Illinois Evidence with Objections in Family Law Cases*

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A collection of frequently encountered Illinois rules of evidence in Family Law cases. This article provides a guide with objections and responses, as well as applicable case law.

* This paper is based upon the same format as the NITA publication Illinois Evidence with Objections – currently the 6th Edition, 2020. Authors: Anthony Bocchino, David Sonenshein, Gino DiVito, James Carey, Martin Snyder. Aspen Publishing.

James Carey was one of my most able professors at Loyola University of Chicago Law School -- teaching criminal law and procedure. This is an excellent resource, and any family lawyer should make certain associates have this handy reference 4x6 booklet. Order from www.nita.org or call 800-225-6482. The NITA publication covers both criminal and civil objections.

Illinois law has long had the various rules of evidence in variety of places. Fortunately, since 2011 Illinois has a comprehensive *codification* of our various rules of evidence. As the committee commentary states:

> 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.
>
> The rules use the general numbering system modeled after the Federal Rules of Evidence. But the Illinois rules will not be modeled after the FRE. Instead, it they reorganize and restate what is existing Illinois law. So, the committee commentary states:
>
> 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 (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.

Click here to see a copy of the 2011 rules.

Ambiguous Questions

Objection

⇨ I object that the question is (ambiguous / vague)

Response

Generally, rephrase the question unless certain of the question's clarity.

Assuming Facts Not in Evidence

Objection

⇨ I object. The question assumes a fact not in evidence. There has been no testimony that ....

Responses

⇨ I will elicit the fact that ... from the witness in a separate question.

⇨ This fact was proved during the earlier testimony of the witness / another witness who has testified.

Authentication of Writings, Photos, and Recordings and Web Site Pages

Objection

⇨ I object. The exhibit has not been authenticated.

Response

⇨ This exhibit was authenticated through testimony of _____ who has testified that:

- ⇨ the witness created the writing; or
- ⇨ the witness was present when the writing was created and testified that it is in substantially the same condition as at the time of its creation; or
- ⇨ the witness knows the *handwriting* because he saw the author write or sign the instrument; or
- ⇨ the witness knows the handwriting by circumstantial evidence (state such circumstantial evidence), or
- ⇨ The witness was present at the time the tape recording, audio, or video was made; or
- ⇨ the witness saw the scene or items portrayed in the photographs at a relevant time and that the photograph is a fair and accurate representation of what was seen; or

⇨ the document is self authenticating as a (newspaper, official publication, certified copy of public record, etc.)

⇨ I request the court compare the handwriting in question with an admittedly authentic writing exemplar and find that it is the handwriting of _____.

⇨ Under 901(b)(1) Testimony of Witness With Knowledge. Under Rule 901(b)(1) all that is necessary is testimony of a witness with knowledge that the matter is what it is claimed to be.

Explanation: See Article 9 of the Illinois Rules of Evidence regarding "Authentication and Identification."

Foundation for the admission of electronic duplicates of photographs from a Web site which were saved onto a flash drive: See, *IRMO Perry*, 2012 IL App (1st) 113054. Admission of electronic photographs on a flash drive was proper.

> Further, "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" is sufficient for authentication. Ill. R. Evid. 901(b)(9).

See discussion below for duplicates under Ill. R. Evid. 1001(4).

As to day-in-the life videos, a significant case is *IRMO Willis,* 234 Ill. App. 3d 156 (3d Dist. 1992), where the trial court allowed the father to introduce into evidence a "day in the life" videotape depicting his two children with his girlfriend during visitation and also a videotape of one of the children shortly after the child had been with the mother. The appellate court ruled that the trial court erred in allowing the videotapes to be introduced into evidence. The court of review reasoned that what children have to say in custody proceedings should be limited to an in-chambers interview under section 604(a) of the IMDMA or the child should testify in open court. The *Willis* court stated:

> Applying the above-mentioned principles, we find that the trial court erred in admitting the videotape into evidence. *Cisarik v. Palos Community Hospital* (1991), 144 Ill. 2d 339 does not apply here. In the context of a child custody proceeding, the legislature has specifically provided that children's testimony be taken either in open court or by means of an *in-camera* interview with the presence of counsel. This statutory framework demonstrates the legislature's overriding concern for protecting the welfare of children. Accordingly, we disapprove of the practice of videotaping children. It is error for the court to allow it. . . . We state in the strongest possible terms that the procedure of using day-in-the-life videotapes of young children in child custody proceedings must not be allowed.

Photographs:

> 'In general, photographs are admissible into evidence if they are identified by a witness who has personal knowledge of the subject matter depicted in the photographs and the witness testifies that the photographs are a fair and accurate representation of the subject matter at the relevant time.' " *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ... "A

photograph 'may be excluded if it is irrelevant or immaterial or if its prejudicial nature clearly outweighs its probative value.' " *Lambert*, 2012 IL App (4th) 110518, ¶ 29.

"A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time ***."

Web-Site Pages, Photos, etc.: Printout can be properly authenticated where the printout contained the Internet domain address and the date it was printed and the court accessed the Web site and verified the Web page. *IRMO Perry*, 2012 IL App (1st) 113054.

None of the photos were screenshots of the Web site, nor did they include the Internet address on the photos. Given the ability to manipulate such digital images, and given [the] concerns regarding the ability of others to post pictures online, we cannot conclude that there was a sufficient foundation that the photographs ... were specifically from the *** Web site, and we cannot conclude that the admission of the photographs to prove that Lori was specifically part of the online "Chix Escorts" service was not an abuse of discretion.

Competence to Testify

Objection

⇨ I object to the calling of this witness on the ground of incompetence to testify, because the witness lacks the ability to (state relevant reason) which has been shown on the voir dire of the witness.

⇨ I move to strike the witness's testimony and object to further testimony on the ground that the witness is incompetent to testify in that his testimony has shown the inability to (state relevant reason).

Responses

⇨ The witness is presumed competent and there has been no showing of inability on the part of the witness to perceive, remember, communicate or appreciate the truth.

⇨ The witness is competent to testify and any questions regarding the witness's testimony capacity go to the weight of the evidence rather than the competence of the witness.

Explanation: Generally, all children over the age of 14 are presumed to be competent to testify.

Compound Question (Multiple)

Objection

⇨ I object. The questions is compound.

Response

⇨ I withdraw the questions and will ask separate questions.

Compromise / Offers to Compromise / Mediation Communication

Objection

⇨ I object. The proffered evidence is evidence of compromise negotiations offered on a material issue in this case.

Response

⇨ The evidence is admissible because:

- ⇨ The evidence is not offered on liability or damages but to show bias or no undue delay; or
- ⇨ The evidence is an admission of an independent fact; or
- ⇨ The evidence is proper impeachment because it contradicts a material point of the testimony of the witness and therefore should be admitted into evidence for impeachment purposes; or
- ⇨ The evidence goes to the issue of the opposing party's unwillingness to compromise which is admissible by Illinois case law (cited below).

Objection

⇨ I object. The proffered evidence is evidence of a "mediation communication" and is therefore privileged barred from being admitted into evidence by the Uniform Mediation Act.

Response

⇨ The evidence is admissible because the Illinois Uniform Mediation Act provides that, "evidence or information that is otherwise admissible... does not become inadmissible... solely by reason of its disclosure or use in a mediation.

Explanation: See Rule 408. The committee comments state:

> Earlier 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.

See Rule 408 providing for:

Prohibited uses:

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

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

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

Permitted Users:

Rule 408(b) provides:

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.

IRMO Toole, 273 Ill.App.3d 607 (2d Dist. 1995) held that evidence of a statement made by wife in a settlement offer, for the purpose of impeaching wife's testimony whether money received from husband's parents was a gift or a loan, may be admitted into evidence because of impeachment value. In *Toole*, the appellate court commented that "the statement in the [wife's] settlement offer contradicts a material point of [the wife's] testimony regarding whether the $44,000 from [the husband's] parents was a gift or a loan and, therefore, should have been admitted into evidence for impeachment purposes."

A good discussion of the law is in *Stathis v. Gelderman, Inc.*, 295 Ill.App.3d 844 (1st Dist. 1998) which stated:

Offers of compromise or settlement generally are inadmissible at trial *(Niehuss v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 143 Ill. App. 3d 444, 450 (1986)) and such evidence must be barred if introduced to prove liability. *McGrath v. Chicago & North Western Transportation Co.*, 190 Ill. App. 3d 276, 280 (1989). Statements otherwise made by a party or on his behalf during the course of negotiations, which are inconsistent with the party's present position, however, may be introduced in evidence against him. *Niehuss*, 143 Ill. App. 3d at 450. If such evidence is introduced to prove an issue other than liability, such as possible bias on the part of a witness, its admission rests within the discretion of the circuit court. *McGrath*, 190 Ill. App. 3d at 281.

Attorney's Fees: As to attorney's fees, *IRMO Mantei*, 222 Ill.App.3d 933 (4th Dist. 1991), held that the trial court did not abuse its discretion in ordering each party to pay own fees where the fees were generated largely from the result of the parties' unwillingness to compromise. The decision stated, "There are times when the failure to compromise is frivolous. The parties should have been aware of the expenses they were incurring in order to split up the limited pot they were contesting. The trial court found neither party was absolved from the responsibility of paying for their own fees."

The appellate court in *In re Marriage of Passiales*, 144 Ill.App. 3d 629 (1st. Dist. 1986) addresses whether to admit pre-trial settlements into evidence to resolve attorney fee disputes. In *Passiales*, the wife claimed that the court erred when it refused to allow her to make an offer of proof and declined to admit evidence that her husband rejected a reasonable settlement offer.

According to the wife, the rejection of her settlement offer reflected his obstructive behavior during the course of the litigation and was relevant to her entitlement to attorney fees. First the court noted that while it is generally error to refuse to grant an offer of proof, the exception to this rule is where it is unnecessary because the nature of the testimony is obvious. The appellate court stated:

> Matters relating to offers of settlement or compromise are ordinarily inadmissible, but admission of other facts elicited incidentally during settlement discussions may be introduced as evidence.

Sawicki v. Kim (1983), 112 Ill.App.3d 641, 644):

> The evidence Carolyn sought to introduce in this case was not an incidental fact elicited during settlement talks. Rather, Carolyn wanted to establish the fact that James refused to go along with a proposed settlement. Such evidence is inadmissible because it is a matter relating to an offer of compromise or negotiation. Carolyn notes that matters relating to settlement are excluded because a jury is likely to construe such evidence as an admission of liability. According to Carolyn, settlement matters are admissible when they are introduced in connection with something other than the issue [144 Ill.App.3d 641] of a party's liability. She contends further that James' repudiation of a settlement agreement was admissible to show that he is responsible for her attorney fees.
>
> It is true that one reason for excluding settlement matters is that they might be construed as admissions of liability. (*Smiley v. Manchester Insurance & Indemnity Co.* (1977), 49 Ill.App.3d 675, 681) However, that is not the only consideration underlying this rule of exclusion. Another reason for excluding matters relating to settlement is that "public policy favors such compromises and in that light they should be considered inadmissible." (49 Ill.App.3d 675, 681 citing *Hill v. Hiles* (1941), 309 Ill.App. 321. If a party's rejection of a settlement offer or repudiation of a settlement agreement were admissible on the issue of attorney fees, then the negotiation process would be hampered. During any negotiation, there must be give and take, and the parties must be free to exchange proposals and counter-proposals without the fear that they will be liable for their opponent's attorney fees if they decide to reject an offer of settlement.
>
> Not only is James' conduct during negotiations inadmissible because of public policy, but such evidence is irrelevant to the issue of whether James is liable for Carolyn's attorney fees. A person's decision to take a case to trial is simply a matter of judgment. The failure to reach a settlement does not mandate, in and of itself, that a litigant must pay his opponent's fees, nor does it justify the amount of a fee award. (*Bellow v. Bellow* (1981), 94 Ill.App.3d 361, 371.) Moreover, the decision to reject a settlement agreement is not misconduct warranting an award of attorney fees under section 2-611 of the Code of Civil Procedure. Ill.Rev.Stat.1983, ch. 110, par. 2-611.

