

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*

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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.
- 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 is not so fortunate as to 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:

- [The author's commentary always appears in brackets.]
- The Committee's commentary never appears in brackets and always is preceded by an appropriate title.
- 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 rules themselves.

In this manner, 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.

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
October 8, 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.tdrllawfirm.com, and it is recommended that the reader check for updates regularly.

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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.



Honorable Thomas R. Fitzgerald
Chief Justice
Illinois Supreme Court

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SUPREME COURT CLERK

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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.

(4) Rule 613(a). Examining Witness Concerning Prior Statement.

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.

(5) Rule 801(d). Statements Which Are Not Hearsay.

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.

(12) Rule 902(11). Certified Records of Regularly Conducted Activity.

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.

(5) Rule 801(d)(1): The provisions of 725 ILCS 5/115–10.1, dealing with prior inconsistent statements in a criminal case, are incorporated nearly verbatim in Rule 801(d)(1)(A) in the interests of completeness and convenience. Similar treatment is given to prior statements of identification, 725 ILCS 5/115–12, in Rule 801(d)(1)(B).

(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.
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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

| <i>Federal Rules of Evidence (FRE)</i> (Amended as of December 1, 2009) | <i>Illinois Rules of Evidence (IRE)</i> (As adopted September 27, 2010, effective January 1, 2011) |
|---|---|
| ARTICLE I GENERAL PROVISIONS | ARTICLE I GENERAL PROVISIONS |
| <p>Rule 101. Scope</p> <p>These rules govern proceedings in the courts of <u>the United States and before the United States bankruptcy judges and United States magistrate judges</u>, to the extent and with the exceptions stated in rule 1101.</p> | <p>Rule 101. Scope</p> <p>These rules govern proceedings in the courts of <u>Illinois</u> to the extent and with the exceptions stated in Rule 1101. <u>A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court.</u></p> <p>Committee Comment to Rule 101</p> <p>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.</p> <p>[IRE 101 is identical to the 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.]</p> |
| <p>Rule 102. Purpose and Construction</p> <p>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.</p> | <p>Rule 102. Purpose and Construction</p> <p>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.</p> <p>[Identical.]</p> |

Rule 103. Rulings on Evidence

Rule 103. Rulings on Evidence

Rule 103(a). Effect of erroneous ruling.

Rule 103(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

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

(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.

(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.~~

[IRE 103(a) is identical to the federal rule, except for the omission of the last sentence of FRE 103(a). That 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., *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, is 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* 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*).

For a relevant rule, see Illinois Supreme Court Rule 366(b) (2)(iii) (need to state issue in post-trial motion to preserve it for appeal).]

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Rule 103(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.

Rule 103(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.

[Identical.]

Rule 103(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.

Rule 103(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.

[Identical.]

Rule 103(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.

Rule 103(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.

[Identical. For relevant information, see Illinois Supreme Court Rule 615 (insubstantial error will be ignored on appeal, plain error will be addressed in terms substantially similar to the rule) and *People v. Herron*, 215 Ill. 2d 167 (2005) (providing the standard for applying plain error review where an issue has been forfeited): “when either (1) the evidence is so close regardless of the seriousness of the error” (i.e., “[T]he defendant must prove ‘prejudicial error.’ That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him”), “or (2) the error is serious, regardless of the closeness of the evidence” (i.e., “the defendant must prove that there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and

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challenged the integrity of the judicial process.... Prejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence'").]

Rule 104. Preliminary Questions

Rule 104. Preliminary Questions

Rule 104(a). Questions of admissibility generally.

Rule 104(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.

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, the court is not bound by the rules of evidence except those with respect to privileges.

[IRE 104(a) is identical to the federal rule, except for the substitution of "the court" for "it" in the last sentence.]

Rule 104(b). Relevancy conditioned on fact.

Rule 104(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.

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.

[Identical. See *Marvel Eng'g Co. v. Commercial Union Ins. Co.*, 118 Ill. App. 3d 844 (1983) (applying FRE 104(b)).]

Rule 104(c). Hearing of jury.

Rule 104(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.

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.

[Identical.]

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Rule 104(d). Testimony by accused.

The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

Rule 104(d). Testimony by Accused.

The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

[Identical.]

Rule 104(e). Weight and credibility.

This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 104(e). Weight and Credibility.

This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

[Identical.]

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.

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 purpose or scope and instruct the jury accordingly.

[IRE 105 is identical to the 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).]

Rule 106. Remainder of or Related Writings or Recorded Statements

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.

Rule 106. Remainder of or Related Writings or Recorded Statements

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.

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[Identical. 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.]

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ARTICLE II
JUDICIAL NOTICE

ARTICLE II
JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

Rule 201. Judicial Notice of Adjudicative Facts

Rule 201(a). Scope of rule.

This rule governs only judicial notice of adjudicative facts.

Rule 201(a). Scope of Rule.

This rule governs only judicial notice of adjudicative facts.

[Identical.]

Rule 201(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.

Rule 201(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.

[Identical. See *Murdy v. Edgar*, 103 Ill. 2d 384 (1984) (providing the same standards contained in the rule).]

Rule 201(c). When discretionary.

A court may take judicial notice, whether requested or not.

Rule 201(c). When Discretionary.

A court may take judicial notice, whether requested or not.

[Identical. 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).]

Rule 201(d). When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

Rule 201(d). When Mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

[Identical.]

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Rule 201(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.

Rule 201(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.

[Identical. See *People v. Barham*, 337 Ill. App. 3d 1121 (2003).]

Rule 201(f). Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

Rule 201(f). Time of Taking Notice.

Judicial notice may be taken at any stage of the proceeding.

[Identical.]

Rule 201(g). 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.

Rule 201(g). Informing the Jury.

In a civil action or proceeding, the court shall inform the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

[IRE 201(g) is identical to the federal rule, 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.]

**ARTICLE III
PRESUMPTIONS IN
CIVIL ACTIONS AND PROCEEDINGS**

**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.

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by rule, statute or court decision, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[IRE 301 is identical to the 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).]

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.

[FRE 302 not adopted.]

