substantive weight to such identification evidence. Under the Illinois rule, it applies only in criminal cases.</td>
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<td>For the Committee's views on these rules, see section (5) under the “Modernization” discussion in the Committee's general commentary on page 3 of this guide.</td>
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or (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, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Amended as of December 1, 2011:

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Author’s Commentary to Rule 801(d)(2)

IRE 801(d)(2) is identical to pre-amended FRE 801(d)(2), except for (1) the addition of (F) to codify Illinois law, and (2) the omission of the last sentence because it is inconsistent with Illinois law, which requires the admission of the subdivision (C), (D), (E), and (F) statements to be based on the relationships specified independently of the contents of the statement.

Note that, though it is labeled “Admission by Party-Opponent,” the rule provides substantive admissibility to party-opponent “statements,” which are not necessarily “admissions” to anything, and may not have been against interest when they were made. Statements that are inconsistent with the position that a party-opponent takes at trial best define such admissions.

Adoption of IRE 801(d)(2)(D) resolves the split in the Illinois Appellate Court about which approach should apply to make an agent’s statement admissible against the principal: the traditional agency approach (which includes the requirement that the agent have authority to speak) or the scope of authority approach (which is consistent with the federal rule and does not require authority to speak). See Pavlik v. Wal-Mart Stores, Inc., 323 Ill. App. 3d 1060 (2001), for a discussion concerning the split and its preference for the federal rule. The adoption of the rule, which includes 801(d)(2)(D) without the requirement of authority, makes it clear that authorization is unnecessary. See also section (6) under the “Modern-
### Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

**Amended as of December 1, 2011:**

#### Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

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**Author's Commentary to Rule 802**

IRE 802 is identical to the pre-amended federal rule, except for language specific to Illinois.
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:

(1). Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(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.

Amended as of December 1, 2011:

In Estate of Parks v. O’Young, 289 Ill. App. 3d 976 (1997), the court noted that it was unaware of any Illinois case that applied the present sense impression exception; see also People v. Stack, 311 Ill. App. 3d 162 (1999) (citing O’Young). But note that in People v. Alsup, 373 Ill. App. 3d 745 (2007), the court relied on the present sense exception, as well as the business records and the excited utterance exceptions, to approve admission of ISPERN radio communications during a police chase of a stolen vehicle that resulted in a homicide.

(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.

Amended as of December 1, 2011:

IRE 803(2) is identical to the pre-amended federal rule. This exception to the hearsay rule generally has been referred to in Illinois cases as the “spontaneous declaration” exception. For case interpretation, see People v. Sutton, 233 Ill. 2d 89, 107 (2009); People v. Williams, 193 Ill. 2d 306, 352 (2000); People v. Burton, 399 Ill. App. 3d 809 (2010). For a recent case applying this exception, see People v. Connolly, 406 Ill. App. 3d 1022 (2010), where, in reviewing a conviction for domestic battery, the appellate court held that (1) the excited utterance of the wife of the defendant sufficiently justified the conviction, despite the wife’s contrary testimony at trial.
(3). Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Amended as of December 1, 2011:

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Author's Commentary to Rule 803(3)

IRE 803(3)(A) is identical to pre-amended FRE 803(3).

IRE 803(3)(B) (concerning one declarant's state of mind, emotion, sensation, or physical condition to prove another declarant's state of mind, emotion, sensation, or physical condition) is added merely to clarify what is implicit in the federal rule and explicit in Illinois. See, e.g., People v. Lawler, 142 Ill. 2d 548, 559 (1991) (evidence of complainant's statement improperly admitted where State did not use the statement solely as evidence of complainant's state of mind regarding whether she consented to intercourse, and State's closing argument showed that statement was used as substantive evidence of its contents -- that defendant had a gun and that she could not get away); People v. Cloutier, 178 Ill. 2d 141, 155 (1997) (statements of declarants that defendant displayed victim's body to them in effort to force them to submit to his wishes were inadmissible on issue of whether defendant's sexual conduct with victim was

and (2) the wife's excited utterance was not a “testimonial statement” and thus did not violate the confrontation clause pursuant to the holding in the Crawford decision.

(3). Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will; or

(B) a statement of declarant’s then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.
achieved by use of force -- defendant was not the declarant and the declarants’ statements had no bearing on defendants’ state of mind when he killed victim). As the supreme court pointed out in Cloutier, “Under [the state of mind] exception, an out-of-court statement of a declarant is admissible when that statement tends to show the declarant’s state of mind at the time of utterance. [Citation] In order to be admissible, the declarant’s state of mind must be relevant to a material issue in the case.” Cloutier, 178 Ill. 2d at 155.

Note that, though the Illinois rule is substantively identical to its federal counterpart, the placement of it as an 803 rule (where the availability of the declarant as a witness is immaterial) represents a substantive change. That is so because Illinois decisions had required the unavailability of the out-of-court declarant in order to trigger the rule’s application, which would have required its placement as an 804 rule. Note, too, that this codification alters the requirement in previous cases that there be a reasonable probability that the statement was truthful. See the thorough discussion of this issue in section (b) under the “Recommendations” discussion in the Committee’s general commentary on pages 5 through 7 of this guide.

For a recent pre-codification case citing some of the no longer applicable common-law principles, see People v. Munoz, 398 Ill. App. 3d 455 (2010) (in defendant’s trial for murder, deceased victim’s statements that defendant “was jealous of her” and “wanted to know where she was and what she was doing all the time” were not admissible). Though relying on pre-codification common-law principles, Munoz and cases it cites (such as Lawler and Cloutier) are relevant to IRE 803(3)(B) for distinguishing statements showing the state of mind of the declarant (which are admissible) as opposed to the state of mind of another person (which are not admissible).

(4). Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or 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.

(4). Statements for Purposes of Medical Diagnosis or Treatment.

(A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external
source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to Rule 703, not including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial, or

(B) in a prosecution for violation of sections 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 (720 ILCS 5/12-13, 720 ILCS 5/12-14, 720 ILCS 5/12-14.1, 720 ILCS 5/12-15, 720 ILCS 5/12-16), statements made by the victim to medical personnel for purposes of medical diagnoses or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Author's Commentary to Rule 803(4)
IRE 803(4)(A) is identical to pre-amended FRE 803(4) as it applies to statements made for treatment purposes but, consistent with Illinois common law, the Illinois rule differs from the federal rule in not allowing statements made for medical diagnosis solely to prepare for litigation or to obtain testimony for trial.

IRE 803(4)(B) is a near-verbatim reproduction of pre-amended section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13). Note, however, that Public Act 96-1551, effective July 1, 2011, amended section 115-13 and various other statutes in the Criminal Code of 1961. As relevant here, Public Act 96-1551 moved sex offenses from Article 12 (which addresses “Bodily Harm” offenses) to Article 11 (which addresses “Sex Offenses”). The result is that, as of July 1, 2011, the sections of the statutes listed in IRE 803(4)(B) have been renumbered. Specifically, the statute that addresses the offense of criminal sexual assault, formerly section 12-13, has been renumbered as section 11-1.20 (720 ILCS 5/11-1.20); the statute that addresses aggravated criminal sexual assault, formerly section 12-14, has been renumbered as section 11-1.30 (720 ILCS 5/11-1.30); the statute that addresses the offense of preda-
tory criminal sexual assault of a child, formerly section 12-14.1, has been renumbered as section 11-1.40 (720 ILCS 5/11-1.40); the statute that addresses the offense of criminal sexual abuse, formerly section 12-15, has been renumbered as section 11-1.50 (720 ILCS 5/11-1.50); and the statute that addresses the offense of aggravated criminal sexual abuse, formerly section 12-16, has been renumbered as section 11-1.60 (720 ILCS 5/11-1.60). Both the pre-amended and amended section 115-13 are provided in the appendix to this guide as Appendix K. Both the pre-amended and amended statute provide for the admission of statements made to medical personnel, by a victim of the offenses whose section numbers are listed, concerning the source of the victim’s symptoms for medical diagnosis or treatment. Despite the statutory amendment, which will require a corresponding amendment to the rule to show current section numbers, the hearsay exception set forth in the rule continues to apply to the offenses listed above. For offenses that occur after the statutory amendment became effective on July 1, 2011, amended section 115-13 will provide the applicable evidentiary rule until IRE 803(4)(B) is amended; however, as noted above, section 115-13 and the existing rule are substantively the same.