In *IRMO Suriano*, 324 Ill.App. 3d 839 (1st. Dist. 4th Div. 2001), the evidence respondent sought to introduce was not an incidental fact elicited during settlement talks; rather, respondent sought to establish that petitioner refused to agree with a proposed settlement. The appellate court stated:

> Such evidence is inadmissible because it is a matter relating to an offer of compromise or negotiation. *Passiales*, 144 Ill.App. 3d at 640. Another reason for excluding matters relating to settlement is that "'public policy favors such compromises and in that light they should be considered inadmissible.'" *Smiley v. Manchester Insurance & Indemnity Co.*, 49 Ill.App. 3d 675, 681 (1977), quoting *Hill v. Hiles*, 309 Ill.App. 321, 331 (1941).

Amendments to Leveling the Playing Field Amendments: The 2009 amendments to the Leveling the Playing Field amendments could lead to a reconsideration and reversal of the *Passiales* line of cases. The 2009 amendments to Section 508(b) provide that if a court finds that a hearing under the Act (instead of the Section of the Act regarding attorney's fees) was precipitated or conducted for an improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly.

Uniform Mediation Act: The Uniform Mediation Act is at 710 ILCS 35/1 (paragraph 4).

Cross-Examination: Beyond the Scope

Objection

⇨ I object. The question is beyond the proper scope of cross-examination.

Responses

⇨ The subject matter of the question was raised when the witness testified on direct examination that (insert prior testimony)

⇨ The question seeks to elicit information that is relevant to the credibility of the witness.

⇨ I request the court allow inquiry outside of scope of cross-examination. I will conduct the inquiry of the witness as if on direct examination.

Court's Witness -- Objecting

Objection

⇨ I object under Rule 614(c) ...

Responses: Rule 614 provides:

> (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.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(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.

Eavesdropping Statute – Introduction of Evidence Contrary to Statute

Objection

⇨ I object. The Defendant is seeking to introduce evidence which is not allowed pursuant to the Illinois Eavesdropping Statute (720 ILCS 5/14-1 *et seq.*).

Responses

⇨ This recording is not a violation of the Illinois Eavesdropping Statute (720 ILCS 5/14-1 et seq.) because.
- ⇨ The *guardian ad litem* is allowed to testify based upon both admissible and non-admissible material. See *IRMO Karonis* (below) but not I believe this case is questionable authority.
- ⇨ The admissions are contained on a telephone answering machine device and accordingly there is no conversation within the meaning of 720 ILCS 5/14-2(a)(1).

Explanation:

The eavesdropping statute provides in pertinent part that "[A] person commits eavesdropping when he . . . [u]ses an eavesdropping device to hear or record all or any part of any **conversation** unless he does so . . . with the consent of all of the parties to such conversation." 720 ILCS 5/14-2(a)(1). The statute further provides that any evidence obtained in violation of the eavesdropping statute "is not admissible in any civil or criminal trial." 720 ILCS 5/14-5.

IRMO Almquist, 299 Ill.App.3d 732 (3d Dist. 1998) involved a unique set of facts in which the father was allowed telephone visitation and the mother, in an effort to frustrate the father's visitation rights blared a tape recorded conversation of the father which was a suicide tape made years before. The appellate court ruled that the suicide tape was not a "conversation." *Almquist* stated, "[T]he addition of a definition of "conversation" to the eavesdropping statute was an effort narrowly tailored to the goal of removing any expectation of privacy element from the crime of eavesdropping. It was not the legislature's intent to provide a definition of "conversation" so broad as to encompass any audible expression whatsoever."

IRMO Karonis, 296 Ill.App.3d 86 (2d Dist. 1998), held that the report of a GAL on child custody issue was proper despite the fact that the GAL listened to tapes of telephone conversations between the father and children and that the taping of the telephone conversations may have violated the Illinois eavesdropping statute. However, while this seemed to be the ruling of the decision, the case seemed to rely upon the fact that the mother was not harmed by the taping because she prevailed in the child

custody issue. The case specifically noted that it was not called to answer the question of whether the GAL was committed a felony by listening to the tapes. What is remarkable about the case is the quote, "To the extent respondent asserts that the GALs cannot consider inadmissible evidence in forming their opinions, his argument is baseless. Section 506 of the Marriage and Dissolution of Marriage Act ... requires the GAL to defend and protect the best interest of the child whom he or she represents. In discharging his or her duty, the GAL will review or consider all kinds of information regarding the child, both admissible and inadmissible at trial. Such information assists the GAL in determining the existence of problems that might cause the child psychological or physical harm. We fail to see any prejudice where the GAL listens to information that may be inadmissible at trial."

Exhibits: Demonstrative

Objection

⇨ I object. The proffered exhibit has not been properly authenticated.

⇨ I object. The proffered exhibit has not been shown to be:

- ⇨ (photos) a fair and accurate depiction of the relevant scene; or
- ⇨ a fair and accurate representation of an object in issue.

Response

⇨ The demonstrative exhibit has been authenticated by the testimony of _____. The witness has testified that:

- ⇨ The photograph shows a relevant scene as it appeared at a relevant time and the exhibit is a fair and accurate depiction of that scene;

Exhibits: Tangible Objects

Objection

⇨ I object. The proffered exhibit is incompetent for the lack of proper foundation.

Response

⇨ I have shown through the testimony of _____ that:

- ⇨ He perceived the exhibit at a relevant time; and
- ⇨ the exhibit is the one perceived; and
- ⇨ it is in substantially the same condition as it was at the relevant time.

Explanation: A chain of custody is not a necessary part of the foundation of a tangible object unless the object is not readily identifiable or is susceptible to alternation by tempering or substitution.

Chain of Custody Needed to be Proved for Cell Phone: *IRMO Perry*, 2012 IL App (1st) 113054:

Further, the circuit court identified a cogent reason in denying the request – a chain of custody problem. Here Lori encounters her own evidentiary foundation problem. "[I]f the offered evidence is not readily identifiable or is susceptible to alteration by tampering or contamination, a chain of custody must be proved." *Van Hattem v. K mart Corp*., 308 Ill. App. 3d 121, 134 (1999) (citing People v. Winters, 97 Ill. App. 3d 288, 289-90 (1981)). "This chain of custody must be of sufficient completeness to render it improbable that the object has either been exchanged with another or subjected to contamination or tampering." *Van Hattem*, 308 Ill. App. 3d at 134-35 (citing Winters, 97 Ill. App. 3d at 290). The fact that Lori had Frank's cell phone meant that the cell phone was subject to tampering by Lori, especially after the hearing. There was no abuse of discretion in the circuit court's denial of Lori's motion to reopen the proofs.

Exhibits: Writings

Objection

⇨ I object to the introduction of the exhibit in that there is an improper foundation because:

- ⇨ It is not **relevant**; or
- ⇨ **Authenticity** has not been shown; or
- ⇨ The **original document rule** has not been met; or
- ⇨ The writing is **hearsay**.

Response

⇨ The foundation requirements regarding relevant, authenticity, the original document rule and hearsay have been met through the testimony of _____, who testified that (insert portion of relevant testimony.)

Expert and Opinion Testimony / Lay Witness, Independent Experts and Controlled Experts

Objection

⇨ **Qualification Generally**: I object to the qualification of the witness as an expert.

⇨ **Helpfulness of Understanding Factual Issue**: I object to the admission of expert testimony because the discipline in which the witness purports to qualify will not provide information that is helpful to understanding any issue of fact.

⇨ **Outside Area of Qualification**: I object to the admission of the witness's opinion because it is beyond the area of expertise in which he or she has been qualified.

⇨ **Credibility of Witness**: I object to the conclusion that this particular witness is credible.

⇨ **General Acceptance**: I object because the theory or process upon which the expert relies has not

been shown to be generally accepted within the scientific community from which it is drawn.

⇨ **SCR 213(f) Objections -- Disclosure of Identity and Testimony of Witnesses**:

⇨ **Failure to Disclose Opinions in Answers to SCR 213(f) Interrogatories on Direct Examination**: I object. The subject matter of the witnesses testimony (and the opinions if an expert witness) on direct examination have not been disclosed in response to the opponent's answers to Supreme Court Rule 213(f) interrogatories. The information sought is of a:

⇨ **Lay Witness**: [Witness giving only facts of lay opinion testimony]. Therefore, SCR 213(f) requires disclosure on the subjects on which the witness will testify. The disclosure must give reasonable notice of the testimony.

⇨ **Independent Expert Witness**: [An independent expert witness is a person giving expert testimony who is not a party, party's employee or the party's retained expert.] Therefore, SCR 213(f) requires disclosure of both the **subject matters** the expert will testify to as well as the **opinions** the party expects to elicit. This has not been provided and according to SCR 213(f), the information disclosed limits the testimony that can be given on direct examination.

⇨ **Controlled Expert Witness**: [A controlled expert witness is a person giving expert testimony who is a party, party's employee or the party's retained expert.] Therefore, SCR 213(f) requires disclosure of the "**subject matter** on which the witness will testify, the **conclusions and opinions** of the witness and the **bases therefore**, the **qualifications of the witness** and **any reports** prepared by the witness about the case."

⇨ **Bases for Expert Opinion Must be Disclosed**: I object. The expert has not disclosed the basis for his opinion.

⇨ **Testimony to Rebut Other Experts Must be Disclosed**: I object. The expert has not disclosed the opinion testimony which rebuts the opinions of our expert, _____. Such disclosure is mandatory under *Copeland v. Stebco*, 316 Ill.App.3d 932 (1st Dist. 2000).

Responses

⇨ I have shown that the witness is qualified as an expert in (insert field of expertise) through the witness's knowledge, skill, experience, training or education.

⇨ I have shown that the area of expertise in which the witness is qualified is one that will be helpful to the court in determining a fact or conclusion in issue.

⇨ **General Acceptance**: The theory (or process) on which the expert has relied has been shown to be accepted within the appropriate scientific community.

⇨ **SCR 213(g) Responses -- Deposition Answer**:

⇨ The opinions of this witness are allowed pursuant to SCR 213(g) because the opinions have been expressed in a deposition and therefore need not be specifically identified in a Rule 213(g) answers to interrogatories. I tender a copy of the deposition transcript to

your honor showing that the opinions were provided in the discovery deposition of the opinion witness. Further authenticate deposition transcript as to signature, etc.