[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 (2d) of Conflicts of Law. See *Esser v. McIntyre*, 169 Ill. 2d 292 (1996) (recognizing that Illinois follows Restatement (2d)'s most significant relationship test).]

**ARTICLE IV
RELEVANCY AND ITS LIMITS**

**ARTICLE IV
RELEVANCY AND ITS LIMITS**

Rule 401. Definition of “Relevant Evidence”

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.

“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.

[Identical. See *People v. Monroe*, 66 Ill. 2d 317 (1977), where the supreme court adopted FRE 401.]

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

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.

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

[IRE 402 is identical to the 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).]

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

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.

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.

[Identical. 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).]

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

Rule 404(a). Character evidence generally.

Rule 404(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:

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;~~

(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;

[The first part of IRE 404(a)(1), which allows evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut such evidence, is identical to 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 the federal rule is deleted because there is no Illinois authority that permits prosecution evidence concerning a character trait of the accused offered to rebut evidence of the same trait of character of the alleged victim offered by the accused.]

(2) **Character of alleged victim.**

(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;

In a criminal case, and subject to the limitations imposed by [section 115-7 of the Code of Criminal Procedure \(725 ILCS 5/115-7\)](#), evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or [battery](#) case to rebut evidence that the alleged victim was the first aggressor;

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(3) Character of witness.

Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

[IRE 404(a)(2) is identical to FRE 404(a)(2), except for two differences. (1) The Illinois rule incorporates the criminal statute that substantially incorporates the provisions of FRE 412. That statute, entitled “Prior sexual activity or reputation as evidence,” 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 discussion related to FRE 412 below.) (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).]

See *People v. Knox*, 94 Ill. App. 2d 36 (1968) (where the defendant attacked the character of the victim of a murder offense through the cross-examination of two State witnesses, it was proper for the State to provide evidence of the victim’s good reputation during the State’s case-in-chief.)

(3) Character of Witness.

Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

[Identical.]

Rule 404(b). Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. 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.

Rule 404(b). Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 725 ILCS 5/115-7.4, and 725 ILCS 5/115-20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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[IRE 404(b) is identical to the first part of FRE 404(b), except for the reference to specific criminal statutes, which allow proof of prior offenses “to show action in conformity therewith.” Section 115-7.3 allows evidence of certain prior sex offenses; section 115-7.4 allows evidence of prior domestic violence offenses; and section 115-20 allows evidence related to prior convictions for certain enumerated offenses. (For more on these three statutes, see the commentary below related to the discussion of FRE 413.) Each of the statutes allows evidence of prior specific instances of conduct of the defendant. They also allow expert opinion testimony and reputation testimony, when the opposing party has offered reputation testimony.

In *People v. Dabbs*, ___ Ill. 2d ___, No. 109698 (November 18, 2010), an opinion that predates the effective date of the new evidence rules by a few weeks, but that refers to the rules generally and to IRE 404(b) in particular, the supreme court provided the following succinct paragraph regarding the common-law principles embodied in the rule:

“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)).”

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The *Dabbs* court also noted its prior holding in *Moss* that, even if offered for a permissible purpose, evidence of other crimes will not be admitted if its prejudicial effect substantially outweighs its probative value (the IRE 403 standard). It also noted its holding in *Wilson* that the admission of other-crimes evidence is subject to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.

For the reasons given above and because of its specific holding regarding the admissibility of evidence related to another offense, the *Dabbs* decision has significant relevance to IRE 404(b). In that decision, the supreme court held that the admission of evidence about the defendant's domestic violence on his former wife, during his trial for domestic violence on his girlfriend, was proper. The court upheld the constitutionality of section 115-7.4, rejecting the defendant's due process claim based on its conclusion that there is no constitutional prohibition against propensity evidence. It noted that the prohibition of propensity evidence is an evidence rule that was subject to exceptions, and that the relevant statute bore a rational relationship to a legitimate legislative purpose. The court concluded 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."

The last part of FRE 404(b), providing a notice requirement, is incorporated into new subdivision (c). See IRE 404(c), immediately below, and the note following that subdivision.]

Rule 404(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.

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[FRE 404 does not have a subdivision (c), but IRE 404(c), like the last part of FRE 404(b), 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

Rule 405. Methods of Proving Character

Rule 405(a). Reputation or opinion.

Rule 405(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.~~

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.

[IRE 405(a) is identical to FRE 405(a), except for the deletion of the second sentence regarding cross-examination on specific acts of conduct, which is not allowed, 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.]

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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 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.]

Rule 405(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.

Rule 405(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

[There is no FRE 405(b)(1), but the rule is identical to FRE 405(b). It 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 essential element of a charge, claim, or defense, such as, as the comment points out, in those involving negligent hiring, negligent entrustment, and defamation in certain cases.]

(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.

[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

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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.

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.

[Identical. For a case allowing evidence of the routine practice of an organization even in the absence of corroboration, see *Grew 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,

Rule 407. Reserved. [Subsequent Remedial Measures]

[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. When the Committee drafted that 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

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control, or feasibility of precautionary measures, if controverted, or impeachment.

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decisions on the issue, and the supreme court has granted review (Docket No. 110096). That court will therefore determine the core issue involving subsection (2) in the rule originally proposed, and will thereby frame the appropriate rule for "Subsequent Remedial Measures."

Note that 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 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.]

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

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

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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 regulatory, investigative, or enforcement authority.~~

(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.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses

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compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim.

[IRE 408(a) is identical to FRE 408(a), except for the deletion of the last portion of 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.]

(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.

[IRE 408(b) is identical to 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."]

Rule 409. Payment of Medical and Similar Expenses

In addition to the provisions of section 8-1901 of the Code of Civil Procedure (735 ILCS 5/8-

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occasioned by an injury is not admissible to prove liability for the injury.

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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.

[IRE 409 is identical to the 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.]

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

Except as otherwise provided in this rule, evidence of the following is not, 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
- (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

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 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

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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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false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

[IRE 410 is based on Illinois Supreme Court Rule 402(f) and is identical to the 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.)]

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.

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.

[Identical. 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).]

Rules 412-415

[There is no IRE 412 through 415 in Illinois.]