In People v. McNeal, 405 Ill. App. 3d 647 (2010), the appellate court held that a nurse’s testimony about a triage nurse’s note concerning the sexual assault of the victim was not hearsay because it was relevant to the nurse’s actions in treating the victim. But even if it were hearsay, the court held, it was admissible under section 115-13 as an exception to the hearsay rule, and that the information on the note was taken by a nurse other than the nurse who testified at trial was not a bar to the admission of the evidence. Moreover, the court held, the evidence was not “testimonial hearsay” and therefore did not violate the Confrontation Clause, pursuant to the holding in Crawford v. Washington, 541 U.S. 36 (2004).

In People v. Falaster, 173 Ill. 2d 220 (1996), the supreme court held that section 115-13, which is a codification of the common-law rule that admits statements concerning medical treatment, permitted admissibility of a victim’s statement to medical personnel about sexual history, where the statement was relevant to the medical treater’s opinion regarding whether the victim had been sexually abused. In People v. Freeman, 404 Ill. App. 3d 978 (2010), the appellate court recognized the conflict between this statute, which allows admissibility, and the rape shield statute (725 ILCS 5/115-7(a), discussed in
(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. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Amended as of December 1, 2011:

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness' memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

**Author's Commentary to Rule 803(5)**

The first sentence of IRE 803(5) is identical to the pre-amended federal rule. The second sentence of the pre-amended federal rule is not adopted because Illinois allows a recorded recollection to be received into evidence at the request even of the proponent of the evidence. See *People v. Olson*, 59 Ill. App. 3d 643 (1978) for a discussion of authorities and a general recitation of the principles.

In *Kociscak v. Kelly*, 2011 IL App (1st) 102811 (December 13, 2011), the appellate court cited previous cases discussing this hearsay exception, noting that, although some cases “described the elements of past recollection recorded using different terminology,” the cases are consistent despite that difference. *Kociscak*, at ¶ 26, 27. This codification, enhanced by the clarity of the stylistic amendments of the federal rules effective December 1, 2011, should ensure consistency in understanding and in terminology.
### Federal Rules of Evidence

(6). **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with (11), (12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Amended as of December 1, 2011:

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

### Illinois Rules of Evidence

(6). **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Author’s Commentary to Rule 803(6)**

IRE 803(6) is identical to the pre-amended federal rule, except for the deletion of “FRE 902(12), or a statute permitting certification” because that rule was incorporated into IRE 902(11) and therefore was not separately adopted, and except for medical records in criminal cases, which are excluded by section 115-5(c)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(c) (1)). The rule adopts the certification requirement of IRE 902(11) (thus providing an alternative to the prior foundational requirement of the testimony of the custodian of the records), and is consistent with the provisions of section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5), as well as of Supreme Court Rule 236, which applies in civil cases. Section 115-5 and Supreme Court Rule 236 are provided in the Appendix to this guide as Appendix L.

See also the Committee’s general commentary in the paragraph entitled “Structural Change” starting on page 6 of this guide.
(7). Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Amended as of December 1, 2011:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8). Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from

(7). Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Author’s Commentary to Rule 803(7)
IRE 803(7) is identical to the pre-amended federal rule.
an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Amended as of December 1, 2011:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office’s activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Author’s Commentary to Rule 803(8)

IRE 803(8)(A) is identical to pre-amended FRE 803(8)(A). IRE 803(8)(B) is identical to pre-amended FRE 803(8)(B), except for the additions of “police accident reports” and, in criminal cases, “medical records,” in order to codify Illinois law as provided in Illinois Supreme Court Rule 236(b) (as to police reports) and in 725 ILCS 5/115-5(c) (as to medical records). (See Appendix L for both the statute and the rule.) Pre-amended FRE 803(8)(C) is not adopted as inconsistent with Illinois law.

See also the Committee’s general commentary in the paragraph entitled “Structural Change” starting on page 6 of this guide.

Note that section 115-15 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-15) allows the State, in prosecutions under the Cannabis Control Act, the Illinois Controlled Substances Act, and for reckless prosecution or DUI, to use lab reports in lieu of actual testimony as prima facie evidence of the contents of the substance at issue unless the defendant files a demand for the testimony of the preparer of the report. That statute, though not repealed, was held unconstitutional as violative of the confrontation clause of the federal and Illinois constitutions by the supreme court in People v. McClanahan, 191 Ill. 2d 127 (2000).

Note also that section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1), which is provided in the appendix to this guide as Appendix M, makes admissible as an exception to the hearsay rule, in both civil and criminal actions, records kept in the ordinary course of business related to medical examinations on deceased persons or autopsies. The reports that are admissible include but are not limited to certified pathologist’s protocols, autopsy reports, and toxicological reports. The statute provides that the preparer of the report is subject to subpoena but, if that person is deceased, a duly authorized official from the coroner’s office may offer testimony based on the reports. A number of recent appellate court cases have applied and upheld the statute against attacks premised on the Confrontation Clause in general and the decisions in Crawford.
(9). Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Amended as of December 1, 2011:

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

Author’s Commentary to Rule 803(9)

IRE 803(9) is identical to pre-amended FRE 803(9), except for the clarifying addition of “Facts contained in” at the beginning of the rule.
### Federal Rules of Evidence

(10). Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Amended as of December 1, 2011:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11). Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Amended as of December 1, 2011:

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

### Illinois Rules of Evidence

(10). Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Author's Commentary to Rule 803(10)

IRE 803(10) is identical to the pre-amended federal rule.

(11). Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Author's Commentary to Rule 803(11)

IRE 803(11) is identical to the pre-amended federal rule.
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<td><strong>(12). Marriage, baptismal, and similar certificates.</strong> Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.</td>
<td><strong>(12). Marriage, Baptismal, and Similar Certificates.</strong> Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Author's Commentary to Rule 803(12)</strong></td>
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<tr>
<td><em>(12) Certificates of Marriage, Baptism, and Similar Ceremonies.</em> A statement of fact contained in a certificate:</td>
<td><em>IRE 803(12) is identical to the pre-amended federal rule.</em></td>
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<td><em>(A) made by a person who is authorized by a religious organization or by law to perform the act certified;</em></td>
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<td><em>(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and</em></td>
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<td><em>(C) purporting to have been issued at the time of the act or within a reasonable time after it.</em></td>
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<tr>
<td><strong>(13). Family records.</strong> Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.</td>
<td><strong>(13). Family Records.</strong> Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Author's Commentary to Rule 803(13)</strong></td>
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<tr>
<td><em>(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.</em></td>
<td><em>IRE 803(13) is identical to the pre-amended federal rule. This codification eliminates certain prerequisites contained in Sugrue v. Crilley, 329 Ill. 458 (1928). See section (7) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.</em></td>
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(14). Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Amended as of December 1, 2011:

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15). Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Amended as of December 1, 2011:

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(14). Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Author's Commentary to Rule 803(14)
IRE 803(14) is identical to the pre-amended federal rule. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.

(15). Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Author's Commentary to Rule 803(15)
IRE 803(15) is identical to the pre-amended federal rule. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.
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<td>(16). <strong>Statements in ancient documents.</strong> Statements in a document in existence twenty years or more the authenticity of which is established.</td>
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Amended as of December 1, 2011:

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

Author's Commentary to Rule 803(16)
IRE 803(16) is identical to the pre-amended federal rule, but note that the “20 years” time period constitutes a change from previous Illinois law, which required that the document be in existence for 30 years. See section (9) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.

(17). **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. |

Amended as of December 1, 2011:

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

Author's Commentary to Rule 803(17)
IRE 803(17) is identical to the pre-amended federal rule.

(18). **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. |

Amended as of December 1, 2011:

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

Author's Commentary to Reservation of Rule 803(18)
IRE 803(18) is reserved because the adoption of FRE 803(18) would have represented a substantive change in Illinois law. The Illinois Supreme Court has not allowed learned treatises to be admitted substantively, either as direct evidence when used to inform the jury of the ba-
**Federal Rules of Evidence**

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<tr>
<th>Rule 803(A)</th>
<th>Rule 803(B)</th>
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<tr>
<td><em>the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and</em></td>
<td><em>the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.</em></td>
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If admitted, the statement may be read into evidence but not received as an exhibit.