⇨ **Spurious Arguments**:

⇨ **Argument Re No Change in Opinion**: There is no duty to supplement a disclosure under Rule 213 when the opinion witness has not changed his or her opinion. / The basis or reason for an opinion is not an opinion under Rule 213.

⇨ Response: SCR plainly requires not only that party make seasonable disclosure regarding new or different opinions held by an opinion witness, but also requires that the "bases" for any opinions be updated as well. *Kotvan v. Kirk*, 321 Ill.App. 3d 733 (1st Dist. 2001).

⇨ **Argument as to Opening Door in Cross**: Counsel opened the door during cross-examination of my witness for the testimony elicited on direct.

⇨ Response: Unless your opponent opens the door during cross-examination, opinions elicited on redirect must be disclosed under SCR 213. *Regala v. Rush North Shore Medical Center*, 323 Ill.App.3d 579 (1st Dist. 2001).

Treatises: For a 2004 article discussing witness disclosure in Illinois see: "Witness Disclosure in Illinois," in the SIU Journal, 28 Southern Illinois University Law Journal 225-271 (2004). See also the September 2007 Illinois Bar Journal Article titled "An updated to SCR 213 Trial Witness Disclosure."

Query re SCR 215 Investigators and IMDMA 604.5 Evaluators: What is a SCR 215 expert (investigator) or an expert chosen under Section 604.5 of the IMDMA? Arguments can be made that each expert would be a controlled expert based upon the theory that the person is a party's "retained expert." The difference is that a party must give disclosure of the "subject matter on which the witness will testify, the conclusions and opinions of the witness and the bases therefore, the qualifications of the witness and any reports prepared by the witness about the case" instead of just the subject matter and opinions. The critical portion of the Supreme Court Rule provides that in considering the disclosure of an independent expert the court, the court must take "into account the limitations on the party's knowledge of the facts known by and opinions held by the witness."

Explanation: See *Wilson v. Clark*, 84 Ill.2d 186 (1981) which permits an expert witness to give his opinion on the basis of facts not in evidence, so long as those facts are of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.

***Frye* Challenges**: Illinois follows the *Frye* test requiring proof of general acceptance in the scientific community. The Illinois Supreme Court case is *Donaldson v. Central Illinois Public Service Company* (2002). *Donaldson* held that under the circumstances it was harmless error not to hold a separate *Frye* hearing regarding Plaintiff's experts testimony. The case stated:

> Illinois law is unequivocal: the exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye*. (Citations omitted.) The *Frye* standard, commonly called the "general acceptance" test, dictates that scientific evidence is only

admissible at trial if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye*, 293 F. At 1014.

Focus on Methodology – Not Conclusions: The court stated that with "general acceptance" the focus is on the underlying methodology used to generate the conclusion, "If the underlying method used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion – despite the novelty of the conclusion rendered by the expert." (Citations omitted).

General Acceptance Does not Mean Accepted by Majority of the Experts: "Simply stated, general acceptance does not require that the methodology be accepted by unanimity, consensus or even a majority of experts. A technique, however, is not "generally accepted" if it is experimental or of dubious validity. Thus, the *Frye* rule is meant to exclude methods new to science that undeservedly create a perception of certainty when the basis for the evidence or opinion is actually invalid." The *Frye* test therefore applies only where the scientific principle, technique or test offered to support the conclusion is "new" or "novel." The case then states, "Generally, however, a scientific technique is 'new' or 'novel' it is 'original or striking' or does not resemble something formerly known or used." (Citing Webster's Third New International Dictionary.)

Understand that the footnote one in *Donaldson* keeps the door slightly open for the court to potentially consider adoption of *Daubert* if the matter were properly raised at the trial court and appellate level.

While *Daubert* does not apply in Illinois (with the exception of the fourth prong, that is, general acceptance), note that the sub-rules per *Daubert* might be introduced but only in establishing whether the technique, etc., is generally accepted.

1) **Empirical Reliability**: Whether "it can be (and had been) tested." ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.")

2) **Peer Review**: Whether the theory or technique has been subjected to peer review and publication.

3) **Rate of Error**: In the case of a particular scientific technique, the court ordinarily should consider the known potential rate of error.

4) **General Acceptance**: The "[G]eneral acceptance" factor. A reliability assessment does permit identification of a relevant scientific community and a determination of a degree of acceptance within that community." Under *Daubert*, general acceptance: is not a precondition to the admissibility of evidence. Under *Frye* (and *Donaldson*) this is the focus of admissibility.

Whiting v. Coultrip, 324 Ill.App. 3d 161 (3rd Dist., 2001), cited the *Cropmate* decision as to the admission of scientific evidence in its decision that certain evidence was admissible. *Whiting* commented, "Because we find the *Cropmate* court's six-inquiry approach to be both an instructive, workable framework and a proper statement of the law as it now stands in Illinois with respect to the

admission of novel scientific evidence, we apply the *Cropmate* factors to the facts of this case." In *Whiting* the appellate court reversed the trial court's determination that certain novel scientific evidence was admissible because of the lack of foundation establishing that the expert used generally accepted and empirically tested methods. *Whiting* recaps these standards as:

> 1) What evidence is proffered?
> 2) Will the proffered evidence assist the trial court in understanding the evidence to determine facts in issue or can the trial court use its own knowledge and experience?
> 3) Does the proffered testimony constitute scientific evidence?
> 4) Is that scientific evidence novel or does it involve a firmly established method of technique?
> 5) If the trial court determines the evidence is "novel" then, does the evidence meets the *Frye* admissibility standard: i.e., is it generally accepted in community?

I have eliminated the last standard – standard 6 – because it contained the *Daubert* standards. The preliminary standards 1-5, however, are useful in laying the foundation per *Frye*.

Opinions Outside of Scope of Expertise: A case which addressed opinions outside the scope of an individual's expertise is the 2004 *Clayton v. Cook* decision. There the First District appellate court held that trial court, in medical malpractice trial, abused its discretion when it failed to impose appropriate sanction when plaintiff's expert gave opinion on lack of supervision by hospital that was completely outside the opinion that had been disclosed in discovery. Further, although the court directed plaintiff's counsel to retract the error, they failed to do so. However, testimony of pathologist with regards to cause of death, without any opinion as to standard of care, was within his expertise and properly allowed. The appellate court discussed Supreme Court Rule 213(g). The opinion stated:

> Illinois Supreme Court rules on discovery are mandatory rules of procedure subject to strict compliance by the parties. *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7, 21 (1999) (*Seef*); *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998) (*Crull*). Discovery rules allow litigants to ascertain and rely upon the opinions of experts retained by their adversaries. *Crull*, 294 Ill. App. 3d at 537, citing *Chicago & Illinois Midland Ry. Co. v. Crystal Lake Industrial Park, Inc.*, 225 Ill. App. 3d 653, 658 (1992). Parties have a duty to supplement seasonably or amend prior answers or responses whenever new or additional information subsequently becomes known to that party." 177 Ill. 2d R. 213(i). To allow either side to ignore the plain language of Rule 213 defeats its purpose and encourages tactical gamesmanship. Crull, 294 Ill. App. 3d at 537.

The *Crull* court stated, "[t]rial courts should be more reluctant under Rule 213 than they were under former Rule 220. (1) to permit the parties to deviate from the strict disclosure requirements, or (2) not to impose severe sanctions when such deviations occur." 294 Ill. App. 3d at 539. However, neither Rule 213 nor its committee comments provide the circuit court with a guideline describing how to formulate a remedy once a violation occurs. The most important function of a court of review is to provide direction to the circuit court as to how to address issues that arise at trial. Consequently, we next address the issue of what remedies a circuit court has available to it when a violation of Rule 213 occurs at trial.

The court then stated, "A circuit court has the discretion to shape a remedy following a violation of Rule 213, including the exclusion or limitation of the scope of expert testimony. *Boland v. Kawasaki Motors Manufacturing Corp., USA*, 309 Ill. App. 3d 645, 652-53 (2000) (*Boland*). The formulation of a remedy

should reflect the underlying purpose of Rule 213 by preventing unfair prejudice or the deprivation of a party's ability to prepare adequately his case through no fault of his own." The appellate court discussed the procedure following an objection under SCR 213:

> First, upon a party's Rule 213 objection, the proponent of the evidence has the burden to prove the opinions were provided in a discovery deposition or Rule 213 interrogatory or answer. 177 Ill. 2d R. 213(g), (i) [citation] eff. July 1, 2002. A circuit court has the discretion to review Rule 213 objections in chambers to determine whether opinions were disclosed properly. *Seef*, 311 Ill. App. 3d at 22.
>
> Next, in the event the circuit court finds that a party has violated Rule 213 disclosure requirements and depending upon the severity of the violation, the opposing party has the option of moving to: (1) strike only the portion of the testimony that violates the rule; (2) strike the witness's entire testimony and bar the witness from testifying further; and (3) have a mistrial declared. The circuit court has the discretion to determine the appropriate remedy. Boland, 309 Ill. App. 3d at 652-53. The court must ensure that the applicable sanction allows for a fair trial rather than punish the party that committed the violation. *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 926 (1998) (Sobczak); *Flanagan v. Redondo*, 231 Ill. App. 3d 956, 963 (1991). Each case presents unique factual circumstances, which should be considered in determining whether a sanction is imposed. *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314, 316-17. (1993) (*Boatmen's National Bank*) (defendant was not prejudiced by undisclosed testimony because it was cumulative of other testimony).

Disclosure of Lay, Independent Expert and Controlled Expert Witnesses: Supreme Court Rule 213(f) provides that upon interrogatory a party must disclose the "identities and addresses" of witnesses who will testify at trial and must provide information as to broken down by the following categories: lay witnesses, independent expert witnesses and controlled expert witnesses

Credibility of Witness: A witness may not testify that a particular witness is credible. In *In Re B.J.*, 316 Ill.App.3d 193 (2000), the appellate court ruled that while an expert may testify about behaviors typically exhibited by sexually abused children, the expert may not testify that a particular witness was credible. "See *Simpkins*, 297 Ill. App. 3d at 683 (1998):

> Whether J.J. demonstrated behaviors typically exhibited by sexually abused children constitutes circumstantial evidence for the trier of fact to consider and give such weight as it deems fit. We reaffirm what we said in *Simpkins*: trial courts should reject the attempt to use purported expert testimony to bolster or attack a witness' credibility. *Simpkins*, 297 Ill. App. 3d at 683. While concluding that Dr. French could not permissibly testify that J.J.'s testimony was unreliable, he could testify, as an expert, regarding the technique employed by those questioning J.J. Certainly, Dr. French could have disputed the validity of the questioning procedure by which J.J.'s responses were obtained and let the fact finder draw its own conclusions on whether to believe J.J.'s answers; however, by asserting that, due to the faulty testing procedure, J.J. was not a credible witness, he invaded the province of the fact finder." Similarly, *Simpkins* involved a case in which a child recanted on the witness stand. There a child protective

> agency worker could not testify about the frequency and reasons for recantations by child victims of sexual abuse because it was inadmissible comment on the veracity of the child's courtroom testimony -- which is a function for either judge or jury. That case involved hearsay statements of sexual abuse under pursuant to section 115-10 of the Criminal Code (725 ILCS 5/115-10).