[Although there are no codified rules of evidence that are a counterpart to FRE 412, 413, 414 and 415, there are statutes that address the same or similar matters. Examples are discussed below in relation to the federal rule that is the counterpart to a relevant statute.]

~~**Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition**~~

[FRE 412 was not adopted, but the same subject matter is addressed by the Rape Shield Statute.]

~~**Rule 412(a). Evidence Generally Inadmissible.**~~

[Section 115-7(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7(a)), 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. Similar to FRE 412(a), in prosecutions for specified sexual offenses and specified offenses involving sexual penetration or sexual conduct, the statute makes inadmissible evidence of the prior sexual activity or of the reputation of an alleged victim or corroborating witness. 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).

~~The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):~~

- ~~(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.~~
- ~~(2) Evidence offered to prove any alleged victim's sexual predisposition.~~

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 section 115-7 of the Code of Criminal Procedure regarding inadmissibility of evidence of prior sexual activity and reputation.]

~~**Rule 412(b). Exceptions.**~~

[Similar to the exceptions provided by FRE 412(b), section 115-7(a) of the Code of Criminal Procedure of 1963 provides for exceptions to the general rule of exclusion where the evidence concerns past sexual conduct with the accused relevant to the issue of consent or when the evidence is constitutionally required to be admitted.]

~~(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~~

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~~(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.~~

~~**Rule 412(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.~~

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[In civil cases, the statute referred to above, section 8-2801 of the Code of Civil Procedure (735 ILCS 5/8-2801), provides exceptions to the general rule of inadmissibility of prior sexual activity or reputation where the evidence is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence" or to prove prior sexual activity with the defendant in order to prove consent.]

[Section 115-7(b) of the Code of Criminal Procedure 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)) 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.]

~~**Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**~~

[FRE 413 was not adopted, but Illinois statutes provide the same principles for sex offenses as well as for other specified offenses.]

~~**Rule 413(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.~~

[Although Illinois has not adopted FRE 413, section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3) has similar provisions.]

[In the prosecution of certain specified sexual offenses or other specified offenses involving sexual penetration or sexual conduct (listed below), section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3), entitled "Evidence in certain cases," allows evidence concerning the defendant's commission of the same or another of the offenses specified in the statute. The statute has been determined to be constitutional by the supreme court in *People v. Donoho*, 204 Ill. 2d 159, 177 (2003). Like FRE 413(a), section 115-7.3(b) provides that such evidence "may be considered for its bearing on any matter to which it is relevant." Section 115-7.3(e) provides that "proof may be made by specific instances of conduct, testimony as to reputation [only after the party opposing has offered that testimony], or testimony in the form of an expert opinion."]

~~**Rule 413(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.~~

[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."]

~~**Rule 413(c)**~~

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

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Rule 413(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).

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[Section 115-7.3 of the Code of Criminal Procedure 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) broadens the admissibility of evidence provided by FRE 413 in relation to sex offenses, because it allows evidence of a non-sex offense, specifically, another offense or offenses of domestic violence in a prosecution for domestic violence. In *People v. Dabbs*, ___ Ill. 2d ___, No. 109698 (November 18, 2010), the supreme court held that the admission of evidence about the defendant’s domestic violence on his former wife, 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 under IRE 404(b), see the discussion concerning that decision under IRE 404(b).

Section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-20) also broadens the provision 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.”]

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

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

Rule 414(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.~~

[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, applies to prosecutions for predatory criminal sexual assault of a child, as well as to other sexual offenses that may have children as victims.]

Rule 414(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.~~

[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 children who are victims of sexual offenses.]

Rule 414(c)

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

Rule 414(d)

~~For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" 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, that was committed in relation to a child;~~

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~~(2) any conduct proscribed by chapter 110 of title 18, United States Code;~~

~~(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;~~

~~(4) contact between the genitals or anus of the defendant and any part of the body of a child;~~

~~(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or~~

~~(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).~~

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

~~Rule 415(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.~~

~~Rule 415(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~~

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[FRE 415 not adopted.]

[Illinois has no counterpart to FRE 415 in civil cases.]

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~~or at such later time as the court may allow for good cause.~~

Rule 415(c)

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

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**ARTICLE V
PRIVILEGES**

**ARTICLE V
PRIVILEGES**

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.~~

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, 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 Illinois courts in the light of reason and experience.

[IRE 501 is identical to the federal rule, except for changes to distinguish Illinois proceedings from federal proceedings.]

~~**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~~

[FRE 502 not adopted.]

[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.]

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~~(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).~~

~~(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 disclo-~~

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~~sure 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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ARTICLE VI
WITNESSES

ARTICLE VI
WITNESSES

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.~~

Rule 601. General Rule of Competency

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

[The first sentence of IRE 601 is identical to the first sentence of the federal rule, except as adjusted for application in Illinois, and to preserve the prohibition of a 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 (725 ILCS 5/115-14). See also section 115-16 of the same Code (725 ILCS 5/115-16) for spousal immunity provisions. 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). The second sentence of FRE 601 is deleted as unnecessary in Illinois state proceedings.]

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 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.

[Identical. See *People v. Enis*, 139 Ill. 2d 264 (1990)]

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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 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.

[Identical.]

Rule 604. Interpreters

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.

Rule 604. Interpreters

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.

[Identical. Interpreters are provided for by statute in civil cases (735 ILCS 5/8-1491); in criminal cases (725 ILCS 140/0.01 *et seq.*); and for deaf persons (735 ILCS 5/8-1402).]

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

[Identical. *See People v. Ernest*, 141 Ill. 2d 412, 420 (1990).]

Rule 606. Competency of Juror as Witness

Rule 606(a). At the trial.

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.

Rule 606. Competency of Juror as Witness

Rule 606(a). At the Trial.

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.

[Identical.]

Rule 606(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.

Rule 606(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.

[IRE 606(b) is identical to 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. Hopley*, 182 Ill. 2d 404 (1998).]

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.

[The first two clauses of IRE 607 are identical to all of FRE 607. They are also identical to Illinois Supreme Court Rule 238(a). The addition of the exception providing the require-

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ment 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.]