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**Illinois Rules of Evidence**

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<tr>
<th>Rule 803(19)</th>
<th>Rule 803(20)</th>
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<tr>
<td><strong>Reputation concerning personal or family history.</strong> Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.</td>
<td><strong>Reputation concerning boundaries or general history.</strong> Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.</td>
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**Amended as of December 1, 2011:**

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<th>Rule 803(19)</th>
<th>Rule 803(20)</th>
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<tr>
<td><strong>Reputation Concerning Personal or Family History.</strong> A reputation among a person’s family by blood, adoption, or marriage — or among a person’s associates or in the community — concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.</td>
<td><strong>Reputation Concerning Boundaries or General History.</strong> A reputation in a community — arising before the controversy — concerning boundaries</td>
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**Author’s Commentary to Rule 803(19)**

IRE 803(19) is identical to the pre-amended federal rule. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.

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**Author’s Commentary to Rule 803(20)**

IRE 803(20) is identical to the pre-amended federal rule. See section (8) under the “Modernization” discussion in
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<tr>
<td><strong>(21). Reputation as to character.</strong> Reputation of a person’s character among associates or in the community.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
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<tr>
<td><strong>(21) Reputation Concerning Character.</strong> A reputation among a person’s associates or in the community concerning the person’s character.</td>
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<td><strong>(22). Judgment of previous conviction.</strong> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
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<td><strong>(22) Judgment of a Previous Conviction.</strong> Evidence of a final judgment of conviction if:</td>
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<td><strong>(A)</strong> the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;</td>
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<td><strong>(B)</strong> the conviction was for a crime punishable by death or by imprisonment for more than a year;</td>
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<td><strong>(C)</strong> the evidence is admitted to prove any fact essential to the judgment; and</td>
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<td><strong>(D)</strong> when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.</td>
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<td><strong>(21). Reputation as to Character.</strong> Reputation of a person’s character among associates or in the community.</td>
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<td>IRE 803(21) is identical to the pre-amended federal rule.</td>
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<td><strong>(22). Judgment of Previous Conviction.</strong> Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.</td>
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<td><strong>Author’s Commentary to Rule 803(22)</strong></td>
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<tr>
<td>IRE 803(22) is identical to the pre-amended federal rule, except for the deletion of “(but not upon a plea of nolo contendere).”</td>
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The pendency of an appeal may be shown but does not affect admissibility.

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<td><strong>(23). Judgment as to personal, family, or general history, or boundaries.</strong> Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.</td>
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</table>

**Amended as of December 1, 2011:**

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and  
(B) could be proved by evidence of reputation.

**Author's Commentary to Rule 803(23)**

IRE 803(23) is identical to the pre-amended federal rule. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.

**24) [Other exceptions.][Transferred to Rule 807]**

**Amended as of December 1, 2011:**

(24) [Other Exceptions.][Transferred to Rule 807]

**Author's Commentary to Rule 803(24)**

Former FRE 803(24) has been transferred to FRE 807. IRE 803(24) has no counterpart in the federal rules. It is adopted to codify Illinois common law.
**Rule 804. Hearsay Exceptions; Declarant Unavailable**

(a). **Definition of unavailability** “Unavailability as a witness” includes situations in which the declarant –

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

2. persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

3. testifies to a lack of memory of the subject matter of the declarant’s statement; or

4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

5. is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

---

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

(a). **Definition of Unavailability.** “Unavailability as a witness” includes situations in which the declarant –

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

2. persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

3. testifies to a lack of memory of the subject matter of the declarant’s statement; or

4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

5. is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
Amended as of December 1, 2011:

**Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness**

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

1. is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
2. refuses to testify about the subject matter despite a court order to do so;
3. testifies to not remembering the subject matter;
4. cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
5. is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

   A. the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
   
   B. the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

Amended as of December 1, 2011:

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

Author's Commentary to Rule 804(a)
IRE 804(a) is identical to pre-amended FRE 804(a).

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

Author's Commentary to Rule 804(b)
IRE 804(b) is identical to pre-amended FRE 804(b). Note that there are a number of Illinois statutes in the Code of Criminal Procedure of 1963 that provide exceptions.
(1). Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or (B) in a discovery deposition as provided for in Supreme Court Rule 212(a)(5).

Amended as of December 1, 2011:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

Author's Commentary to Rule 804(b)(1)

IRE 804(b)(1)(A) is identical to pre-amended FRE 804(b)(1), except for the change of the phrase “in a deposition” to “in an evidence deposition.” This was done, and IRE 804(b)(1)(B) was added, because in Illinois, unlike in the federal system, depositions are not admissible unless permitted by a rule such as IRE 801(d)(2), which allows admission of out-of-court statements by party-opponents for hearsay statements of absent witnesses in criminal cases but are not listed in IRE 804. These statutory provisions frequently supplement the well accepted hearsay exceptions addressed in the 804 rules and, because of the Crawford decision, the constitutional validity of many of them is questionable. They might be referred to as residual exceptions, and are discussed in the author’s commentary to FRE 807 below. They include: section 115-10, hearsay exceptions related to specified offenses committed on children under 13 years of age or on mentally retarded persons (725 ILCS 5/115-10); section 115-10.2, hearsay exception when a person refuses to testify despite a court order to do so (725 ILCS 5/115-10.2); section 115-10-2a, hearsay exception admitting prior statements in domestic violence prosecutions when the witness is unavailable (725 ILCS 5/115-10.2a); section 115-10.3, hearsay exception involving elder adults suffering from mental or physical disability who are victims of specified offenses (725 ILCS 5/115-10.3); section 115-10.4, hearsay exception when the witness, who has testified under oath regarding a material fact and was subject to cross-examination, is deceased (725 ILCS 5/115-10.4).
(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination. (and those made by specified persons for whose statements a party-opponent is accountable) as not hearsay, or by a rule such as Supreme Court Rule 212(a)(5), which allows admission at trial of the discovery deposition of a deponent who is unable to attend the trial because of death or infirmity and who is not a controlled expert witness, or, for cases filed before January 1, 2011, who is not a party.

Note that the supreme court amended Rule 212(a)(5), effective January 1, 2011, by retaining the exclusion related to a controlled expert's discovery deposition, but deleting the exclusion related to a party's discovery deposition. The effect of the amendment is that the discovery deposition of a party who is unavailable due to death or infirmity is admissible, but note that the Committee Comments to the rule state that the amendment “applies to cases filed on or after the effective date of January 1, 2011, and that it refers to “rare, but compelling circumstances” where it should be permitted and that “it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited.”

Note too that the discovery deposition testimony of an absent or deceased party opponent is admissible (under IRE 801(d)(2)), and was admissible even before these codified rules and the amendment to Rule 212(a)(5); see In re Estate of Rennick, 181 Ill. 2d 395 (1998).

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(2) Statement Under Belief of Impending Death. In a prosecution for homicide, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Amended as of December 1, 2011:

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances.

Author's Commentary to Rule 804(b)(2)

IRE 804(b)(2) is identical to pre-amended FRE 804(b)(2), except for the deletion of the phrase “or in a civil action or proceeding” because in Illinois statements under belief of impending death are admissible only in homicide cases. The historical acceptance of this “dying declarations” exception to the hearsay rule was recognized in Crawford v. Washington, 541 U.S. 36 (2004).
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Amended as of December 1, 2011:

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Author’s Commentary to Rule 804(b)(3)

IRE 804(b)(3) is identical to pre-amended FRE 804(b)(3), except for the change in the second sentence from the specific, “to exculpate the accused,” to the general, “in a criminal case.” (See section (10) under the “Modernization” discussion in the Committee’s general commentary on page 4 of this guide.) Although the rule applies to both civil and criminal cases, the change in the Illinois version makes it clear that the rule applies both to the State and to the defendant in a criminal case, and that the requirement of trustworthiness likewise applies to both parties in a criminal case.

The rule has both “sword and shield” attributes. When invoked by the defendant in a criminal case, it is intended to exculpate. When invoked by the State, on the other hand, it is for the purpose of inculpating the defendant. That is so because, when statements of an out-of-court declarant satisfy the requirements of the rule, they frequently inculpate the defendant on trial. Such against-the-interest-of-the-declarant statements are admissible as an exception to the hearsay rule against an implicated defendant if they pass the trustworthiness test. For an example of such a case, see U.S. v. Watson, 525 F.3d 583 (7th Cir. 2008) (statement of a co-defendant implicating the defendant met trustworthiness test of FRE 804(b)(3) and its admission did not violate the Confrontation Clause as a “testimonial statement” under Crawford v. Washington, 541 U.S. 36 (2004)). In applying the rule when it is invoked by the State, it must be recognized that a declarant might seemingly and sometimes un-
knowingly) implicate himself in the commission of an offense while trying to shift primary responsibility to the defendant, thus making the trustworthiness of the statement questionable.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the United States Supreme Court provided four factors for providing indicia of reliability: (1) whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) whether the statement is corroborated by other evidence; (3) whether the statement was self-incriminating and against the declarant's penal interest; and (4) whether there was an adequate opportunity to cross-examine the declarant. In *People v. Bowell*, 111 Ill. 2d 58 (1980), the Illinois Supreme Court held that these factors were “regarded simply as indicia of trustworthiness and not as requirements of admissibility.” As a matter of fact, in contrast to the fourth factor, note that the rule's designation as an 804 rule requires the unavailability of the out-of-court declarant as a threshold requirement for admissibility of the statement.

