

## **NEW ILLINOIS RULES OF EVIDENCE EFFECTIVE JANUARY 1, 2011**

By Ronald F. Wittmeyer, Jr.

### **Chief Justice Fitzgerald Appoints Special Committee**

In November of 2008, then Chief Justice Thomas Fitzgerald appointed a Special Committee on Illinois Evidence and charged that committee with codifying Illinois' Rules of Evidence. The nineteen member Special Committee was chaired by Illinois Appellate Court Justice Donald C. Hudson, and was comprised of leading Illinois jurists, legal scholars, legislative representatives, and distinguished members of the Illinois bar.

Professor Michael H. Graham, the author of a leading Illinois Evidence treatise, acted as the committee's advisor. The committee's purpose was to codify existing Illinois evidence law, not change the law. Before the committee began its work, Illinois was one of only six states that had not adopted rules of evidence. Up to this point, the Illinois rules of evidence were scattered throughout case law, statutes, and the Illinois Supreme Court rules. The goal of the two year effort by the Special Committee was to streamline, simplify, and expedite the resolution of evidentiary issues at trial. Further, Justice Fitzgerald believed that adopting a set of rules of evidence in Illinois would provide clarity and predictability during trials, as well as more uniform application of evidentiary rulings throughout the state.

Beginning in November of 2008, the committee held monthly meetings, along with numerous telephone conferences and emails between meetings. After the committee researched, discussed, and debated every rule, the process culminated in a first draft of the IRE in October of 2009, which was prepared by Professor Graham.

The committee then invited public comment, by conducting public hearings and reviewing written comments, which led to modifications of the initial draft of the rules. The revised draft was then submitted with the committee's recommendation, and adopted by the Illinois Supreme Court on September 27, 2010, to become effective January 1, 2011.

### **New Illinois Rules of Evidence Patterned after the Federal Rules of Evidence**

The structure and organization of the IRE was patterned after the Federal Rules of Evidence. While in many cases the Illinois rules are the same or similar to the Federal rules, the intention of the committee was not to mirror the Federal rules, but rather to codify the existing body of Illinois evidentiary law. The committee decided that it was logical to follow the time-tested organizational structure of the Federal Rules of Evidence, as had all the other forty-four states that had adopted their own state rules of evidence. Just having the Illinois rules follow a familiar and logical organizational structure, makes researching and resolving evidentiary issues more efficient. The new rules apply to both criminal and civil cases, unless the rules state otherwise. However, additional criminal statutes that govern some evidentiary questions are not all included in the new rules.

The new rules can be found at the following website:

[www.state.il.us/court/SupremeCourt/Evidence/Evidence.asp](http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.asp)

### **Committee Commentary Essential to Understanding New IRE**

The committee chose not to issue commentary on each rule separately. Rather, nine pages of committee commentary can be found at the beginning of the new rules. Review of this commentary is essential to an understanding of the use and application of the IRE.

The committee makes clear in its numbered paragraph (1), that its mission was to incorporate into the IRE "the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principal of evidentiary law within the last 50 or so years". For example, the IRE retains the *Frye* standard pertaining to expert opinion evidence, as reflected in IRE 702. The commentary, as well as Rule 101, also make clear that the legislature is free to adopt further rules of evidence, as long as a statute is not in conflict with the new IRE or a Supreme Court decision.

The commentary also explains, in its numbered paragraph (3), that some updating was done as part of its process, which the committee calls "modernization". The committee comments indicate

that in fourteen instances where there was no conflict with either statutes or recent appellate or Illinois Supreme Court decisions, and where the committee determined that a rule was universally or almost universally accepted in other jurisdictions, that updating the Illinois evidentiary law was in order. Those fourteen instances of modernization are set forth in the commentary.

In numbered paragraph (4) of its commentary, the committee recommended a few changes to Illinois evidence law, only two of which were approved by the Illinois Supreme Court: 1) Allowing opinion testimony as a form of reputation testimony, as set forth in Rule 405 and Rule 608; and 2) Eliminating the requirement that a declarant be found unavailable to testify before admitting a prior statement of then existing mental, emotional, or physical condition, as set forth in Rule 803(3).

### **Interpretation and Effect of the New Rules**

Justice Hudson, in speaking at a recent ITLA seminar introducing the new IRE, pointed out that standard rules of statutory interpretation apply to the interpretation of the new IRE. That is, the intent of the rule must first be determined from the plain and ordinary language of the rule, if that can be done. If, however, an ambiguity exists, then it is appropriate to look to the committee comments to determine the drafter's intent and purpose behind the rule. Since the overall intent of the drafters was to codify existing law, case law that existed prior to the IRE could then become persuasive.

One of the members of the special committee, former Appellate Court Justice, Gino L. DiVito, has published an annotated guide to the new IRE. Justice DiVito's guide contains a side by side comparison of the new IRE with the Federal Rules of Evidence. The colored coded guide illustrates every difference between the two sets of rules, and also contains extensive annotation and commentary by Justice DiVito. Justice DiVito is continuing to update this comprehensive annotated guide. This is a tremendous resource, which can be found online at Justice DiVito's law firm website, which is [www.tdrlawfirm.com](http://www.tdrlawfirm.com). The Illinois Bar Association, has also published a pocket size edition of the new IRE, which can be purchased for \$10 from the ISBA.

While there will obviously continue to be ample debate over the introduction and exclusion of evidence in Illinois, the time and energy devoted (or wasted) on argument over correctly identifying the applicable Illinois evidentiary rule should be greatly reduced. The new IRE should afford the practitioner efficiencies in adequately preparing for evidentiary issues before trial, as well as expediting the resolution of evidentiary issues during trial. The Special Committee performed a tremendous unpaid service to the bench, bar, and citizens of the State of Illinois in creating the new Illinois Rules of Evidence.

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