Rule 608. Evidence of Character and Conduct of Witness

Rule 608. Evidence of Character of Witness

(a). Opinion and reputation evidence of character.

[Except for the title, IRE 608 is identical to FRE 608(a). There therefore is no subsection (a) or (b).]

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.

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 FRE 608(a), a rule that addresses “evidence of character.” The rule therefore relates to the testimony of a witness 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 required 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~~

[FRE 608(b) (known as the rule that allows evidence of “prior bad acts”) has not been adopted.]

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~~witness' 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' 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' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.~~

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[Note that FRE 608(b) addresses proof of "specific instances of conduct," not character evidence. Under the federal rule, a testifying witness may be cross-examined (1) about specific instances of the witness' own conduct related to truthfulness or untruthfulness, or (2) about specific instances of conduct related to truthfulness or untruthfulness of another witness. That type of inquiry (related to what is referred to as questioning about "prior bad acts") is not permitted in Illinois. For that reason, FRE 608(b) was not adopted.]

In addition to not permitting *inquiry* concerning specific instances of conduct, 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 not admitting proof of a lawyer's suspension from the practice of law was proper.

That Illinois permits proof of specific instances of conduct pursuant to some 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 include the one cited in IRE 404(b) and discussed in the comments to that rule, as well as the statutes discussed in the comments related to FRE 412, 413, and 414.]

Rule 609. Impeachment by Evidence of Conviction of Crime

Rule 609. Impeachment by Evidence of Conviction of Crime

Rule 609(a). General rule.

Rule 609(a). General Rule.

For the purpose of attacking the character for truthfulness of a witness,

For the purpose of attacking the credibility of a witness, evidence that the witness has been con-

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(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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victed 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.

Illinois has adopted the standard provided by *People v. Montgomery*, 47 Ill. 2d 510 (1971), for impeachment by 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. Dissimilarities include:

(1) For proof of a prior felony conviction, FRE 609(a)(1), like IRE 609(a), applies the standard of FRE 403 to a witness, but a different standard if the evidence of conviction is to be introduced against the accused. The difference is that, when applied to the accused, the standard applied 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, while the Illinois standard (applying the standard provided by IRE 403) prohibits admission of the evidence of the prior conviction only if its probative value is substantially outweighed by its prejudicial effect.

(2) FRE 609(a)(2), unlike IRE 609(a), allows 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 standard to such convictions.

In sum, IRE 609(a) applies the same standard regarding the admission of evidence about 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 evidence is substantially outweighed by the danger of unfair prejudice), without distinguishing between a mere witness

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and a witness who is the accused, and without regard for whether the prior conviction was for an offense involving dishonesty or false statement.

Illinois decisions require that evidence of prior convictions of the defendant for impeachment purposes must be proved through the introduction of certified copies of the judgment of conviction, and not through cross-examination of the defendant. 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 concerning his convictions on direct examination. In *People v. Harris*, 231 Ill. 2d 582 (2008), 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. *Patrick* and *People v. Averett*, 237 Ill. 2d 1 (2010), are also authority for the principle that, to preserve appellate review concerning error in the court's denial of the defendant's motion *in limine*, 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 rejected the "mere fact" method of proving a prior conviction, *i.e.*, that as part of its balancing test, the trial court should consider permitting admission merely of the fact of the conviction rather than allowing a designation of the offense and sentence. The court reasoned that the nature of the prior conviction is relevant to the jury's credibility determination and the "mere fact" method inevitably invites the jury to speculate about the prior offense.]

Rule 609(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.~~

Rule 609(b). Time Limit.

Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.

[The first part of IRE 609(b) is identical to FRE 609(b), except for the deletion of “imposed for that conviction,” thus potentially extending the 10-year period. The last part of the rule (from the word “unless”) is not adopted as inconsistent with Illinois law, which, pursuant to *Montgomery*, prohibits admission of evidence of a prior conviction, with or without notice, where the conviction (or the release from incarceration, whichever is later) occurred more than 10 years prior.

In Illinois, “the operative dates under *Montgomery* are the date of the prior conviction or release from confinement, whichever occurred later, and the date of trial.” The date on which the subsequent offense occurred is not controlling. *People v. Naylor*, 229 Ill. 2d 584 (2008). Because the date of the witness’ release from confinement is controlling, any time spent on parole or mandatory supervised release is not relevant. *People v. Sanchez*, ___ Ill. App. 3d ___ No. 1-08-3458 (Aug. 31, 2010).]

Rule 609(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.

Rule 609(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.

[Although worded differently, IRE 609(c) is similar to 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

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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.]]

Rule 609(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.

Rule 609(d). Juvenile Adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, 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.

[Identical, 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 when a 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 appears to be statutory authority for use of juvenile adjudications, overrides the common law prohibition against such use. Note, too, that in *People v. Coleman*, 399 Ill. App. 3d 1150 (4th Dist. 2010), the appellate court, in *dicta*, reasoned that the common law rule controlled over the statute by offering a basis for reconciling the apparent conflict between the two. Specifically, it held that the phrase, “pursuant to the rules of evidence for criminal trials” contained in the statute, represented legislative deference to the common law rule provided by *Montgomery*. It is important to note that, because the issue in that case was determined on other grounds, its reasoning was *dicta*. However, in *People v. Villa*, ___ Ill. App. 3d ___, No. 2-08-0918 (June 30, 2010) (*appeal allowed*, No. 110777 (Sept. 29, 2010)), the Second District of the appellate court explicitly rejected the reconciliation reasoning offered in the *Coleman* case and, con-

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cluding that the legislative intent of the General Assembly was clearly reflected in the statute and that the General Assembly had the ability to legislate rules of evidence, it held that the statute authorized the admission of the defendant's juvenile adjudication for impeachment purposes. Still later, in *People v. Bond*, ___ Ill. App. 3d ___, 4-09-0511 (November 1, 2010), the Fourth District adhered to its earlier decision in *Coleman*, while rejecting the reasoning in *Villa*.