Note also that FRE 804(b)(3) had been amended effective December 1, 2010. The December 1, 2011 amendment is identical to the earlier amendment, merely replacing lower case letters in its title with upper case letters. Although both amended versions are worded differently from the rule it replaced (including the insertion of “in a criminal case” to replace “to exculpate the accused”), it is substantially identical both to that pre-amended rule and to the Illinois rule.
(4). Statement of personal or family history.

(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

Amended as of December 1, 2011:

(4) Statement of Personal or Family History. A statement about:

(A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person’s family that the declarant’s information is likely to be accurate.

Author’s Commentary to Rule 804(b)(4)
IRE 804(b)(4) is identical to pre-amended FRE 804(b)(4).
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(5). [Other exceptions.] [Transferred to Rule 807]  

(6). Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.  

Amended as of December 1, 2011:  

(5) [Other Exceptions.] [Transferred to Rule 807.]  

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.  

Author’s Commentary to Rule 804(b)(5)  

IRE 804(b)(5) is identical to pre-amended FRE 804(b)(6), former FRE 804(b)(5) “Other Exceptions,” having been transferred to FRE 807. Note that the rule applies both to civil and criminal cases. For a relevant case on forfeiture by wrongdoing, see People v. Hanson, 238 Ill. 2d 74 (2010) (both testimonial and nontestimonial statements are admissible under the doctrine; reliability of statement not a factor concerning admissibility). See also section 115-10.6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.6), which makes admissible the statements of a declarant who was murdered by the defendant to prevent the declarant from testifying in a criminal or civil case, and section 115-10.7 of the same Code (725 ILCS 5/115-10.7), where the unavailable witness’ absence was wrongfully procured.  

The United States Supreme Court noted that the federal rule codified the common-law forfeiture doctrine as a hearsay exception that does not violate the Confrontation Clause in Davis v. Washington, 547 U.S. 813, 833 (2006); and in Giles v. California, 554 U.S. 353 (2008), it limited its application to cases where there is evidence of the defendant’s intent to prevent the witness from testifying, holding that it did not automatically apply where the offense is murder.
### Federal Rules of Evidence

**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.

*Amended as of December 1, 2011:

**Rule 805. Hearsay Within Hearsay**

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

### Illinois Rules of Evidence

**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.

**Author’s Commentary to Rule 805**

IRE 805 is identical to pre-amended FRE 805.
Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), 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.

Amended as of December 1, 2011:

Rule 806. Attacking and Supporting the Declarant’s Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Author’s Commentary to Rule 806

IRE 806 is identical to the pre-amended federal rule, except for the addition of (F) in the first part of the first sentence, which was done to reflect that (F) was added to IRE 801(d)(2). Note that this rule is consistent with, but more expansive than, the provisions of the last sentence of IRE 613(b). See also section (11) under the “Modernization” discussion in the Committee’s general commentary on page 4 of this guide.
Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

Amended as of December 1, 2011:

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party sufficient notice in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

Author’s Commentary to Non-Adoption of Federal Rule 807

The Illinois Supreme Court “has specifically declined to adopt this [residual] exception” to the hearsay rule. People v. Olinger, 176 Ill. 2d 326, 359 (1997). Illinois, however, has what might be referred to as a limited residual hearsay exception for certain available and unavailable witnesses in both criminal and civil cases.

There are a number of criminal statutes that provide for the admissibility of hearsay statements where the out-of-court declarant is unavailable. The admissibility of these statements is open to question, however, because of the United States Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004) (repudiating the reliability standard set forth in Ohio v. Roberts, 448 U.S. 56 (1980), and holding that the Confrontation Clause prohibits admission of “testimonial” hearsay when the out-of-court declarant does not testify and when the defendant did not have an opportunity to cross-examine the unavailable declarant in a prior proceeding). Examples of such statutes, all under the Code of Criminal Procedure of 1963, include: section 115-10.2 (725 ILCS 5/115-10.2), where a witness refuses to testify despite a court order to do so; section 115-10.2a (725 ILCS 5/115-10.2a), where a declarant is unavailable to testify in a domestic violence prosecution; section 115-10.3 (725 ILCS 5/115-10.3), where a declarant is an elder adult who is a victim of certain specified offenses and is unable to testify because of physical or mental disability; section 115-10.4 (725 ILCS 5/115-10.4), where a declarant is deceased.

If the statements in the statutes listed above are deemed to be “testimonial statements” (a term not fully defined in Crawford, but one that certainly refers to statements made in response to police questioning “to establish or prove past events potentially relevant to later criminal prosecution” (see Davis v. Washington, 547 U.S. 813, 822 (2006)), and, in the words of Crawford, 541 U.S. at 68, “to prior testimony at a preliminary hearing, before a grand jury, or at a former trial”), the Crawford decision renders the hearsay statements of each of the absent declarants in each of the statutes inadmissible, pursuant to the constitutional protection afforded by the Confrontation Clause (not by the rules of evidence related to hearsay), unless the defendant had an opportunity to cross-examine the unavailable declarant in a prior proceeding.
party reasonable notice of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.

After the decision in *Crawford*, in two separate cases the United States Supreme Court concluded that the Confrontation Clause was not implicated and thus allowed admission of out-of-court statements. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court held that the declarant’s statements in a 911 call (in which she described the defendant’s contemporaneous violence) were non-testimonial — as descriptive of an ongoing emergency and not solely of past events — and thus admissible, despite the absence of the declarant (defendant’s former girlfriend) at the trial. In contrast, in a companion case decided along with *Davis* (*Hammon v. Indiana*), the defendant’s wife, while separated from her husband in a separate room of their home, informed police of the domestic abuse she had just suffered at his hands. This was deemed not to have satisfied the “ongoing emergency” exception (but merely a narrative about past events), and thus constituted testimonial hearsay that was not admissible when the wife did not appear at her husband’s trial.

Recently, in *Michigan v. Bryant*, ___ U.S. ___, 131 S.Ct. 1143 (2011), the Court applied the “ongoing emergency” doctrine in a case where police questioned the mortally wounded victim, who had been shot and was found in a gas station parking lot. The victim’s statements, in response to police questioning about who shot him and where and how it happened, were deemed to be non-testimonial because of the potential danger to the victim, to the police, and to others because of the violence inflicted by an unapprehended person with a gun.

Section 8-2701 of the Code of Civil Procedure (735 ILCS 5/8-2701) has provisions similar to those in section 115-10.3 of the Code of Criminal Procedure (regarding an unavailable elder adult), but the statute is unaffected by *Crawford*, which does not apply in civil cases, because that decision is limited to an accused’s right to confrontation, and does not address evidentiary rules related to hearsay.

Section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10) provides an example of a statute that partially complies with *Crawford* and partially does not. It allows admission of hearsay statements made by a victim of physical or sexual acts who is either a child under the age of 13 or a mentally retarded person. Subsection 115-10(b)(2)(A) allows admissibility of a hearsay statement of the victim’s complaint about the act when the victim testifies about it. In *People v. Cookson*, 215 Ill. 2d 194 (2005), the Illinois Supreme Court upheld the statute in response to the defendant’s conten-
tions premised on Crawford. But section 115-10(b)(2)(B) allows admissibility of a hearsay statement of the victim “describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of the prosecution,” when the victim is unavailable as a witness, the statement is corroborated, and the court finds that the statement is reliable. In People v. Kitch, 239 Ill. 2d 452 (2011), in rejecting the defendant’s contention that section 115-10 is facially unconstitutional and in discussing section 115(b)(2)(B) (which was not directly under review in the case), the supreme court pointed out that Crawford “requires something different: where the declarant is unavailable, the defendant must have had a prior opportunity for cross-examination.”