Supreme Court Rule 213(f) provides that upon interrogatory a party must disclose the "identities and addresses" of witnesses who will testify at trial and must provide information as to broken down by the following categories: lay witnesses, independent expert witnesses and controlled expert witnesses.

1) ***Lay Witnesses***. A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must **identify the subjects on which the witness will testify**. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness. Rule 701 addresses the role of lay witnesses:

> 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.

Disclosure of Lay, Independent Expert and Controlled Expert Witnesses: Rule 702 addresses Testimony by Experts and states:

> 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

(2) ***Independent Expert Witnesses***. An "independent expert witness" is a person giving expert testimony who **is not the party, the party's current employee, or the party's retained expert**. For each independent expert witness, the party must identify the **subjects on which the witness will testify and the opinions the party expects to elicit**. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) ***Controlled Expert Witnesses***. A "controlled expert witness" is a person giving expert testimony who **is the party, the party's current employee, or the party's retained expert**. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

SCR 213(g) relating to Deposition Answers: SCR 213(g) now provides:

> Limitation on Testimony and Freedom to Cross-Examine. The information disclosed in answer to a Rule 213(f) interrogatory, or at deposition, limits the testimony that can be given by a witness on direct examination. **Information expressed in a deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the deposition**. Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

SCR 219(c)(iv) provides that as sanctions for failure to comply with discovery a witness may, "be barred from testifying concerning that issue." Richard L. Miller, "An Introduction to Opinion Testimony Disclosures in Illinois," See, *Illinois Bar Journal*, 89 Ill. B. J. 18 at 21 (Jan. 2001). See also, *Warrender v. Millsop*, 304 Ill.App.3d 260 (2d Dist. 1999), (Second District appellate court reversed when the trial court allowed a witness, who had not been properly disclosed under former Rule 213(g), to testify at trial).

Rule 213(i) now provides simply, "Duty to Supplement. A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party."

Discovery Sanctions re Striking Expert's Testimony: *Coleman v. Abella*, 322 Ill.App. 3d 792 (1st Dist., 2000), (Trial court did not abuse its discretion by entering Rule 219 discovery sanction striking plaintiff's expert's testimony at trial pursuant to SCR 213(i) when plaintiff's attorney failed to disclose supplemental materials supplied to expert after expert's deposition).

Coleman stated that Rule 213 provides for stricter standards of discovery compliance than former Rule 220. The 1993 Illinois Supreme Court case of *Boatmen's National Bank of Belleville v. Martin*, provides for six factors for the court to consider in excluding such testimony: (1) surprise to the adverse party; (2) the prejudicial effect of the witness's testimony; (3) the nature of the witness's testimony; (4) the diligence of the adverse party; (5) whether the objection to the witness's testimony was timely; and (6) the good faith of the party calling the witness.

Expert's Additional Work after Deposition / Disclosure of All the Bases of Opinions: *Copeland v. Stebco*, 316 Ill.App.3d 932 (1st Dist. 2000), holds that any additional work done by an

expert **after** their deposition must be disclosed under Rule 213, even if the additional work done by the expert does not change their opinions (expert performed additional testing of product). See also *Coleman* (expert read additional depositions).

A party must disclose not only the specific opinions of their expert, but **all the bases** for those opinions. (See also *Coleman and Kotvan v. Kirk*, (1st Dist. 2001).

Liberal Construction per SCR 213(k) Versus "Strict Compliance": Rule 213 disclosure requirements are mandatory and subject to strict compliance. *Susnis v. Radfar*, 317 Ill.App.3d 817 (1st Dist. 2000). It is not enough that the opinions disclosed addressed "almost the exact issues" as sought to be elicited during trial. It is probably that this is not good law in light of the portion of the 2002 amendments which reads, "Liberal Construction: This rule is to be liberally construed to do substantial justice between or among the parties." SCR 213(k).

Discovery of Opinions During Cross-Examination: Counsel is entitled to rely upon disclosed opinions and the bases thereof and is prejudiced if undisclosed opinions are discovered during cross-examination *Copeland*.

Documents Produced During Discovery: The mere disclosure of a record during discovery does not constitute disclosure of an opinion or the bases for an opinion under Rule 213. If the information in a record sets forth an opinion or forms the basis for an opinion, it must be disclosed in answer to 213(f) and (g) interrogatories or in an opinion witness deposition. *Kotvan.*

Committee Comments 20 SCR 213(f): The committee comments state: "The purpose of this paragraph is to prevent unfair surprise at trial, without creating an undue burden on the parties before trial."

"**Lay witnesses**" include persons such as an eyewitness to a car accident. For witnesses in this category, the party must identify the "subjects" of testimony—meaning the topics, rather than a summary. An answer must describe the subjects sufficiently to give "reasonable notice" of the testimony, enabling the opposing attorney to decide whether to depose the witness, and on what topics. In the above example, a proper answer might state that the witness will testify about: "(1) the path of travel and speed of the vehicles before impact, (2) a description of the impact, and (3) the lighting and weather conditions at the time of the accident." The answer would not be proper if it said only that the witness will testify about: "the accident." Requiring disclosure of only the subjects of lay witness testimony represents a change in the former rule, which required detailed disclosures regarding the subject matter, conclusions, opinions, bases and qualifications of any witness giving any opinion testimony, including lay opinion testimony. Experience has shown that applying this detailed-disclosure requirement to lay witnesses creates a serious burden without corresponding benefit to the opposing party.

"**Independent expert witnesses**" include persons such as a police officer who gives expert testimony based on the officer's investigation of a car accident, or a doctor who gives expert testimony based on the doctor's treatment of the plaintiff's injuries. For witnesses in this category, the party must identify the "subjects" (meaning topics) on which the witness will testify and the "opinions" the party expects to elicit. The limitations on the party's knowledge of the facts known by and opinions held by the witness often will be important in applying the "reasonable notice" standard. For example, a treating doctor might refuse to speak with the plaintiff's attorney, and the doctor cannot be contacted by the defendant's attorney, so the opinions set forth in the medical records about diagnosis, prognosis, and cause of injury

might be all that the two attorneys know about the doctor's opinions. In these circumstances, the party intending to call the doctor need set forth only a brief statement of the opinions it expects to elicit. On the other hand, a party might know that a treating doctor will testify about another doctor's compliance with the standard of care, or that a police officer will testify to an opinion based on work done outside the scope of the officer's initial investigation. In these examples, the opinions go beyond those that would be reasonably expected based on the witness' apparent involvement in the case. To prevent unfair surprise in circumstances like these, an answer must set forth a more detailed statement of the opinions the party expects to elicit. Requiring disclosure of only the "subjects" of testimony and the "opinions" the party expects to elicit represents a change in the former rule, which required detailed disclosures about the subject matter, conclusions, opinions, bases, and qualifications of all witnesses giving opinion testimony, including expert witnesses over whom the party has no control. Experience has shown that the detailed-disclosure requirement is too demanding for independent expert witnesses.

"**Controlled expert witnesses**" include persons such as retained experts. The party can count on full cooperation from the witnesses in this category, so the amended rule requires the party to provide all of the details required by the former rule. In particular, the requirement that the party identify the "subject matter" of the testimony means that the party must set forth the gist of the testimony on each topic the witness will address, as opposed to setting forth the topics alone.

A party may meet its disclosure obligation in part by incorporating prior statements or reports of the witness. The answer to the Rule 213(f) interrogatories served on behalf of a party may be sworn to by the party or the party's attorney.

Consultants: An expert who is a consultant and who has not been disclosed as a witness may not be compelled to give testimony unless the attorney has elected to call the expert as a witness. While this is clear according to Supreme Court Rules as well as the comments, it is also clear per case law. See, e.g., *People v. Spiezer*, 316 Ill.App.3d 75, even expanding rule to criminal cases and stating, " In civil cases, parties are not entitled to discover the identities or opinions of nontestifying, consulting experts. See *Costa v. Dresser Industries*, Inc, 268 Ill. App. 3d 1 (1994). Indeed, the identity, opinions, and work product of a consultant are discoverable only upon a showing of "exceptional circumstances under which it is impracticable *** to obtain facts or opinions on the same subject matter by other means." 166 Ill. 2d R. 201(b)(3); see also *Hickman*, 329 U.S. at 512, 91 L. Ed. at 463, 67 S. Ct. at 394 ("[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order")."

A November 2020 medical malpractice case applies to family law proceedings since it held that one is entitled to flip a disclosed a controlled expert to a consultant. So held the Illinois Supreme Court in Dameron. V. Mercy Hospital & Medical Center, 2020 IL 125219. The case concluded:

> A party is permitted to redesignate an expert from a Rule 213(f) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and where a report has not yet been disclosed. Here, Dameron properly withdrew Dr. Preston as a Rule 213(f) controlled expert witness almost a year before trial and redesignated him as a Rule 201(b)(3) consultant. Because Dr. Preston was properly redesignated as a Rule 201(b)(3) consultant, Dameron was not required to turn over the concrete factual data contained in

> Dr. Preston's report and EMG study. Rule 201(b)(3) protects not only conceptual data but also factual information. Defendants made no attempt to show exceptional circumstances warranted disclosure of the data contained in the report and study.

There is an argument that the SCR 213(f) rules as to disclosure have become more lenient. However, a 2004 case offers a warning where the only disclosure was that the Plaintiff would testify to matters set forth in his complaint. *Kim v. Mercedes Benz*, (1st Dist., 2004), The appellate court there stated:

> Here, regardless of the complaint's numerous allegations of the diminished value of the vehicle, plaintiff's generalized statement as to his proposed testimony created an unfair surprise with respect to the attempt to introduce testimony as to the diminished value of the ML 320. To allow plaintiff to disclose that he would testify as to matters set forth in the complaint would create an undue burden on defendant, especially given the limitation on plaintiff's personal knowledge upon which he was to rely for his proposed opinion regarding what he would have paid for the vehicle based on the alleged defects. Official Reports Advance Sheet No. 8 (April 17, 2002), R. 213(f), eff. July 1, 2002. A more detailed disclosure describing the specific nature of plaintiff's testimony would have allowed defense counsel to decide whether to depose plaintiff or whether to provide an opposing expert witness on the issue of diminished value.
>
> Because plaintiff provided only a generalized statement describing his lay witness testimony, he failed to provide reasonable notice of the proposed testimony and, therefore, was not disclosed properly pursuant to Rule 213(f). Accordingly, the circuit court did not abuse its discretion and the proposed testimony was excluded properly.