The Committee Comment to the rule (provided below after Rule 609(e)) provides that the effectiveness of the statute remains an open question. See also the "Statute Validity" discussion in the Committee's general commentary on page 2 of this guide. Note that the supreme court allowed leave to appeal in the *Villa* case (Docket No. 110777) two days after adopting these codified rules of evidence. It will therefore resolve this issue, either allowing the rule to remain in place or substituting it with the statutory provision.]

Rule 609(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.

Rule 609(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.

[Identical.]

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

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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.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

[Identical.]

Rule 611. Mode and Order of Interrogation and Presentation

Rule 611(a). Control by court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611. Mode and Order of Interrogation and Presentation

Rule 611(a). Control by Court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

[Identical.]

Rule 611(b). Scope of cross-examination.

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.

Rule 611(b). Scope of Cross-Examination.

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.

[Identical. See *People v. Terrell*, 185 Ill. 2d 467 (1998).]

Rule 611(c). Leading questions.

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.

Rule 611(c). Leading Questions.

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 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.

[Almost identical, except that FRE 611(c)'s "a witness identified with an adverse party" has been deleted because it 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. It would also 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."]

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 tes-

Rule 612. Writing Used To Refresh Memory

If a witness uses a writing to refresh memory for the purpose of testifying, either—

- (1) while testifying, or
- (2) before testifying,

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 for the purpose of impeachment 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 writ-

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timony 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.

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ing 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.

[IRE 612 is identical to 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 limit admission of the refreshing document only for that purpose.]

Rule 613. Prior Statements of Witnesses

Rule 613. Prior Statements of Witnesses

Rule 613(a). Examining witness concerning prior statement.

Rule 613(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.

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.

[IRE 613 is identical to the 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. See also *People v. Smith*, 78 Ill. 2d 298 (1980). Contrary to the contention that it represents a change in Illinois law, however, note that IRE 613(a) addresses merely the

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method of questioning a witness about a prior statement, while IRE 613(b) addresses the prerequisites for providing the extrinsic evidence to complete the impeachment of the witness, which includes the witness' having knowledge of the prior statement in order to afford the witness an opportunity to explain or deny it.]

Rule 613(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).

Rule 613(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).

[Identical, except for the addition of the word "first," for clarification purposes, and the substitution of "opposing" party for "opposite" party.]

Rule 614. Calling and Interrogation of Witnesses by Court.

Rule 614. Calling and Interrogation of Witnesses by Court.

Rule 614(a). Calling by court.

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.

Rule 614(a). Calling by Court.

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.

[Identical.]

Rule 614(b). Interrogation by court.

The court may interrogate witnesses, whether called by itself or by a party.

Rule 614(b). Interrogation by Court.

The court may interrogate witnesses, whether called by itself or by a party.

[Identical. See *People v. Falaster*, 173 Ill. 2d 220, 231-32 (1996) (court must avoid conveying to jury its views regard-

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ing merits of the case, veracity of witness, and weight of evidence).]

Rule 614(c). Objections.

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.

Rule 614(c). Objections.

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.

[Identical. See *People v. Westpfahl*, 295 Ill. App. 3d 327 (1998).]

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.

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 law to be present.

[Identical, 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 TESTIMONY

ARTICLE VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' 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' 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.

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' 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' 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.

[Identical. For application of the rule, see *Freedling-Skokie Roll-Off Serv., Inc. v. Hamilton*, 108 Ill. 2d 217 (1985); *People v. Novak*, 163 Ill. 2d 93 (1994).]

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 (3) the witness has applied the principles and methods reliably to the facts of the case.~~

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 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.

Committee Comment to Rule 702

Rule 702 confirms that Illinois is a *Frye* state. The second sentence of the rule enunciates the core principles of the *Frye* test for admissibility of scientific evidence as set forth in *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, (2002).

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[The first portion of IRE 702 is identical to the first portion of FRE 702. Because Illinois applies the *Frye* test (*Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)) to expert witness testimony (see, e.g., *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63 (2002) (reiterating the *Frye* standard and rejecting the “*Frye-plus-reliability*” test)), rather than the *Daubert* standard (*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)), the last portion, which incorporates the *Daubert* standard, has not been adopted. Instead, the second sentence, expressing the *Frye* standard, has been added to emphasize that Illinois remains a *Frye* state.]

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.~~

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.

[The first sentence of IRE 703 is identical to FRE 703, as is the second sentence except for the deletion of the last phrase. The third sentence of the 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 standard provided by FRE 403 (thus providing a presumption of nondisclosure), has not been adopted. Thus, the provisions of IRE 403 (which are identical to those 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, the court must determine whether or not the probative value of the disclosure is substantially outweighed by the danger of unfair prejudice.]

Rule 704. Opinion on Ultimate Issue

~~(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.~~

~~(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to 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.~~

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

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

Rule 704. Opinion on Ultimate Issue

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

[IRE 704 is identical to FRE 704(a) except for the first phrase referring to “subdivision (b),” which has not been adopted. See *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).]

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

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

[Identical. See *Wilson v. Clark*, 84 Ill. 2d 186 (1981), where the supreme court adopted FRE 705, as well as FRE 703.]

Rule 706. Court Appointed Experts

[FRE 706 not adopted.]

Rule 706(a) Appointment.

[FRE 706(a) not adopted.]

~~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.~~

[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).]

Rule 706(b). Compensation.

[FRE 706(b) not adopted.]

~~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.~~

[In Illinois, where the court has discretion to appoint an expert, the inherent power of the court allows for appropriate compensation to be paid.]

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~~Rule 706(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.~~

[FRE 706(c) not adopted.]

[A jury should not be advised of the court-appointed status of an expert witness. *Morrison v. Pickett*, 103 Ill. App. 3d 643, 645 (1981).]

~~Rule 706(d). Parties' experts of own selection.~~

~~Nothing in this rule limits the parties in calling expert witnesses of their own selection.~~

[FRE 706(d) not adopted.]

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

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ARTICLE VIII
HEARSAY

ARTICLE VIII
HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

Rule 801. Definitions

The following definitions apply under this article:

[Identical.]

Rule 801(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.

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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.

[Identical.]

Rule 801(b). Declarant.