Note that section 8-2601 of the Code of Civil Procedure (735 ILCS 5/8-2601) has similar provisions applicable to a child under the age of 13. That statute is unaffected by the Crawford decision because, like section 8-2701 of that Code, it applies to civil proceedings.

For more on Crawford’s application of the Confrontation Clause to “hearsay statements,” in addition to Crawford v. Washington, Davis v. Washington, People v. Cookson, and People v. Kitch, all of which are cited and discussed above, see People v. Stechly, 225 Ill. 2d 246 (2007) and In re Rolandis G., 232 Ill. 2d 13 (2008).
### ARTICLE IX

**AUTHENTICATION AND IDENTIFICATION**

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<td>Rule 901. Requirement of Authentication or Identification</td>
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<td>(a). <strong>General provision.</strong> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.</td>
<td>(a). <strong>General Provision.</strong> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.</td>
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**Amended as of December 1, 2011:**

**Rule 901. Authenticating or Identifying Evidence**

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b). **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

**Amended as of December 1, 2011:**

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

1. **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

**Amended as of December 1, 2011:**

(1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

**Author’s Commentary to Rule 901(a)**

IRE 901(a) is identical to the pre-amended federal rule. The rule requires that, to have an item of evidence admitted, there must be evidence sufficient to prove that the item is what the proponent claims it to be.

(b). **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

**Author’s Commentary to Rule 901(b)**

IRE 901(b) is identical to the pre-amended federal rule. The following subdivisions of Rule 901(b) provide examples of evidence that satisfy authentication requirements.

1. **Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be.

**Author’s Commentary to Rule 901(b)(1)**

IRE 901(b)(1) is identical to the pre-amended federal rule.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

Amended as of December 1, 2011:

(2) Nonexpert Opinion About Handwriting. A nonexpert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

Amended as of December 1, 2011:

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

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

Amended as of December 1, 2011:

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

Author's Commentary to Rule 901(b)(2)

IRE 901(b)(2) is identical to the pre-amended federal rule. For relevant statutory provisions, see 735 ILCS 5/8-1501 et seq.

(3) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

Author's Commentary to Rule 901(b)(3)

IRE 901(b)(3) is identical to the pre-amended federal rule.

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

Author's Commentary to Rule 901(b)(4)

IRE 901(b)(4) is identical to the pre-amended federal rule.
<table>
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<tr>
<td><strong>(5) Voice identification.</strong> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.</td>
<td><strong>(5) Voice Identification.</strong> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Amended as of December 1, 2011:</strong></td>
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<tr>
<td><strong>(5) Opinion About a Voice.</strong> An opinion identifying a person’s voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.</td>
<td><strong>(5) Telephone Conversations.</strong> Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.</td>
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<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>Amended as of December 1, 2011:</strong></td>
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<tr>
<td><strong>(6) Telephone conversations.</strong> Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.</td>
<td><strong>(6) Evidence About a Telephone Conversation.</strong> For a telephone conversation, evidence that a call was made to the number assigned at the time to:</td>
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<td></td>
<td><strong>(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or</strong></td>
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<td></td>
<td><strong>(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.</strong></td>
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<tr>
<td><strong>Author's Commentary to Rule 901(b)(5)</strong></td>
<td><strong>Author's Commentary to Rule 901(b)(6)</strong></td>
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<tr>
<td>IRE 901(b)(5) is identical to the pre-amended federal rule.</td>
<td>IRE 901(b)(6) is identical to the pre-amended federal rule.</td>
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<td><strong>(7) Public records or reports.</strong> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.</td>
<td><strong>(7) Public Records or Reports.</strong> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.</td>
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<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><em>Author’s Commentary to Rule 901(b)(7)</em></td>
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<td><strong>(7) Evidence About Public Records.</strong> Evidence that:</td>
<td>IRE 901(b)(7) is identical to the pre-amended federal rule.</td>
</tr>
<tr>
<td>(A) a document was recorded or filed in a public office as authorized by law; or</td>
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<tr>
<td>(B) a purported public record or statement is from the office where items of this kind are kept.</td>
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<tr>
<td><strong>(8) Ancient documents or data compilation.</strong> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.</td>
<td><strong>(8) Ancient Documents or Data Compilation.</strong> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.</td>
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<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><em>Author’s Commentary to Rule 901(b)(8)</em></td>
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<tr>
<td><strong>(8) Evidence About Ancient Documents or Data Compilations.</strong> For a document or data compilation, evidence that it:</td>
<td>IRE 901(b)(8) is identical to the pre-amended federal rule, but note that the 20-year provision in (C) represents a change in Illinois, which previously required a 30-year time period. See section (9) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.</td>
</tr>
<tr>
<td>(A) is in a condition that creates no suspicion about its authenticity;</td>
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<tr>
<td>(B) was in a place where, if authentic, it would likely be; and</td>
<td></td>
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<tr>
<td>(C) is at least 20 years old when offered.</td>
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</table>
(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Amended as of December 1, 2011:

(9) **Evidence About a Process or System.** Evidence describing a process or system and showing that it produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Amended as of December 1, 2011:

(10) **Methods Provided by a Statute or Rule.** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

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

Author's Commentary to Rule 901(b)(9)
IRE 901(b)(9) is identical to the pre-amended federal rule.

(10) **Methods Provided by Statute or Rule.** Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.

Author's Commentary to Rule 901(b)(10)
IRE 901(b)(10) is identical to the pre-amended federal rule, except for the changes to distinguish from the federal system.
Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

Amended as of December 1, 2011:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1). Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

Amended as of December 1, 2011:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

Author's Commentary to Rule 902(1)

IRE 902(1) is identical to the pre-amended federal rule.
(2). Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

Amended as of December 1, 2011:

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3). Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United

(2). Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United
Federal Rules of Evidence

| States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. |

Amended as of December 1, 2011:

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification. |

Illinois Rules of Evidence

| States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. |

Author's Commentary to Rule 902(3)

IRE 902(3) is identical to the pre-amended federal rule.
(4). **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

Amended as of December 1, 2011:

(4) **Certified Copies of Public Records.** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5). **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

Amended as of December 1, 2011:

(5) **Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6). **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

Amended as of December 1, 2011:

(6) **Newspapers and Periodicals.** Printed material purporting to be a newspaper or periodical.

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(4). **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court.

(5). **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6). **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

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Author’s Commentary to Rule 902(4)

IRE 902(4) is identical to the pre-amended federal rule, except for the changes to distinguish from the federal system.

Author’s Commentary to Rule 902(5)

IRE 902(5) is identical to the pre-amended federal rule.

Author’s Commentary to Rule 902(6)

IRE 902(6) is identical to the pre-amended federal rule.
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<tr>
<td><strong>(7). Trade inscriptions and the like.</strong> Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.</td>
<td><strong>(7). Trade Inscriptions and the Like.</strong> Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, <strong>content</strong>, <strong>ingredients</strong>, or origin.</td>
</tr>
<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><strong>Author's Commentary to Rule 902(7)</strong></td>
</tr>
<tr>
<td><strong>(7) Trade Inscriptions and the Like.</strong> An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.</td>
<td>IRE 902(7) is identical to the pre-amended federal rule, except that “content” and “ingredients” are added to codify Illinois common law. See People v. Shevock, 335 Ill. App. 3d 1031 (2003) (proper to admit, as exception to hearsay rule, boxes of Sudafed with labels that showed active ingredient was pseudoephedrine, a necessary ingredient of methamphetamine); In re T.D., 115 Ill. App. 3d 872 (1983) (label on glue container admissible to prove presence of hazardous substance).</td>
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<td><strong>(8). Acknowledged documents.</strong> Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.</td>
<td><strong>(8). Acknowledged Documents.</strong> Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.</td>
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<td><em>Amended as of December 1, 2011:</em></td>
<td><strong>Author's Commentary to Rule 902(8)</strong></td>
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<tr>
<td><strong>(8) Acknowledged Documents.</strong> A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.</td>
<td>IRE 902(8) is identical to the pre-amended federal rule.</td>
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<td><em>Amended as of December 1, 2011:</em></td>
<td><strong>Author's Commentary to Rule 902(9)</strong></td>
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<td><strong>(9) Commercial Paper and Related Documents.</strong> Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.</td>
<td>IRE 902(9) is identical to the pre-amended federal rule.</td>
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<td><strong>(10). Presumptions under Acts of Congress.</strong> Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.</td>
<td><strong>(10). Presumptions Under Statutes</strong> Any signature, document, or other matter declared by statutes to be presumptively or prima facie genuine or authentic.</td>
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**Amended as of December 1, 2011:**