Spurgeon v. Mruz, (1st Dist., 2005). In a medical malpractice trial, the Plaintiff waived objection to the defendant's expert witness testifying without having been deposed when counsel failed to object at the time defendant presented witness at trial -- even though the Plaintiff had previously brought a motion to bar the expert from testifying. Further, since the trial court offered plaintiff opportunity to depose expert on eve of trial at the expense of defendant at time of plaintiff's choosing, the trial court did not abuse its discretion when it denied motion in limine seeking to bar witness' testimony. Instructively, the court stated:

> A party who, prior to trial, unsuccessfully moves to bar certain evidence, must object again to the evidence when it is offered. *Scassifero v. Glaser* , 333 Ill. App. 3d 846, 855-56 (2002). Although the plaintiffs filed a motion in limine to bar Dr. DuBoe's testimony, they did not renew their objection when he was called to the stand to testify. The plaintiffs made several Rule 213 objections to specific portions of the witness's testimony, but they failed to object to the witness testifying at all. Therefore, plaintiffs have waived consideration of this issue on appeal.

Controlled Expert Can Elaborate at Trial: A controlled expert can elaborate on previously disclosed opinions "as long as the testimony states logical corollaries to the opinion rather than new reasons for it." Foley v. Fletcher (1st Dist., 2005). The opinion cites to previous case law stated:

> A witness may elaborate on a disclosed opinion as long as the testimony states logical

corollaries to the opinion, rather than new reasons for it. *Barton v. Chicago & North Western Transportation Co.*, 325 Ill. App. 3d 1005, 1039 (2001). The testimony at trial must be encompassed by the original opinion. *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 576 (2001). A party's Rule 213 disclosures must "drop down to specifics." Sullivan , 209 Ill. 2d at 109. While it is improper for a trial court to allow previously undisclosed opinions that advance a new negligence theory (*Clayton v. County of Cook*, 346 Ill. App. 3d 367 (2003)), testimony is not a new opinion merely because it refers to a more precise time than appeared in the expert's Rule 213 disclosure (*Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7, 23 (1999)). [Note by GJG: the *Clayton* opinion was modified on rehearing and is a February 2004 decision.)]

Firsthand Knowledge

Objection

⇨ I object. There has been no foundation to show the witness has personal knowledge of the matter about which he has been asked.

Response

⇨ The witness has shown firsthand knowledge of the subject matter of the witness's testimony. A foundation has been laid which demonstrates the witness was in a position to know those items about which his testimony will be given.

Explanation: *IRMO Shelton*, 217 Ill.App.3d 26 (5th Dist. 1991) addressed whether the custodial parent who was seeking leave to remove the children was basing her testimony as to job opportunities and starting salaries on hearsay information. The appellate court stated that where a party testified that she applied for and investigated job opportunities and found out the amount of the starting salary, such testimony was not hearsay due to the wife's personal investigation and personal knowledge. The Plaintiff's testimony was that she "investigated and found out."

Habit and Routine Practice

Objection

⇨ I object. The evidence is not relevant because it is such an isolated occurrence so that is insufficient to constitute a habit or routine practice.

Response

⇨ This evidence is relevant because it shows:

- ⇨ a consistent habit or routine practice;
- ⇨ which raises a permissible inference that the party /organization likely acted in this case according to the habit or routine practice.

Explanation: Rule 406 states:

> 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.

It confirms the clear direction of Illinois case 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.

Habit is defined as conduct that becomes semiautomatic, invariably regular, and not merely a tendency to act in a given manner. *Knecht v. Radiac Abrasives, Inc.*, 219 Ill.App.3d 979 (1991).

Hearsay

Objection

⇨ I object. The question calls for a hearsay answer. (Real Witness Rule)

⇨ I move to strike the answer as hearsay.

Response

⇨ The statement is not being offered for the truth of the matter asserted, but rather it is offered to show that the statement was made. The making of the statement is relevant to show:

- ⇨ the effect on a person who heard the statement; or
- ⇨ a prior inconsistent statement; or
- ⇨ the operative facts or a verbal act; or
- ⇨ the knowledge of the declarant.

Explanation: Eliminate the traditional definition (out of court statement offered for the truth of the matter asserted). Put it at least in plain English, "Hearsay is evidence of an out of court statement that is offered to prove its truth."

If the out of court statement is clearly offered for its truth the question is hearsay. If the out of court statement is not clearly offered for its truth, must the content of the out of court statement be believed in order for it to be relevant? If yes, the evidence is hearsay.

To simplify things, McElhaney calls the hearsay rule the "real witness" rule. He says: "Every time you think a question might call for hearsay, stop and ask yourself: Who is the real witness? Who do I want to cross examine to test what's being said?" Essentially, McElhaney substitutes the out of court statement phrase for the real witness tag line.

A case which discusses this distinction as to whether the statement is offered for its truth is *Estate of Barbara Parks v. O'Young, M.D. and St. Bernard Hospital*, 289 Ill.App. 3d 976 (1st Dist., 1997), where the court cited Graham (801.5 at 647), "a statement is not hearsay when the fact that the statement is

made is relevant for its effect on the listener without regard to the truth of the matter asserted." In *Parks* the statement was determined not to be hearsay because it was offered to show the hospital's knowledge concerning misconduct on behalf of an employee.

Hearsay: Attacking and Supporting Credibility of Hearsay Declarant

Objection

⇨ I object. The question seeks to attack the credibility of a person who has not appeared as a witness.

Response

⇨ This impeachment of an out-of-court declarant is permissible to the same extent available to a testifying witness.

Explanation: See Cleary & Graham, Section 806.1. Impeachment by a prior inconsistent statement of a hearsay declarant is permitted despite the inability to confront the declarant with the inconsistency to afford him an opportunity to admit or deny.

Therefore, assume hearsay is allowed backdoor through a custody evaluation. The person's bias, interest, corruption, coercion, prior criminal conviction or inconsistent statements may be shown.

Hearsay: Non-Hearsay Admissions

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Responses

⇨ The statement is not hearsay because I have shown that:

- ⇨ the statement was made by the party opponent; or
- ⇨ Statement Adopted by Act, Conduct, Silence – Vicarious Admission: the statement was made by a person and was adopted by the party opponent as the party's own by his act, conduct or silence, and it therefore a vicarious admission of the party opponent; or
- ⇨ Agent – Vicarious Admission: the statement was made by an agent authorized to speak on behalf of a party opponent and is thus a various admission of the party; or
- ⇨ Person in Privity: the statement was made by a person in privity with a party.

Explanation: See Cleary & Graham, Sec. 802. Any statement made by a part of adopted by a party directly or vicariously is admissible against the party if the statement is relevant and its probative value is not outweighed by its prejudice.

Note the historical rule that a guardian of an infant may not make admissions, including statements in

pleadings, binding on a minor. See, *Anderson v . Anderson*, 39 Ill.App.2d 141 (1963).

Hearsay: Non-Hearsay Child Abuse (including Sexual Abuse)

Objection

⇨ I object. The question calls for a hearsay answer.

⇨ I move to strike the answer as hearsay.

Responses

⇨ The statement is not hearsay because I have shown that the statements constitute, "previous statements made by the child relating to any allegation that the child is an abused or neglected child" within the meaning of the Abused and Neglected Child Reporting Act or the Juvenile Court Act of 1987. Section 607e) of the IMDMA provides that such statements are admissible in a hearing concerning custody or visitation with the child.

Explanation: Section 607(a) provides:

> Previous statements made by the child relating to any allegations that the child is an abused or neglected child***shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.

There is an issue whether such statements would be admissible within proceedings under the IDVA. The argument that such statements are admissible in proceedings under the IDVA include the fact that the IDVA provides that temporary custody in such proceedings are determined pursuant to the provisions of the IMDMA and the IPA of 1984 and that the court has the right to "determine the visitation rights, if any, of respondent in any case in which the court awards physical care or temporary legal custody of a child to petitioner." 750 ILCS 60/214(b)(6). As to visitation subsection (7) provides that the court shall "not be limited to the standard set forth in Section 607.1 of the IMDMA." Note, however, that *Daria W. v. Bradley W.*, 317 Ill.App. 3d 194 (3d Dist. 2000), held that under section of the 5/606(e) of the IMDMA, a child's hearsay statements are properly admitted without a showing of the child's unavailability. The issue is the applicability of Section 8-2601 of the Code of Civil Procedure (735 ILCS 5/8-2601) as compared with Section 606(e) of the IMDMA.

Hearsay Statements of Abuse Re Another Child Under IMDMA Proceeding: The Section 606(e) provisions apply only to statements made by the child who is subject to the custody or visitation proceedings. *IRMO Rudd*, 293 Ill.App.3d 367 (4th Dist. 1997). If the statements do not fall within the ambit of Section 607(a) of the IMDMA, then the provisions of Section 8-2601(a) of the Illinois Code of Civil Procedure [735 ILCS 5/8-2601(a)] apply. Section 8-2601(a) provides:

> An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds

> that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

The appellate court in *Rudd* found that the allegations of sexual abuse are relevant in determining the visitation rights of a parent, even if the allegations are not against the parent's child. Although the record was silent about a final determination of the allegations, the appellate court concluded, "Requiring the court to essentially ignore allegations of abuse would greatly enhance the risk of subjecting the child to a dangerous environment. We see no sound reason for precluding [the mother] from attempting to prove the allegations of abuse made against [the father]." The trial court should not have ruled on the hearsay objection until it conducted a hearing in which it heard and considered evidence related to the reliability of the niece's statements.

Hearsay Statements of Abuse in Juvenile Court Proceedings: In *In re A.P., a Minor,* 285 Ill.App.3d 897 (1997), GDR 97-81, the Illinois Supreme Court addressed the requirements to make hearsay statements by minors admissible under Section 2-18(4)(c) of the Juvenile Court Act [705 ILCS 405/2-18(4)(c)]. Section 2-18(4)(c) uses language comparable to the language in IMDMA Section 606(e):

> Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.

See also, *In Re C.C.*, 224 Ill.App.3d 207 (1st Dist., 5th Div. 1992), GDR 92-22.

Hearsay Exception: Absence of Entry in Business Records

Objection

- ⇨ I object. The question calls for a hearsay answer.
- ⇨ I move to strike the answer as hearsay.

Responses

- ⇨ The absence of a record in this record is admissible to show the non-occurrence of an event. I have shown through the testimony of _____, who is the custodian of the business records, or other qualified person, that:
  - ⇨ a business record exists; and
  - ⇨ the matter which is not recorded in the record is of a kind for which a record would regularly be made and preserved;
  - ⇨ the source of information or other circumstances fail to indicate a lack of trustworthiness.

Explanation: Rule 803(7) provides as a hearsay exception:

(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.

See: Cleary & Graham, Sec. 803.15.

Sample Certification:

Certification of Custodian or Other Qualified Person re Absence of Record:

I am the custodian of the records. The records that have been requested are set forth in the attached summary of requested memoranda reports, records, or data compilations, in any form (documents) for which we have no record. Otherwise, such documents would have been regularly made and preserved in the course of regularly conducted activity.

This is based upon Rule of Evidence that provides:

> 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.

Hearsay Exception: Excited Utterance (Spontaneous Declaration)

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Responses

⇨ The statement is admissible as an excited utterance (or spontaneous declaration). I have shown through the testimony of _____ that the statement:

- ⇨ relates to a startling event or condition; and
- ⇨ the event was sufficiently startling to produce a spontaneous and unreflecting statement; and
- ⇨ there was no time to fabricate.

Explanation: *People v. Robinson*, (2nd Dist., 2008), held that this exception to the hearsay rule permitted a police officer to testify regarding the victim's statements of domestic battery. It cited *People*

v. Gwinn (366 Ill. App. 3d 501, 517 (2006).