A “declarant” is a person who makes a statement.

Rule 801(b). Declarant.

A “declarant” is a person who makes a statement.

[Identical.]

Rule 801(c). Hearsay.

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

Rule 801(c). Hearsay.

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

[Identical. See *People v. Carpenter*, 28 Ill. 2d 116 (1963).]

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Rule 801(d). Statements which are not hearsay.

A statement is not hearsay if—

Rule 801(d). Statements Which Are Not Hearsay.

A statement is not hearsay if

[Identical.]

Rule 801(d)(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

Rule 801(d)(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

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~~(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

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

(B) one of identification of a person made after perceiving the person.

[FRE 801(d)(1)(A) applies both to civil and criminal cases. IRE 801(d)(1)(A)(1) is identical to FRE 801(d)(1)(A), but it does not apply to civil cases. It 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(c) of the Code of Criminal Procedure (725 ILCS 5/115-10.1(c)). Although they broaden the scope of FRE 801(d)(1)(A) in criminal cases, they do 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 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.

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 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

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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.

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, e.g., *People v. Walker*, 211 Ill. 2d 317, 344 (2004). That common law rule continues to apply in Illinois.

IRE 801(d)(1)(B), though bearing a different number designation, is identical to FRE 801(d)(1)(C). It does not represent a change in Illinois law because section 115-12 of the Code of Criminal Procedure (725 ILCS 5/115-12) also gives substantive weight to such identification evidence. Under the Illinois rule, it applies only in criminal cases.

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.]

Rule 801(d)(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, 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~~

Rule 801(d)(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, 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, or (F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

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~~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).~~

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[IRE 801(d)(2) is identical to 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.]

Early appellate court decisions required that, in order for a statement to be admissible against a principal, the agent or servant had to have been authorized to make the statement. *See, e.g., Kapelski v. Alton & Southern R.R.*, 36 Ill. App. 3d 37 (1976); *Waechter v. Carson Pirie Scott & Co.* 170 Ill. App. 3d 370 (1988). The adoption of this rule, which includes 801(d)(2)(D) without such a requirement, makes it clear that authorization is unnecessary. *See* section (6) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.]

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.

Rule 802. Hearsay Rule

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

[Identical, 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:

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:

[Identical.]

~~**Rule 803(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.~~

[IRE 803(1) is Reserved – Illinois has not adopted FRE 803(1) Present Sense Impression exception to the hearsay rule]

[*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

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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.]

Rule 803(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.

Rule 803(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.

[Identical; 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).]

Rule 803(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.

Rule 803(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.

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[IRE 803(3)(A) is identical to 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); *People v. Cloutier*, 178 Ill. 2d 141, 155 (1997).

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 the no longer applicable common-law principles, see *People v. Munoz*, 398 Ill. App. 3d 455 (2010). *Munoz* and cases it cites are also relevant 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).]

Rule 803(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.

Rule 803(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.

[IRE 803(4)(A) is identical to 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 section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13). That statute provides for the admission of statements for medical diagnosis or treatment, where they are made by a victim of certain sex offenses to medical personnel concerning the source of the victim's symptoms in cases involving the following offenses in the Criminal Code of 1961: criminal sexual assault (section 12-13); aggravated criminal sexual assault (section 12-14); predatory criminal sexual assault (section 12-14.1); criminal sexual abuse (section 12-15); and aggravated criminal sexual abuse (section 12-16).

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.

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In *People v. Freeman*, ___ Ill. App. 3d ___, No. 1-08-1536 (Sept. 28, 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 this guide in the commentary related to FRE 412), which denies admissibility. The court held that the statement that she had not had previous sexual intercourse, made to a doctor by the 12-year-old victim of a sex offense, was admissible because it was relevant to the issue of whether, based on the physical examination of the victim by the doctor, a sexual assault had occurred.]

Rule 803(5). Recorded recollection.

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

Rule 803(5). Recorded Recollection.

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

[The first sentence of IRE 803(5) is identical to the federal rule. The second sentence 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.]

Rule 803(6). Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), ~~Rule 902(12),~~

Rule 803(6). Records of Regularly Conducted Activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless

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~~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.

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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.

[IRE 803(6) is identical to the federal rule, except for the deletion of “FRE 902(12), or a statute permitting certification” because that rule was not adopted, and except for medical records in criminal cases, which are excluded by section 115-5(c)(1) of the Code of Criminal Procedure (725 ILCS 5/115-5(c)(1)). The rule adopts the certification requirement of IRE 902(11), and is consistent with the provisions of section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115), as well as Supreme Court Rule 236, which applies in civil cases.]

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

Note also that section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1) makes admissible as an exception to the hearsay rule, in both civil and criminal actions, reports kept in the ordinary course of business related to 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.]

Rule 803(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 non-occurrence or nonexistence of the matter, if the

Rule 803(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 non-occurrence or nonexistence of the matter, if the

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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.

Rule 803(8). Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, 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 an investigation made pursuant to authority granted by law,~~ unless the sources of information or other circumstances indicate lack of trustworthiness.

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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.

[Identical.]

Rule 803(8). Public Records and Reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, 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.

[IRE 803(8)(A) is identical to FRE 803(8)(A). IRE 803(8)(B) is identical to 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). 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.]

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Rule 803(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.

Rule 803(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.

[IRE 803(9) is identical to FRE 803(9), except for the clarifying addition of “Facts contained in” at the beginning of the rule.]

Rule 803(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.

Rule 803(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.

[Identical.]

Rule 803(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.

Rule 803(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.

[Identical.]

Rule 803(12). Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other cer-

Rule 803(12). Marriage, Baptismal, and Similar Certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other cer-

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emony 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.

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emony 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.

[Identical.]

Rule 803(13). Family records.

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.

Rule 803(13). Family Records.

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.

[Identical. 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.]

Rule 803(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.

Rule 803(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.

[Identical. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.]

Rule 803(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

Rule 803(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

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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.

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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.

[Identical. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.]

Rule 803(16). Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

Rule 803(16). Statements in Ancient Documents.

Statements in a document in existence 20 years or more the authenticity of which is established.

[Identical, 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.]