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

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<th>Author's Commentary to Rule 902(10)</th>
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<tr>
<td>IRE 902(10) is identical to the pre-amended federal rule, except for changes to distinguish from the federal system.</td>
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(11). Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

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

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The word “certification” as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
**Federal Rules of Evidence**

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<th>IRE 902(11)</th>
<th><strong>Amended as of December 1, 2011:</strong></th>
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<tr>
<td><strong>(11) Certified Domestic Records of a Regularly Conducted Activity.</strong></td>
<td>The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.</td>
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**Author's Commentary to Rule 902(11)**

IRE 902(11) is identical to the pre-amended federal rule, except (1) “domestic” is deleted in the title and in the first part of the first sentence; (2) “declaration” is replaced by “certification” in the first and last paragraphs to correspond to the term used in IRE 803(6); (3) as adjusted to distinguish from federal proceedings; and (4) in the first sentence of the last paragraph, “certification” is defined. By incorporating the provisions related to the certification of foreign business records into this rule, there was no need to have separate rules for domestic and foreign records. The rule abandons Illinois’ former requirement that a witness be called to establish the foundation for introduction of a business record. See also the Committee’s general commentary about self-authentication in section (12) under the “Modernization” discussion on page 4 of this guide.
(12). **Certified foreign records of regularly-conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly-conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly-conducted activity; and

(C) was made by the regularly-conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

**Amended as of December 1, 2011:**

(12) **Certified Foreign Records of a Regularly Conducted Activity.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

**Author’s Commentary to Non-Adoption of Federal Rule 902(12)**

Adoption of FRE 902(12) was deemed unnecessary because it addresses the same subject matter as IRE 902(11), which, by striking the term “domestic” in its title and in its body, incorporates the provisions of FRE 902(12), which address “foreign records.” Note that the definition of “certification” in IRE 902(11) is based on the requirements of a “declaration” in the first sentence of the final paragraph of FRE 902(12).
Rule 903. Subscribing Witness’ Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Amended as of December 1, 2011:

Rule 903. Subscribing Witness’s Testimony

A subscribing witness’s testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Author's Commentary to Rule 903

IRE 903 is identical to the pre-amended federal rule.
ARTICLE X
CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1). **Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

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**Amended as of December 1, 2011:**

**Rule 1001. Definitions That Apply to This Article**

In this article:

(a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.

(2). **Photographs.** “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

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**Amended as of December 1, 2011:**

(c) A “photograph” means a photographic image or its equivalent stored in any form.

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Author’s Commentary to Rule 1001(1)

Except for the addition of the word “sounds,” IRE 1001(1) is identical to pre-amended FRE 1001(1), which, through amendment effective December 1, 2011, is now FRE 1001(a) and (b).

(1). **Writings and Recordings.** “Writings” and “recordings” consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

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Author’s Commentary to Rule 1001(2)

Except for the additional underlined portion at the end, IRE 1001(2) is identical to pre-amended FRE 1001(2), which, through amendment effective December 1, 2011, is now FRE 1001(c). For a relevant case, see People v. Taylor, 2011 IL 110067, ¶¶ 42, 43 (citing IRE 1001(2), in holding that a VHS videotape of a DVR recording qualifies as an “original” recording).
(3). **Original.** An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

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<td><strong>(d)</strong> An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.</td>
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(4). **Duplicate.** A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

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<tr>
<td><strong>(e)</strong> A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.</td>
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<th><strong>Author’s Commentary to Rule 1001(3)</strong></th>
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<tr>
<td>IRE 1001(3) is identical to pre-amended FRE 1001(3), which, through amendment effective December 1, 2011, is now FRE 1001(d). For a relevant case, see People v. Taylor, 2011 IL 110067, ¶¶ 42, 43 (though employing language in the rule without specifically citing it, holding that a VHS videotape of a DVR recording qualifies as an “original” recording).</td>
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<th><strong>Author’s Commentary to Rule 1001(4)</strong></th>
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</thead>
<tbody>
<tr>
<td>IRE 1001(4) is identical to pre-amended FRE 1001(4), which, through amendment effective December 1, 2011, is now FRE 1001(e).</td>
</tr>
</tbody>
</table>
Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Amended as of December 1, 2011:

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Author’s Commentary to Rule 1002

IRE 1002 is identical to pre-amended FRE 1002, except for the modification to distinguish from the federal system.
**Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

**Amended as of December 1, 2011:**

**Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.

**Rule 1004. Admissibility of Other Evidence of Contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

**Amended as of December 1, 2011:**

**Rule 1004. Admissibility of Other Evidence of Content**

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

1. **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

**Amended as of December 1, 2011:**

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

2. **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

**Author’s Commentary to Rule 1004(1)**

IRE 1004(1) is identical to pre-amended FRE 1004(1), the provisions of which, through amendment effective December 1, 2011, are now addressed in FRE 1004(a).
### Federal Rules of Evidence

<table>
<thead>
<tr>
<th>(2). Original not obtainable.</th>
<th>(2). Original Not Obtainable.</th>
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<tr>
<td>No original can be obtained by any available judicial process or procedure; or</td>
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<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><em>Author's Commentary to Rule 1004(2)</em></td>
</tr>
<tr>
<td>(b) <em>an original cannot be obtained by any available judicial process;</em></td>
<td>IRE 1004(2) is identical to pre-amended FRE 1004(2), the provisions of which, through amendment effective December 1, 2011, are now addressed in FRE 1004(b).</td>
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<tr>
<th>(3). Original in possession of opponent.</th>
<th>(3). Original in Possession of Opponent.</th>
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<tr>
<td>At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or</td>
<td>At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or</td>
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<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><em>Author's Commentary to Rule 1004(3)</em></td>
</tr>
<tr>
<td>(c) <em>the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or</em></td>
<td>Except for the deletion of the last portion of FRE 1004(3), which is unnecessary, IRE 1004(3) is identical to pre-amended FRE 1004(3), the provisions of which, through amendment effective December 1, 2011, are now addressed in FRE 1004(c).</td>
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<td>The writing, recording, or photograph is not closely related to a controlling issue.</td>
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<tr>
<td><em>Amended as of December 1, 2011:</em></td>
<td><em>Author's Commentary to Rule 1004(4)</em></td>
</tr>
<tr>
<td>(d) <em>the writing, recording, or photograph is not closely related to a controlling issue.</em></td>
<td>IRE 1004(4) is identical to pre-amended FRE 1004(4), the provisions of which, through amendment effective December 1, 2011, are now addressed in FRE 1004(d).</td>
</tr>
</tbody>
</table>
Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Amended as of December 1, 2011:

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Author's Commentary to Rule 1005

IRE 1005 is identical to pre-amended FRE 1005. A relevant rule and relevant statutes include: Supreme Court Rule 216(d); 735 ILCS 5/8-1202; and 735 ILCS 5/8-1206.
Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Amended as of December 1, 2011:

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

Amended as of December 1, 2011:

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Author’s Commentary to Rule 1006
IRE 1006 is identical to pre-amended FRE 1006.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

Author’s Commentary to Rule 1007
IRE 1007 is identical to pre-amended FRE 1007. See also the Committee’s general commentary in section (14) under the “Modernization” discussion on page 4 of this guide.
Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Amended as of December 1, 2011:

Rule 1008. Functions of the Court and Jury

Ordinarlly, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Author’s Commentary to Rule 1008

IRE 1007 is identical to pre-amended FRE 1007, except for the substitution of “Rule 104(a)” for “rule 104,” without intending a substantive change. Note, however, that the amendment of FRE 1007, effective December 1, 2011, changed the reference to “rule 104” to “Rule 104(b),” and clarified that the rule has relevance to the provisions of Rule 1004 (“Admissibility of Other Evidence of Contents”) and Rule 1005 (“Public Records”).
Rule 1101. Applicability of Rules

(a). Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.

Amended as of December 1, 2011:

Rule 1101. Applicability of the Rules

(a) To Courts and Judges. These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

Rule 1101. Applicability of Rules

(a) Except as otherwise provided in paragraphs (b) and (c), these rules govern proceedings in the courts of Illinois.