Startling Event / Spontaneous and Unreflecting Statement: *Robinson* reasoned:

> The State responds, in part, that the startling event was not limited to the punch itself, but comprised defendant's ongoing violent outburst. We agree. [The officer's] observed firsthand the apparent results of the outburst: a hole punched in a wall, broken glass, spattered blood, and defendant's own bleeding hand. Nettles also observed defendant "yelling, screaming and acting out of control." Defendant's outburst qualifies as a startling occurrence for purposes of the excited utterance exception. The trial court could reasonably conclude that the outburst was sufficient to produce "a stress of nervous excitement" that would inhibit Conner's "reflective faculties." Given Conner's emotional state, the trial court could also reasonably conclude that she was under the influence of that stress when she spoke to Nettles and that she therefore lacked time to fabricate.

Relationship between Statement and Startling Event: *Robinson* reasoned: "Even though [the alleged victim] did not state precisely when defendant punched her, her statement--when taken as a whole and viewed in light of the surrounding circumstances--strongly implies that defendant punched her contemporaneously with his outburst."

IRMO L.R. and A.L.R., 202 Ill.App.3d 69 (1st Dist., 1990) held that the spontaneous declaration exception to the hearsay rule did not apply, based upon a totality of the circumstances, where child aged 3 did not repeat any statements indicating abuse to anyone other than the mother custodian and maternal grandmother. This case was decided prior to the amendments to Section 606(e) of the IMDMA.

IRMO Ashby, 193 Ill.App.3d 366 (5th Dist. 1990) held that spontaneous declaration of child relating to sexual abuse may be testified to by third party, as being within the spontaneous declaration exception three factors must be present: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence. (*IRMO Theis* (1984), 121 Ill.App.3d 1092, 1097)

Note, Illinois **appears** not to adopt the **present sense impression** exception to the hearsay rule. Parks, discussed above, stated, “we are aware of no Illinois cases that have applied that exception.” Referring to the 7th (1996) edition of Hunter’s Handbook. The case stated, “moreover, even if such an exception existed under Illinois law, it would not be applicable in the instant case. The requirements are: 1) that the statement describe of explain the event perceived; 2) that the declarant must have in fact perceived the event described; and (3) that the description must be substantially contemporaneous with the events in question. This exception if it applied would allow admission of a declarant’s report made to a third party concerning observations that the declarant is making at a time contemporaneous with those observations (e.g., tape recording of “911" telephone call.

Hearsay Exception: Former Testimony

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ The statement is admissible as former testimony. I have shown through the testimony of _____ that:

- ⇨ the witness is unavailable; and
- ⇨ the statement is testimony given as a witness at another hearing of the same or different proceeding, or in an evidence deposition in a civil case; and
- ⇨ the actions are the same or involve the same issues;
- ⇨ the parties are the same or are in privity.

Hearsay Exception: Judgment of Previous Conviction

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ The statement is admissible as a judgment of previous conviction. I have shown through a certified record, or testimony of _____ that this statement is evidence of:

- ⇨ a final judgment;
- ⇨ entered after a trial or upon a plea of guilty;
- ⇨ adjudging a person guilty of a serious crime;
- ⇨ which is offered to prove a fact essential to sustain the judgment; and
- ⇨ is offered against the convicted person who is a party in this, a later civil lawsuit.

See *IRMO Engelbach*, 181 Ill.App.3d 563 (1989) (exception applies even where the conviction is not of a party in a later civil lawsuit. All felonies are serious crimes. Some misdemeanors may be as well. Battery has been held to be a serious crime. Cleary & Graham, Sec. 803.21.

Hearsay Exception: Market Report or Mortality Table

Objection

⇨ I object. The document is an out-of-court statement and is therefore hearsay.

Response

⇨ The statement is admissible as a market report or a mortality table. I have shown that the document is:

- ⇨ a market report admissible under 810 ILCS 5/2-724 (the UCC) as a report of an official publication, trade journal; or
- ⇨ in a newspaper or periodicals of general circulation published as the reports of such established commodity market; or
- ⇨ the document is a mortality or annuity table which I have shown to be a standard authority.

Explanation: Cleary & Graham, Sec. 803.18.

Mortality Tables: Mortality tables that are commonly used in divorce cases include the life tables issues by the National Center for Health Statistics. Other life tables used in divorce cases include RP 2000, Group Annuity Reserving - GAR-94 life tables. For a summary, click here. For another article addressing the different assumptions, click here. For standards addressing these tables, click here.

RP 2000 is generationally adjusted and gender specific.

UP-94 Indexed to Different Years.

The GAR 94 tables are automatically adjusted for decreasing mortality (the fact that as time goes by people tend to live longer). The GAR 94 table reflects mortality as of 1994. The issue was the inclusion of what is called a "projection scale AA" -- which includes declines in projected mortality. The two tables are them mathematically combined so that mortality reflects not only a person's age but the year in which the person attains that age.

IRS Rev Rul 2001-62. This is a unisex table based on GAR-94 table updated only to 2002. It is *not* generationally adjusted. The federal government mandated its use in certain situations. If the plan were to calculate the lump sum it would pay for the pension (which is not necessarily the pension's true actuarial value), it may use this method.

The ASA 2008 report states:

> In situations where either party to a divorce or other marriage breakdown is entitled to receive benefits under a pension plan, the entitlement is viewed as an asset, part of the matrimonial property to be divided between the parties. For that purpose, it is necessary to place a value on this element of matrimonial property. The marriage breakdown Standards apply in those Canadian jurisdictions where the law permits the application of actuarial judgment. While these Standards are binding only upon actuaries, it is also used by other professionals who are called upon to perform such valuations. The pension commuted value Standards apply in those situations where a withdrawing member chooses to commute a pension benefit for transfer to another pension or other retirement plan. The right to commute is imposed by law, but it has been left to the actuarial profession to establish Standards. Since a solvency or hypothetical wind-up valuation entails estimating the cost of settling benefits, the commuted value Standards affects solvency funding requirements to the extent plan members would be expected to elect

commuted values in an actual wind-up.

Consider the difference between the tables:

> Annuity values based on the RP-2000 Tables were calculated and compared to annuity values based on the GAM-83 and UP-94 tables. In general, the RP-2000 values are between two and nine percent higher for males and between three and five percent lower for females than the GAM-83 values. The RP-2000 values for males under age 80 are within two percent of the values based on the UP-94 table projected to 2000. For males at ages 80 and 90 the RP-2000 values are substantially lower than the projected UP-94 values. For females the RP-2000 values are lower than the projected UP-94 values by about two to four percent.

Note that FinPlan states:

> For figuring life expectancy, the software will take the age when the pension begins and use the UP-94 mortality table which is used by the IRS for certain pension valuations as set forth in Revenue Ruling 2001-62.
>
> There is no right or wrong mortality table for pension valuation, but the UP-94 table used by the IRS and the GAM 83 table used in the pre-2004 version of Divorce Math Calculation are widely accepted.
>
> UP stands for "Uninsured Pensioners." The UP-94 table is a recently published mortality table from the Society of Actuaries.

Family Law Software states: Life Expectancy Table to Use:

> RP-2000: A table that is generally more accurate and reflects a broader population-wide average. The data for this table comes from the lives of those in the private sector and includes more blue-collar workers and others in "less-healthy" populations. This table is gender-specific and generationally adjusted.
>
> UP-94: A table based mostly on the lives of federal civil servants and tends to give slightly higher results.
>
> Gender Specific: On average, women tend to live longer than men. To reflect this, mortality tables are different for women and men. In some cases, you may be required to use a unisex table that averages women's and men's mortality.
>
> Generationally Adjusted: Due to advances in society, on average, people are living longer and longer. As a result, someone who turns 65 in 2020 has a longer life expectancy than someone who turned 65 in year 2008. All of our tables are generationally adjusted and use "Projection Scale AA" adjustment algorithm that is published and recommended by the American Society of Actuaries.

Interest Rate for Pension Valuation: Regarding interest rates FinPlan states:

> GATT legislation passed in 1994 changed the methodology for valuing pensions in divorce by calling for a market interest rate (defined for some purposes as a 10+ year Treasury Note) to be used in determining lump sum values of a pension and by mandating an updating of life expectancy tables. Government funding pension requirements called for changes in interest rates from prior Pension Benefit Guaranty (PBGC) practice of using lower interest rates to value lump sum pension amounts.
>
> Recommendation. Start with the current 10+ Year Treasury Note rate and adjust this rate depending on how actuaries in your area are valuing pensions in divorce.
>
> The 10+ Year Treasury Note rate is available each day in the Wall Street Journal under the Interest Rate Table for US Treasury Securities. Look up the actual yield (not the stated yield) for a longer term T bond. This is usually the last line of the table. It is also printed in many other daily papers, because it is the benchmark rate for tracking government interest rates. is again issuing 30 Year Bonds and values are shown in the Wall Street Journal.
>
> Another method to reach the fair market value of a pension is to price an annuity with a stream of payments identical to the pension benefit. Some consultants use this methodology and the interest rate is actually a yield curve (different rate for each different period as set by market).
>
> Annuity rates are generally at, or slightly higher than 10+ Year Treasury Note interest rates depending on market conditions.
>
> PBGC Interest Rate
>
> The PBGC publishes monthly interest rates used in administering different aspects of pension plans.
>
> If you choose to use the PBGC rates for valuing a pension, the rate to be used is the PBGC rate for valuing annuity benefit payments which the PBGC states as a rate for the first 20 years following plan termination and a slightly different rate for the remaining periods. You would enter the PBCG rate for valuing annuity benefits (first 20 years) into Divorce Math Calculations.
>
> It is recommended that you discuss these various interest rates with your actuary to determine an appropriate approach for valuing pensions in your state. The interest rate is a critical variable in valuing pensions and this section is intended to provide background for making an informed decision on this variable.

Family Law Software is more sophisticated. It states:

> **Interest Rate (Discount Rate):** By default, the software uses a current 20 year United States treasury bill rate, which we update regularly. Although there is no theoretical

justification for using multiple tiers of interest rates, some evaluation methods currently use three (or more) tiers of interest rates. You may do that, by clicking the link shown below. You may specify three tiers of interest rates, or more. The software allows you to specify a different interest rate for every year, if you so desire.

Hearsay Exception: Public Records and Reports: Police Records

Objection

⇨ I object. The document is hearsay and does not fall within the [business] records exception or.

⇨ Counsel has not laid a proper foundation for admission as a business record.

⇨ I object. Police reports are not admissible into evidence.

Response

⇨ I have laid a proper foundation for the record as a business record.

⇨ Supreme Court Rule 236(b) is limited to exclusion of accident reports. The police report offered into evidence is not an accident report and foundation has been established for admission as a business record.

Explanation: Cleary & Graham, Sec. 803.13. Note, SCR 236(b) excludes in civil cases only police accident reports. It does not exclude all police reports. It provides, "Although police reports may otherwise be admissible in evidence under the law, subsection (a) of this rule does not allow such writings to be admitted as a record or memorandum made in the regular course of business. See also, Grubb, Sec. 6.160.