Rule 803(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.

Rule 803(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.

[Identical.]

~~**Rule 803(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~~

Rule 803(18). Reserved. [Learned Treatises]

[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 basis of an expert’s opinion, or when used for impeachment. For a sampling of cases, see *Walski v. Tiesenga*, 72 Ill. 2d 249 (1978); *People v. Anderson*, 113 Ill. 2d 1 (1986); *Roach*

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~~be read into evidence but may not be received as exhibits.~~

v. Springfield Clinic, 157 Ill. 2d 29 (1993); *Schuchman v. Stackable*, 198 Ill. App. 3d 209 (1990).]

Rule 803(19). Reputation concerning personal or family history.

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.

Rule 803(19). Reputation Concerning Personal or Family History.

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.

[Identical. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.]

Rule 803(20). Reputation concerning boundaries or general history.

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.

Rule 803(20). Reputation Concerning Boundaries or General History.

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.

[Identical. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.]

Rule 803(21). Reputation as to character.

Reputation of a person's character among associates or in the community.

Rule 803(21). Reputation as to Character.

Reputation of a person's character among associates or in the community.

[Identical.]

Rule 803(22). Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (~~but not upon a plea~~

Rule 803(22). Judgment of Previous Conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person

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~~of 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.

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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.

[Identical to the federal rule, except for the deletion of “(but not upon a plea of nolo contendere).”]

Rule 803(23). Judgment as to personal, family, or general history, or boundaries.

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.

Rule 803(23). Judgment as to Personal, Family or General History, or Boundaries.

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.

[Identical. See section (8) under the “Modernization” discussion in the Committee’s general commentary on page 3 of this guide.]

Rule 803(24) [Other exceptions.] [Transferred to Rule 807]

Rule 803(24). Receipt or Paid Bill.

A receipt or paid bill as prima facie evidence of the fact of payment and as prima facie evidence that the charge was reasonable.

[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

Rule 804. Hearsay Exceptions; Declarant Unavailable

Rule 804(a). Definition of unavailability

“Unavailability as a witness” includes situations in which the declarant –

Rule 804(a). Definition of Unavailability.

“Unavailability as a witness” includes situations in which the declarant –

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(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(b). Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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(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.

[Identical.]

Rule 804(b). Hearsay Exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

[Identical. Note that there are several statutes that provide hearsay exceptions for absent witnesses in Illinois criminal cases but are not listed in IRE 804. They are provided in the Code of Criminal Procedure. They include: section 115-10, hearsay exceptions related to specified offenses committed on children under 13 years of age or on mentally retarded

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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).]

Rule 804(b)(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.

Rule 804(b)(1). Former Testimony.

Testimony given as a witness (A) 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).

[IRE 804(b)(1)(A) is identical to 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 provided for 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 neither a controlled expert witness nor a party and who is unable to attend the trial because of death or infirmity) or by a rule such as IRE 801(d)(2).]

Rule 804(b)(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

Rule 804(b)(2). Statement Under Belief of Impending Death.

In a prosecution for homicide, a statement made by a declarant while believing that the de-

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ant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Rule 804(b)(3) Statement against interest.

[FRE 804(b)(3), effective until December 1, 2010:]

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.

[FRE 804(b)(3), effective December 1, 2010:]

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.

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clarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

[Identical, except for the deletion of the phrase "or in a civil action or proceeding" because in Illinois dying declarations are admissible only in homicide cases.]

Rule 804(b)(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 in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[Identical, except for the change in the second sentence from "to exculpate the accused" to "in a criminal case," to reflect Illinois law that makes the principle applicable to both the prosecutor and the defendant. This application recognizes that a declarant might seemingly implicate himself in the commission of an offense while shifting primary responsibility to the defendant, thus making the trustworthiness of the statement questionable. See section (10) under the "Modernization" discussion in the Committee's general commentary on page 4 of this guide.

Note that FRE 804(b)(3) was amended effective December 1, 2010. Although it is worded differently from the rule it replaced, it is substantially identical both to that rule and to the Illinois rule.]

Rule 804(b)(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.

Rule 804(b)(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.

[Identical.]

FRE 804(b)(5). [Other exceptions.]
[Transferred to Rule 807]

Rule 804(b)(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.

Rule 804(b)(5). 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.

[IRE 804(b)(5) is identical to FRE 804(b)(6), former FRE 804(b)(5) "Other Exceptions," having been transferred to FRE 807. For relevant cases on forfeiture by wrongdoing, see *People v. Hanson*, ___ Ill. 2d ___, No. 106566 (June 24, 2010); *People v. Stechly*, 225 Ill. 2d 246, 269 (2007). See also section 115-10.6 of the Code of Criminal Procedure (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.]

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.

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.

[Identical.]

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.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), (E), or (F), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[IRE 806 is identical to the 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). 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~~

[FRE 807 not adopted.]

[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 applicable to criminal cases only.]

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~~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.~~

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For an example of where a witness is available, a hearsay statement of a child under the age of 13 years, who is a victim of a physical or sexual offense and who testifies at the proceeding, is admissible under section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10). See *People v. Cookson*, 215 Ill. 2d 194 (2005), where the supreme court upheld the statute in response to the defendant's contentions premised on *Crawford v. Washington*, 541 U. 36 (2004).

For examples of statutes where prior statements are admissible because witnesses are unavailable, see 725 ILCS 5/115-10.2, where a witness refuses to testify despite a court order to do so; 725 ILCS 5/115-10.2a, where a witness is unavailable to testify in a domestic violence prosecution; 725 ILCS 5/115-10.3, where a witness is an elder adult who is a victim of certain specified offenses and is unable to testify because of physical or mental disability; 725 ILCS 5/115-10.4, where a witness is deceased.; 725 ILCS 5/115-10.7, where the unavailable witness' absence was wrongfully procured.]

| ARTICLE IX AUTHENTICATION AND IDENTIFICATION | ARTICLE IX AUTHENTICATION AND IDENTIFICATION |
|---|--|
| Rule 901. Requirement of Authentication or Identification | Rule 901. Requirement of Authentication or Identification |
| Rule 901(a). General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. | Rule 901(a). General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. [Identical.] |
| Rule 901(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: (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be. (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation. (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. | Rule 901(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: [Identical.] (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be. [Identical.] (2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation. [Identical.] (3) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. [Identical.] (4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. [Identical.] |

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(5) Voice identification. 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.