Author's Commentary to Rule 1101(a)

IRE 1101(a) is adjusted to distinguish from the federal system and to provide that the rules of evidence govern in all court proceedings, except as provided in IRE 1101(b) and (c).
(b). **Proceedings generally.** These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

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<td><strong>(b). Proceedings generally.</strong> These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.</td>
<td><strong>(b). Rules Inapplicable.</strong> These rules (other than with respect to privileges) do not apply in the following situations:</td>
</tr>
<tr>
<td><strong>Amended as of December 1, 2011:</strong></td>
<td><strong>(1) Preliminary Questions of Fact.</strong> The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.</td>
</tr>
<tr>
<td><strong>(b) To Cases and Proceedings.</strong> These rules apply in:</td>
<td><strong>(2) Grand Jury.</strong> Proceedings before grand juries.</td>
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<tr>
<td>· civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;</td>
<td><strong>(3) Miscellaneous Proceedings.</strong> Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation, conditional discharge or supervision; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, and contempt proceedings in which the court may act summarily.</td>
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<tr>
<td>· criminal cases and proceedings; and</td>
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<tr>
<td>· contempt proceedings, except those in which the court may act summarily.</td>
<td><strong>Author's Commentary to Rule 1101(b)</strong></td>
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</table>

IRE 1101(b) provides the proceedings in which the evidence rules are inapplicable. Having provided in IRE 1101(a) that the rules apply in all proceedings in Illinois courts, but for the exceptions provided for in IRE 1101(b) and (c), it was unnecessary to provide a counterpart to FRE 1101(b), which details federal proceedings where the rules apply. IRE 1101(b) addresses the same subject matter and incorporates, and is identical to, the provisions of FRE 1101(d) (which, before the amendment effective December 1, 2011, was identically titled), except for: (1) the addition of “conditional discharge or supervision,” which are not authorized dispositions in criminal cases in the federal system; and (2) the inclusion of “contempt proceedings in which the court may act summarily,” which FRE 1101(b) also exempts from the application of the evidence rules.

The highlighted portion arguably represents a change in Illinois law, because recent case law indicates that at
least some Illinois rules of evidence do apply in probation proceedings. In People v. Renner, 321 Ill. App. 3d 1022, 1026 (2001), the appellate court denied the State’s appeal from a trial court ruling that granted a probationer’s motion in limine to exclude a certified laboratory report of results of the probationer’s urine test at her probation revocation hearing. The appellate court stated that “hearsay evidence is not competent evidence in probation revocation proceedings; therefore, hearsay testimony is not competent to sustain the State’s burden of proof...” Id. Conversely, because FRE 1101(d)(3) provides that the Federal Rules of Evidence do not apply in probation proceedings, reliable hearsay evidence is admissible in such proceedings. See, e.g., U.S. v. Pratt, 52 F.3d 671, 675 (7th Cir. 1995) (citing FRE 1103(d)(3) and allowing hearsay testimony that satisfied the reliability requirement). There is some Illinois case law, however, to support an argument that IRE 1101(b) does not represent a clear departure from Illinois law. There are appellate court decisions stating that many of the Illinois rules of evidence do not apply in probation revocation proceedings. See, e.g., People v. Allegri, 127 Ill. App. 3d. 1041, 1045 (1984) (“Many of the evidentiary rules do not apply with full force to probation revocation proceedings.”); People v. Tidwell, 33 Ill. App. 3d 232, 237 (1975) (stating, in the context of the sentencing court’s imposition of restitution as a condition of probation, “strict rules of evidence do not apply” in probation proceedings, and the court should rely on “parameters of reasonableness, not technical rules of evidence”). Section 115-5(c)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(c)(2)) provides insight regarding future application of the rule. That statute allows admissibility of investigative records (pursuant to the business records exception to the hearsay rule) for “technical violations” of probation and supervision (and presumably of conditional discharge). It defines a “technical violation” as “a breach of a sentencing order but does not include an allegation of a subsequent criminal act asserted in a formal criminal charge.” Most likely, in cases involving technical violations, the statute as well as IRE 1101(b)(3) will be invoked while, in cases involving revocation based on criminal conduct, the State will need to abide by evidentiary rules, presenting witnesses with first-hand knowledge rather than risking reliance on hearsay to satisfy its burden of proof. In any case, as in federal proceedings, “reliability” of information is expected to be the standard in Illinois probation, conditional discharge, and supervision revocation proceedings.
(c). Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

**Amended as of December 1, 2011:**

(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.

(d). Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

1. **Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

2. **Grand jury.** Proceedings before grand juries.

3. **Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

**Amended as of December 1, 2011:**

(d) Exceptions. These rules — except for those on privilege — do not apply to the following:

1. the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

2. grand-jury proceedings; and

(c). Small Claims Actions. These rules apply to small claims actions, subject to the application of Supreme Court Rule 286(b).

**Author's Commentary to Rule 1101(c)**

IRE 1101(c), which addresses small claims actions, differs from FRE 1101(c), which addresses the rule of privilege and has been incorporated into the first sentence of IRE 1101(b). There is no federal counterpart to IRE 1101(c) because there are no federal small claims proceedings.

**Author's Commentary to Non-Adoption of Federal Rule 1101(d)**

There is no separate IRE 1101(d). As pointed out above in the author's commentary to IRE 1101(b), the provisions of FRE 1101(d) are incorporated into and are nearly identical to IRE 1101(b).
(3) miscellaneous proceedings such as:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examination in a criminal case;
- sentencing;
- granting or revoking probation or supervised release; and
- considering whether to release on bail or otherwise.

(e). Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(e) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled “An Act authorizing associations of producers of aquatic products” approved June 25, 1934 (15 U.S.C. 522); review of orders of
petroleum control boards under section 5 of the Act entitled “An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes”, approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled “An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes”, approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

Amended as of December 1, 2011:

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Author’s Commentary to Non-Adoption of Federal Rule 1101(e)

FRE 1101(e), which specifically applies to federal proceedings, was not adopted.
<table>
<thead>
<tr>
<th><strong>Federal Rules of Evidence</strong></th>
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<tbody>
<tr>
<td><strong>Rule 1102. Amendments</strong></td>
<td><strong>Rule 1102. Title</strong></td>
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<tr>
<td>Amended as of December 1, 2011:</td>
<td>Author’s Commentary to Non-Adoption of Federal Rule 1102</td>
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<tr>
<td>Rule 1102. Amendments</td>
<td>The Illinois rules do not provide for an explicit and separate rule for amendments as does FRE 1102. It is clear, however, that the Illinois Supreme Court has authority to make amendments, and IRE 101 recognizes the ability of the General Assembly to provide statutory rules of evidence.</td>
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<tr>
<td>These rules may be amended as provided in 28 U.S.C. § 2072.</td>
<td>Rule 1102. Title</td>
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<td></td>
<td>These rules may be known and cited as the Illinois Rules of Evidence.</td>
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<tr>
<td><strong>Rule 1103. Title</strong></td>
<td>Author’s Commentary to Rule 1102</td>
</tr>
<tr>
<td>Amended as of December 1, 2011:</td>
<td>IRE 1102 is the Illinois counterpart to FRE 1103.</td>
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<td>Rule 1103. Title</td>
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<td>These rules may be known and cited as the Federal Rules of Evidence.</td>
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</tbody>
</table>
Sec. 115-7.3. Evidence in certain cases.

(a) This Section applies to criminal cases in which:

(1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV;

(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 12-12 of the Criminal Code of 1961; or

(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant’s commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(f) In prosecutions for a violation of Section 10-2, 12-4, 12-13, 12-14, 12-14.1, 12-15, 12-16, or 18-5 of the Criminal Code of 1961, involving the involuntary delivery of a controlled substance to a victim, no inference may be made about the fact that a victim did not consent to a test for the presence of controlled substances.

(Source: P.A. 95-892, eff. 1-1-09.)
APPENDIX B

725 ILCS 5/115-7.4

Sec. 115-7.4. Evidence in domestic violence cases.

(a) In a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, evidence of the defendant’s commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(c) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(Source: P.A. 95-360, eff. 8-23-07.)
APPENDIX C

725 ILCS 5/115-20

Sec. 115-20. Evidence of prior conviction.

(a) Evidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member as defined in Section 112A-3, stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant.