Hearsay Exception: Recorded Recollection

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ The statement is admissible as a recorded recollection.
⇨ I have shown through the testimony of _____ that it is:

- ⇨ a memorandum or record concerning a matter
- ⇨ about which a witness once had knowledge
- ⇨ but now has insufficient recollection, which cannot be refreshed by the memorandum; and

⇨ I have shown the memorandum to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

Explanation: See *Salcik v. Tassone*, 236 Ill.App.3d 548 (1992) for the basic rule. See Cleary & Graham, Section 803.9.

Hearsay Exception: Records of Regularly Conducted Business Activity (Business Records)

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ The statement is admissible as a business record pursuant to Supreme Court Rule 236(b) [SCR . I have shown through the testimony of _____, who is a custodial of the record or a person who has knowledge of the record keeping system, that the statement is contained in:

Manually Entered Records:

⇨ a writing or record;
⇨ which was made as a memorandum or record of any act, transaction or event;
⇨ at or near the time of such act, transaction, occurrence or event (within a reasonable time thereafter);
⇨ was made in the regular course of the business; and
⇨ it was the regular course of the business to make such record at the time of such act, transaction, occurrence or event.

For Computer Generated Records add:

⇨ the particular computer produces an accurate record when properly employed and generated;
⇨ the computer was properly employed and operated in the matter at hand; and
⇨ the foundation testimony concerning the sources of information, method and time of preparation indicates the trustworthiness of the evidence.
⇨ I have shown the memorandum to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

Self-Authentication:

⇨ The document is self-authenticated as a business record pursuant to Rules 803(6) and 902(11).

Explanation:
Self-Authentication of Business Records:

Rule 902(11). **Certified Records of Regularly Conducted Activity.**
Self-authentication of **business records** is provided by Supreme Court Rule 902(11).

First, Rule 803(6) provides:

> 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.

Rule 902(11) provides:

> (11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record:
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;
> (B) was kept in the course of the regularly conducted activity; and
> (C) was made by the regularly conducted activity as a regular practice.
>
> The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Sample Certification:

Certification of Custodian or Other Qualified Person:

The records that are set forth in the attached summary of documents were:

> *(A) 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) kept in the course of the regularly conducted activity; and*
> *(C) made by the regularly conducted activity as a regular practice.*

If you are seeking to have self-authenticated the absence of a record, note that Rule 803(7) as quoted above provides:

> Evidence that a matter is not included in the ... records 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.

Explanation:

See Cleary & Graham, Section 803.9.

IRMO DeLarco, 313 Ill.App.3d 107 (2nd Dist. 2000), points out the difference between computer **generated** records and computer **stored** records:

> Records directly generated by the computer itself are generally admissible as representing the tangible result of the computer's internal operations. Citation Omitted. All that need be shown is that the recording device was accurate and operated properly when the evidence was generated. In contrast to computer-generated records, printouts of computer-stored data constitute statements placed into the computer by out-of-court declarant and cannot be tested by cross-examination. Citation Omitted. Such information therefore should not be admissible absent an exception to the hearsay rule.

The decision then discusses the hearsay exception which would allow admission of computer **stored** records, that is, the business records exception to the hearsay rule. *DeLarco* states:

> Tangible printouts of computer-stored data are admissible under the business exception to the hearsay rule if (1) the electronic computing equipment is recognized as standard, (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded, and (3) the foundation testimony establishes that the sources of information, method and time of preparation indicate its trustworthiness and justify its admission. ***
>
> Where a fact may be ascertained only by the inspection of a large number of documents

comprised of detailed statements, a summary of those documents may be received into evidence, but the mass of documents must be placed in the hands of the court or be made accessible to the opposing party for inspection. Citation Omitted. When original documents are voluminous and cannot be conveniently examined to extract the fact to be proved, any competent witness who had seen the original may testify to the fact, provided it is capable of being determined by calculation. Citation Omitted. ***

We hold, therefore, in the case of computer-**stored** records, where the records sought to be admitted are **summaries** of original documents, such as the time slips in this case, the original documents must be in court or made available to the opposing party, and the party seeking the admission of the summaries must be able to provide the testimony of a competent witness or witnesses who have seen the original documents and can testify to the facts contained therein.

Hearsay Exception: Declaration Against Interest

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ This statement is admissible as a declaration against interest. I have shown through the testimony of _____ that the statement:

- ⇨ was made by a declarant who is now unavailable; and
- ⇨ 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 criminal or civil liability or
- ⇨ to render invalid a claim by the declarant against another; and

- ⇨ that a reasonable person in the declarant's position would not have made this statement unless he believed it to be true; and

See: Cleary & Graham, Supplement, p. 219.

Hearsay Exception: Statements Made for Purpose of Medical Diagnosis or Treatment

Objection

⇨ I object. The question calls for a hearsay answer.
⇨ I move to strike the answer as hearsay.

Response

⇨ This statement is admissible as a statement for the purpose of medical diagnosis or treatment. I have shown through the testimony of _____ that the statement:

- ⇨ was made for purposes of medical diagnosis or treatment;
- ⇨ describes medical history; or describes past or present symptoms, pain, or sensations; or describes the inception or general character of the cause or external source thereof; and
- ⇨ was reasonably pertinent to diagnosis or treatment.

See: *Wilson v. Clark*, *Wilson v. Clark*, 84 Ill.2d 186 (1981). The key question is whether the statement is pathologically germane to the diagnosis or treatment of a medical patient. When and how the injury occurs is usually pertinent. Who caused the injury usually is not.

While hearsay evidence may be allowed for the purpose of medical diagnosis or treatment, keep in mind the child- witness must be determined to be competent to testify. *IRMO Taylor*, 202 Ill.App.3d 740 (3d Dist. 1990) held that a non-treating physician could not testify to what a child told him when the child was three-years-old and not competent to testify. In *Taylor*, the appellate court ruled that the trial court erred in admitting the testimony of a physician. The trial court made a finding that the wife's current husband had disciplined the minor child by locking him in a dark closet which caused the child to have nightmares based upon testimony of a physician. The doctor testified that he took notes of his meeting with the child but he had no independent recollection of the conversation. When asked by father's counsel to refer to his notes, the trial court denied the hearsay objection of the mother's attorney. On cross-examination the doctor stated that the child had not been brought to him for treatment and that he had not given any medical advice or treatment. The doctor also testified that he could not determine if the three-year-old told the truth. The appellate court noted the exception for hearsay in reporting to a doctor one's complaints has to do with the fact that the person who is making the statement is otherwise reliable as a witness. The appellate court stated that the three-year-old child's competency to testify was clearly questionable, and that the testimony constituted hearsay not within any exception to the hearsay rule.

Hearsay Exception: Then Existing Mental, Emotional or Physical Condition (State of Mind Exception)

Objection

- ⇨ I object. The question calls for a hearsay answer.
- ⇨ I move to strike the answer as hearsay.

Response

- ⇨ This statement is admissible as a statement of the then-existing mental, emotional or physical condition. I have shown through the testimony of _____ that the statement:
    - ⇨ is of the declarant's then-existing:
        - ⇨ state of mind, or
        - ⇨ emotions; or
        - ⇨ sensation; or
        - ⇨ physical condition.

Explanation: Hearsay evidence of the children's preferences is allowed as an exception to the general rule. *IRMO Rizzo*, 95 Ill.App.3d 636 (1st Dist. 1981); IRMO Siegel, 123 Ill.App. 3d 710 (1st Dist., 1984); and *IRMO Deckard*, 246 Ill.App.3d 427May 14, 2012 (4th Dist. 1993); and *IRMO Gustafson*, 187 Ill.App.3d 551 (4th Dist. 1989) However, this evidence should be limited to state of mind and emotional state. (See also *IRMO Sieck*, 78 Ill.App.3d 204, 218 (1979)). In *Gustafson*, following the court's ruling that the children would not be interviewed, the wife requested testimony from the maternal grandmother concerning statements made by the children. The maternal grandmother testified that the children told her that they were locked out of their home on occasion, that a child saw the father naked, that they were left

at home alone when the father went bar hopping, etc. The trial court denied the father's application for change of custody. The appellate court reversed and remanded with directions. The appellate court addressed the hearsay evidence which was given by the maternal grandmother. The appellate court stated: "The trial court's reasoning would be an argument for always refusing to examine children in custody disputes. The position is contrary to respected authority, and ignores the elements to consider when deciding the propriety of having children testify. (Citations omitted.)" The appellate court continued:

> Hearsay evidence of the children's preferences is allowed as an exception to the general rule. *IRMO Rizzo*, 95 Ill.App.3d 636, 642 (1st Dist. 1981); *IRMO Siegel*, 123 Ill.App. 3d 710 (1st Dist., 1984); and *IRMO Deckard*, 246 Ill.App.3d 427 (4th Dist. 1993). However, this evidence should be limited to state of mind and emotional state. (See also *IRMO Sieck*, 78 Ill.App.3d 204, 218 (1979). We know of no exception to the hearsay rule which would allow most of the testimony given by Helen Stone.

In *Deckard*, on appeal the father complained that the boys were not called as witnesses or examined in camera. The mother responded that the boys were in the physical custody of the father at the time of the hearing and he chose not to bring them to the hearing. The mother also pointed out that the father objected, on the basis of hearsay, to things which were said at a meeting where she and the father discussed the matter with the boys. The appellate court, siding with the mother, stated:

> Conscientious parents may choose not to subject their children to testifying, either in court or in camera (citation omitted) and should not be forced to do so where such testimony would be unnecessary. If the boys' testimony would have supported his position, [the father] could have called them as easily as could [the mother]. Her failure to call them does not weigh against her. (Citation omitted.) Although not an issue on this appeal, we note that children's statements as to whom they prefer as a custodian, or where they desire to live, are admissible under the state-of-mind exception to the hearsay rule. (Citations omitted.)

IRMO Hefer, 282 Ill.App.3d 73 (4th Dist. 1996), discusses allowance of the children's preferences via hearsay testimony. It states, "The more sensitive courts do not specifically ask a child whether he prefers to live with his father or his mother. *IRMO Balzell*, 207 Ill.App. 3d 310, 314 (3d. Dist.1991). A better way than an in camera hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian ad litem, or through professional personnel. *IRMO Wycoff*, 266 Ill.App. 3d 408, 415-16 (4th Dist.1994). It also points out that there are problems with relying on the wishes of the child because it "provides an incentive for parental manipulation and intimidation of the child" plus "an opportunity for the child's manipulation of the parents."

See *IRMO Gustafson*, 187 Ill.App.3d 551 (4th Dist. 1989), which held that while hearsay evidence of the children's custodial preference (limited to state of mind and emotional state exceptions) may be allowed as an exception to the general rule, evidence of parental misconduct should not be admitted through hearsay. (The maternal grandmother testified that the children told her that they were locked out of their home on occasion, that a child saw the father naked, that they were left at home alone when the father went bar hopping, etc.) This testimony was not allowed. The appellate court stated, "We know of no exception to the hearsay rule which would allow most of the testimony given by Helen Stone."