(6) Telephone conversations. 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.

(7) Public records or reports. 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.

(8) Ancient documents or data compilation. 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.

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(5) Voice Identification. 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. [Identical.]

(6) Telephone Conversations. 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. [Identical.]

(7) Public Records or Reports. 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. [Identical.]

(8) Ancient Documents or Data Compilation. 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.

[Identical, 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.]

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(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.

(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.~~

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(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. [Identical.]

(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.

[Identical, 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:

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

[Identical.]

Rule 902(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.

Rule 902(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.

[Identical.]

Rule 902(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 politi-

Rule 902(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 politi-

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cal subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

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cal subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

[Identical.]

Rule 902(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 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.

Rule 902(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 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.

[Identical.]

Rule 902(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

Rule 902(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

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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.~~

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other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.

[Identical, except for the changes to distinguish from the federal system.]

Rule 902(5). Official publications.

Books, pamphlets, or other publications purporting to be issued by public authority.

Rule 902(5). Official Publications.

Books, pamphlets, or other publications purporting to be issued by public authority.

[Identical.]

Rule 902(6). Newspapers and periodicals.

Printed materials purporting to be newspapers or periodicals.

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Printed materials purporting to be newspapers or periodicals.

[Identical.]

Rule 902(7). Trade inscriptions and the like.

Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

Rule 902(7). Trade Inscriptions and the Like.

Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, content, ingredients, or origin.

[Identical, except that “content” and “ingredients” are added to codify Illinois common law.]

Rule 902(8). Acknowledged documents.

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.

Rule 902(8). Acknowledged Documents.

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.

[Identical.]

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Rule 902(9). Commercial paper and related documents.

Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

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Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

[Identical.]

Rule 902(10). Presumptions under Acts of Congress.

Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Rule 902(10). Presumptions Under Statutes.

Any signature, document, or other matter declared by statutes to be presumptively or prima facie genuine or authentic.

[Identical, except for changes to distinguish from the federal system.]

Rule 902(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

Rule 902(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

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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.

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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.

[Identical, 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. 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.]

~~**Rule 902(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~~

[FRE 902(12) not adopted.]

[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).]

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~~(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.~~

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.

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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.

[Identical.]

ARTICLE X
CONTENTS OF WRITINGS,
RECORDINGS, AND PHOTOGRAPHS

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CONTENTS OF WRITINGS,
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Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

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For purposes of this article the following definitions are applicable:

[Identical.]

Rule 1001(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.

Rule 1001(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.

[Identical, except for the addition of “sounds.”]

Rule 1001(2). Photographs.

“Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

Rule 1001(2). Photographs.

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

[Identical, except for the additional highlighted portion at the end.]

Rule 1001(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

Rule 1001(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

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printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

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printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

[Identical.]

Rule 1001(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.

Rule 1001(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.

[Identical.]

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.

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 statute.

[Identical, 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.

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.

[Identical.]

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—

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

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[Identical. IRE 1004 (including the subdivisions that follow) eases Illinois' recognition of degrees of secondary evidence and provides the same circumstances as the federal rule under which the original of a document is unnecessary. See also the Committee's general commentary in section (13) under the "Modernization" discussion on page 4 of this guide.]

Rule 1004(1). Originals lost or destroyed.

All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

Rule 1004(1). Originals Lost or Destroyed.

All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

[Identical.]

Rule 1004(2). Original not obtainable.

No original can be obtained by any available judicial process or procedure; or

Rule 1004(2). Original Not Obtainable.

No original can be obtained by any available judicial process or procedure; or

[Identical.]

Rule 1004(3). Original in possession of opponent.

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

Rule 1004(3). Original in Possession of Opponent.

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

[IRE 1004(3) is identical to the federal rule, except for the deletion of the last portion of FRE 1004(3), which is unnecessary.]

Rule 1004(4). Collateral matters.

The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1004(4). Collateral Matters.

The writing, recording, or photograph is not closely related to a controlling issue.

[Identical.]

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.

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.

[Identical. 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.

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.

[Identical.]

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.

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.

[Identical. 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.

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\(a\)](#). 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.

[Identical, except for the substitution of "Rule 104(a)" for "rule 104," without substantive change.]

ARTICLE XI
MISCELLANEOUS RULES

ARTICLE XI
MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

Rule 1101. Applicability of Rules

Rule 1101(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.

Rule 1101(a)

Except as otherwise provided in paragraphs (b) and (c), these rules govern proceedings in the courts of Illinois.

[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).]

Rule 1101(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.

Rule 1101(b). Rules Inapplicable.

These 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, 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.

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[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, except 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 identically titled FRE 1101(d), 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 her 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

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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 criminal conduct the State will opt for live witnesses over hearsay because of their more persuasive attributes. 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.]

Rule 1101(c). Rule of privilege.

The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

Rule 1101(c). Small Claims Actions.

These rules apply to small claims actions, subject to the application of Supreme Court Rule 286(b).

[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.]

Rule 1101(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.

[FRE 1101(d) not adopted.]

[There is no separate IRE 1101(d). As pointed out above in the comment to IRE 1101(b), the provisions of FRE 1101(d) are incorporated into and are nearly identical to IRE 1101(b).]

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(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.

Rule 1101(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(c) 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~~

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[FRE 1101(e) not adopted.]

[FRE 1101(e), which specifically applies to federal proceedings, was not adopted.]

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~~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.~~

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

Illinois Rules of Evidence (IRE)

(As adopted September 27, 2010, effective January 1, 2011)

[FRE 1102 not adopted.]

[The Illinois rules do not provide for an explicit and separate rule for amendments as does FRE 1102; however, the second sentence of IRE 101 addresses how amendments are effected.]

Rule 1102. Title

These rules may be known and cited as the Illinois Rules of Evidence.

[IRE 1102 is the Illinois counterpart to FRE 1103.]