(b) If the defendant is accused of an offense set forth in subsection (a) or the defendant is tried or retried for any of the offenses set forth in subsection (a), evidence of the defendant’s conviction for another offense or offenses set forth in subsection (a) may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant if the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct as evidenced by proof of conviction, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

(Source: P.A. 90-387, eff. 1-1-98.)
APPENDIX D

735 ILCS 5/8-1901

(Text of Section WITH the changes made by P.A. 94-677, which has been held unconstitutional)

Sec. 8-1901. Admission of liability - Effect.

(a) The providing of, or payment for, medical, surgical, hospital, or rehabilitation services, facilities, or equipment by or on behalf of any person, or the offer to provide, or pay for, any one or more of the foregoing, shall not be construed as an admission of any liability by such person or persons. Testimony, writings, records, reports or information with respect to the foregoing shall not be admissible in evidence as an admission of any liability in any action of any kind in any court or before any commission, administrative agency, or other tribunal in this State, except at the instance of the person or persons so making any such provision, payment or offer.

(b) Any expression of grief, apology, or explanation provided by a health care provider, including, but not limited to, a statement that the health care provider is “sorry” for the outcome to a patient, the patient’s family, or the patient’s legal representative about an inadequate or unanticipated treatment or care outcome that is provided within 72 hours of when the provider knew or should have known of the potential cause of such outcome shall not be admissible as evidence in any action of any kind in any court or before any tribunal, board, agency, or person. The disclosure of any such information, whether proper, or improper, shall not waive or have any effect upon its confidentiality or inadmissibility. As used in this Section, a “health care provider” is any hospital, nursing home or other facility, or employee or agent thereof, a physician, or other licensed health care professional. Nothing in this Section precludes the discovery or admissibility of any other facts regarding the patient’s treatment or outcome as otherwise permitted by law.

(c) The changes to this Section made by this amendatory Act of the 94th General Assembly apply to causes of action accruing on or after its effective date.

(Source: P.A. 94-677, eff. 8-25-05.)

(Text of Section WITHOUT the changes made by P.A. 94-677, which has been held unconstitutional)

Sec. 8-1901. Admission of liability - Effect. The providing of, or payment for, medical, surgical, hospital, or rehabilitation services, facilities, or equipment by or on behalf of any person, or the offer to provide, or pay for, any one or more of the foregoing, shall not be construed as an admission of any liability by such person or persons.
Testimony, writings, records, reports or information with respect to the foregoing shall not be admissible in evidence as an admission of any liability in any action of any kind in any court or before any commission, administrative agency, or other tribunal in this State, except at the instance of the person or persons so making any such provision, payment or offer.

(Source: P.A. 82-280.)
Sec. 115-7. a. In prosecutions for predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV; and in prosecutions for battery and aggravated battery, when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 12-12 of the Criminal Code of 1961; and with the trial or retrial of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, and aggravated indecent liberties with a child, the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this Code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.

b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. The court shall not admit evidence under this Section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence that may be admitted and areas with respect to which the alleged victim or corroborating witness under Section 115-7.3 of this Code may be examined or cross examined.

(Source: P.A. 89-428, eff. 12-13-95; 89-462, eff. 5-29-96; 90-132, eff. 1-1-98.)
APPENDIX F

735 ILCS 5/8-2801

Sec. 8-2801. Admissibility of evidence; prior sexual activity or reputation.

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil proceeding except as provided in subsections (b) and (c):

(1) evidence offered to prove that any victim engaged in other sexual behavior;
or

(2) evidence offered to prove any victim’s sexual predisposition.

(b) Exceptions.

(1) In a civil case, the following evidence is admissible, if otherwise admissible under this Act:

(A) evidence of specific instances of sexual behavior by the victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; and

(B) evidence of specific instances of sexual behavior by the victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent by the victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subsection (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the victim or, when appropriate, the victim’s guardian or representative.

(2) Before admitting evidence under this Section the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(Source: P.A. 96-307, eff. 1-1-10.)
Appendix G

705 ILCS 405/5-150

Sec. 5-150. Admissibility of evidence and adjudications in other proceedings.

(1) Evidence and adjudications in proceedings under this Act shall be admissible:

(a) in subsequent proceedings under this Act concerning the same minor; or

(b) in criminal proceedings when the court is to determine the amount of bail, fitness of the defendant or in sentencing under the Unified Code of Corrections; or

(c) in proceedings under this Act or in criminal proceedings in which anyone who has been adjudicated delinquent under Section 5-105 is to be a witness including the minor or defendant if he or she testifies, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials; or

(d) in civil proceedings concerning causes of action arising out of the incident or incidents which initially gave rise to the proceedings under this Act.

(2) No adjudication or disposition under this Act shall operate to disqualify a minor from subsequently holding public office nor shall operate as a forfeiture of any right, privilege or right to receive any license granted by public authority.

(3) The court which adjudicated that a minor has committed any offense relating to motor vehicles prescribed in Sections 4-102 and 4-103 of the Illinois Vehicle Code shall notify the Secretary of State of that adjudication and the notice shall constitute sufficient grounds for revoking that minor’s driver’s license or permit as provided in Section 6-205 of the Illinois Vehicle Code; no minor shall be considered a criminal by reason thereof, nor shall any such adjudication be considered a conviction.

(Source: P.A. 90-590, eff. 1-1-99.)
Sec. 2-1102. Examination of adverse party or agent. Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

(Source: P.A. 82-280.)

Supreme Court Rule 238

Rule 238. Impeachment of Witnesses; Hostile Witnesses

(a) The credibility of a witness may be attacked by any party, including the party calling the witness.

(b) If the court determines that a witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross-examination.

Amended February 19, 1982, effective April 1, 1982; amended April 11, 2001, effective immediately.
Appendix I

725 ILCS 5/115-10.1

Sec. 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and
(b) the witness is subject to cross-examination concerning the statement, and
(c) the statement--

(1) was made under oath at a trial, hearing, or other proceeding, or
(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

(Source: P.A. 83-1042.)
APPENDIX J

725 ILCS 5/115-12

Sec. 115-12. Substantive Admissibility of Prior Identification. A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him.

(Source: P.A. 83-367.)
APPENDIX K

725 ILCS 5/115-13

[Effective prior to July 1, 2011:]

Sec. 115-13. In a prosecution for violation of Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the “Criminal Code of 1961”, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

[Effective July 1, 2011 (with added portions underlined):]

Sec. 115-13. In a prosecution for violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the “Criminal Code of 1961”, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

(Source: P.A. 96-1551, eff. 7-1-11; P.A. 89-428, eff. 12-13-95; 89-462, eff. 5-29-96.)
APPENDIX L

725 ILCS 5/115-5

Sec. 115-5. Business records as evidence.

(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term “business,” as used in this Section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, optical imaging, or other process which accurately reproduces or forms a medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This Section shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

(c) No writing or record made in the regular course of any business shall become admissible as evidence by the application of this Section if:

1. Such writing or record has been made by anyone in the regular course of any form of hospital or medical business; or
(2) Such writing or record has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind, except during a hearing to revoke a sentence of probation or conditional discharge or an order of court supervision that is based on a technical violation of a sentencing order when the hearing involves a probationer or defendant who has transferred or moved from the county having jurisdiction over the original charge or sentence. For the purposes of this subsection (c), “technical violation” means a breach of a sentencing order but does not include an allegation of a subsequent criminal act asserted in a formal criminal charge.

(Source: P.A. 91-548, eff. 1-1-00.)

**Supreme Court Rule 236**

**Rule 236. Admission of Business Records in Evidence**

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term “business,” as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) Although police accident reports may otherwise be admissible in evidence under the law, subsection (a) of this rule does not allow such writings to be admitted as a record or memorandum made in the regular course of business.

Amended August 9, 1983, effective October 1, 1983; amended April 1, 1992, effective August 1, 1992.
Appendix M

725 ILCS 5/115-5.1

Sec. 115-5.1. In any civil or criminal action the records of the coroner’s medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner’s office, duly certified by the county coroner or chief supervisory coroner’s pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section. These reports, specifically including but not limited to the pathologist’s protocol, autopsy reports and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions stated therein.

A duly certified coroner’s protocol or autopsy report, or both, complying with the requirements of this Section may be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. The records referred to in this Section shall be limited to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.

Persons who prepare reports or records offered in evidence hereunder may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause. However, if such person is dead, the county coroner or a duly authorized official of the coroner’s office may testify to the fact that the examining pathologist, toxicologist or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical report or record was prepared in the ordinary and usual course of the deceased person’s duty or employment in conformity with the provisions of this Section.

(Source: P.A. 82-783.)