A case limiting the perception that the rules of evidence may differ in custody cases compared to other cases is *IRMO Kutinac*, 182 Ill.App.3d 377 (2d Dist. 1989), where the Second District appellate court held that relaxation of hearsay rule not appropriate in proceedings involving best interest of the children. In *Kutinac*, the person who attempted to mediate the issue of removal submitted her written report and an addendum to the report. The addendum had copies of two letters attached. The letters addressed the physical condition of the mother and the children. Neither the mother or father objected at the hearing to the introduction of the report or addendum in evidence, but at the end of the hearing the father moved to strike the letters as hearsay. The trial judge did not allow the motion to strike the letters since the report of the mediator made reference to them. The appellate court held that this was error. It ruled that the letter was hearsay. It further stated:

> In cases such as the one at bar in which the interests of children are at stake, it is vital for the trial judge to have as complete a picture of the facts as possible in order to determine what course is in the best interests of the children. Relaxation of the rule against hearsay is therefore not appropriate in proceedings involving the interests of children.

Introduction of Section 605 Report: *IRMO Heldebrandt*, 251 Ill.App.3d 950 (4th Dist. 1993) addressed wether the Section 605 report needed to be introduced into evidence. On appeal the appellate court first takes up the issue raised by the father as to whether the report of the counselor must be formally introduced into evidence. The review court ruled that the counselor's report need not be formally introduced into evidence and stated:

> [W]hen a court receives a report pursuant to section 605 of the Act, the court can consider the report as if the contents of that report had been given as direct testimony during a hearing. The court need not receive the report into evidence during a formal proceeding in order to consider the report when reviewing custody or visitation arrangements. Thus, section 605(c) of the Act provides that a report submitted under this section is an exception to the hearsay rule.

Such reports will generally refer to the children's custodial preferences. See also *IRMO Noble*, 192 Ill.App.3d 501 (2d Dist. 1989).

But, *IRMO Hazard*, 167 Ill.App.3d 61 (1st Dist., 1988) held that the parts of Sec. 605 report which contained information that was received by third parties, or otherwise outside the personal knowledge of the investigator, were hearsay and properly struck where the report referred to statements by witnesses who were not called to testify at trial.

Impeachment: Bias, Interest, and Improper Motive

Objection

⇨ (To questions posed on cross-examination) I object. Counsel is attempting to impeach the witness on improper grounds. The testimony attempted to be elicited is irrelevant.

⇨ (To extrinsic evidence) I object. Counsel has not laid the proper foundation for use of extrinsic evidence to impeach. The witness whom counsel is attempting to impeach has:

- ⇨ Not yet been called as a witness; or
- ⇨ was not confronted with the alleged bias, interest or improper motive on cross-examination; or
- ⇨ was confronted with alleged bias, interest or improper motive but did not deny its existence.

Responses

⇨ (to an objection posed on cross-examination) I am attempting to show that the witness is:

- ⇨ biased; or
- ⇨ is prejudiced; or
- ⇨ has an interest in the outcome of this case; or
- ⇨ has an improper motive for giving testimony.

⇨ (to an objection posed to extrinsic evidence)

Impeachment: Learned Treatises

Objection

⇨ I object. This is improper impeachment.

Responses

⇨ This statement is admissible to impeach the expert witness as a statement contained in a learned treatise.
- ⇨ I have called the statement to the attention of the expert; and
- ⇨ the statement is contained in a treatise or periodical written for professional colleagues;
- ⇨ which has been established as a reliable authority by the testimony or admission of the expert witness, by other expert testimony, or by judicial notice.
- ⇨ has an interest in the outcome of this case; or
- ⇨ has an improper motive for giving testimony.

Impeachment: Extrinsic Evidence (The Collateral Evidence Rule)

Objection

⇨ I object. This evidence is collateral.

Responses

⇨ The evidence is non-collateral and is therefore proper extrinsic evidence of impeachment.

Explanation: Impeachment evidence offered outside of (extrinsic to) the cross-examination of the

witness to be impeached is called extrinsic evidence. Extrinsic evidence is therefore defined by timing – at a time other than during cross. To be admissible, extrinsic evidence must be non-collateral, that is, relevant for any purpose other than mere contradiction of the witness. Certain matters are categorically non-collateral: bias, prior convictions, competency of an expert witness. Impeachment by a prior inconsistent statement and by contradiction are governed, on a case by case basis, by the basic definition of non-collateral: if relevant for some purpose other than the mere contradiction.

An additional foundation prerequisite applies to introduction of extrinsic evidence of bias and of a prior inconsistent statement. The proponent must first confront the witness with the facts which show bias or the statement during cross.

Whiting discusses collateral evidence:

> Finally, we address whether the trial court erred when it allowed Officer Cunningham to testify to his general practice in filing a police report but limited cross-examination on the same. A witness may not be contradicted as to collateral, irrelevant or immaterial matters. *Herget National Bank v. Johnson*, 21 Ill.App. 3d 1024 (3d Dist.1974). The decision of whether a matter is collateral lies within the trial court's sound discretion, and a reviewing court will not reverse that decision unless there has been a clear abuse of discretion. *People v. Breton*, 237 Ill.App. 3d 355 (2d. Dist. 1992). Plaintiff contends that Officer Cunningham should not have been allowed to testify that it was his general practice to file a police report if any party to an automobile accident complained of injury, because Cunningham could not remember the details of the accident at issue or whether plaintiff, in fact, [*20] complained of an injury. Given these circumstances, we agree that he should not have been allowed to testify. Even showing him photographs of the scene did not refresh his memory. Accordingly, we find that Officer Cunningham's testimony was not simply collateral but irrelevant. On remand, the trial court should prohibit similar testimony in any future litigation.

Impeachment: Impeachment of One's Own Witness

Objection

⇨ I object. Counsel is impeaching his own witness.

Responses

⇨ Under SCR 238, the credibility of a witness may be attacked by any party, including the party calling the witness.

Impeachment: Memory and Perception

Objection

⇨ I object. The question seeks to elicit irrelevant information; the question involves improper

impeachment.

Responses

⇨ The question calls for an answer that will show the witness's inability to remember the events about which testimony has been given or his inability to perceive. This is proper cross-examination.

Impeachment: Prior Convictions

Objection

⇨ I object. The preferred conviction is improper impeachment.

Responses

⇨ The preferred conviction is admissible because:

- ⇨ The conviction is for a crime punishable by imprisonment for more than one year under the law of _____ where the witness was convicted; or
- ⇨ the conviction is for a crime, which involves dishonesty or false statement; and
- ⇨ the probative value of the conviction is not substantially outweighed by the danger of unfair prejudice; and
- ⇨ less than 10 years have elapsed since the date of the conviction (or the release of the witness from confinement – whichever date occurs later).

Explanation: See 735 ILCS 5/8-101 (method of proof in civil cases). Rule 609 provides:

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

(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.

(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.

(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.

(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.

The commentary to Rule 609 states:

> 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 (1971).

Juvenile Court Adjudications: The official commentary states:

> Rule 609(d) is a codification of the *Montgomery* holding related to the admissibility of juvenile adjudications for impeachment purposes. Rule 609(d) may conflict with section 5–150(1)(c) of the Juvenile Court Act (705 ILCS 405/5–150(1)(c)), which arguably makes such adjudications admissible for impeachment purposes. Concerning that issue, it should be noted that in *People v. Harris*, 231 Ill. 2d 582 (2008), the Supreme Court held that juvenile adjudications are admissible for impeachment purposes when a defendant opens the door to such evidence (in that case, by testifying that "I don't commit crimes"). Because of its holding, which was based on the defendant's own testimony, the court declined to consider whether section 5–150(1)(c) overrides the common law prohibition against such use. The codification of *Montgomery* in Rule 609(d) is not intended to resolve this issue.

Impeachment: Prior Inconsistent Statements

Objection

⇨ I object. The preferred statement is not inconsistent with the witness's testimony and is irrelevant.

Responses

⇨ The statement is inconsistent with the witness's testimony, and I have a good faith basis for asking the questions.

Explanation: Prior inconsistent statements are not hearsay because what is relevant is the inconsistency – not the truth or falsity of the statement. "Inconsistent" is defined loosely: it includes, in addition to directly contradictory statements, those which have a reasonable tendency to discredit the witness's testimony. The examiner's good faith belief means that he must have the ability to prove that the statement was made if it is denied. If the statement is denied and extrinsic evidence is offered, the statement must be non-collateral, i.e., it must relate to something which is relevant apart from the contradiction.

Impeachment: Specific Acts of Misconduct

Objection

⇨ I object. Evidence of specific instances of misconduct is an impermissible form of impeachment.

Response

⇨ There is none.

Judicial Notice

Objection

⇨ I object to the court judicially noticing _____ in that:
- ⇨ it is not **generally known** in this jurisdiction; and/or
- ⇨ it is **not so capable of verification as to be beyond reasonable controversy**.

Response

⇨ Judicial notice of _____ is appropriate because:
- ⇨ the fact is generally known; or
- ⇨ it is capable of verification so as to be beyond reasonable controversy.

Explanation: Section 2-18(6) of the Juvenile Court Act relating to judicial notice in juvenile court proceedings provides:

> In any hearing under this Act, the court may take judicial notice of prior sworn testimony or evidence admitted in prior proceedings involving the same minor if (a) the parties were either represented by counsel at such prior proceedings or the right to counsel was knowingly waived and (b) the taking of judicial notice would not result in admitting hearsay evidence at a hearing where it would otherwise be prohibited. 705 ILCS 405/2-18(6).

In re J.G., 298 Ill.App.3d 617 (4th Dist. 1998), discussed the procedure to take in taking wholesale judicial notice of the proceedings in another cause of action. *J.G.* stated:

> If the State wishes the trial court to take judicial notice of portions of the court file in a particular unfitness proceeding, the State can make a proffer to the court of the material requested to be noticed. Defense counsel should then be allowed an opportunity to object to the State's request. Such a procedure would serve to focus the trial court' attention on only those matters that are admissible under the rules of evidence, as well as make it easier for a reviewing court to determine what the trial court actually relied on in making its decision of unfitness.

See *In Re A.B.*, 308 Ill.App.3d 227 (2d Dist. 1999), and also *Interest of H.C.*, 305 Ill.App.3d 869 (4th Dist. 1999), GDR 99-79 . In both *A.B.* and *H.C.* the trial court took wholesale judicial notice of the entire underlying file instead of following the admonitions from *J.G.* that the party moving for judicial notice should attempt to introduce specific items from the underlying proceeding.

H.C. has an extended discussion of judicial notice. Justice Steigmann, in his Illinois Evidence Manual,

previously noted that "the field of permissive judicial notice is almost limitless" and that "a court may take judicial notice of the proceedings and judgments in other cases in its court or in inferior courts within its jurisdiction where the other proceedings involve substantial and the same parties are the determinate of the pending cause." Robert J. Steigmann, *Illinois Evidence Manual, 3d ed.*, § 2:01, § 2:15. Although Steigmann previously wrote that the field of judicial notice is almost limitless, the Fourth District recently placed some limits on judicial notice on juvenile proceedings. *In Interest of J.G.* (4th Dist. 1998). (Steigmann was not on the panel in *J.G.*) The *J.G.* court held "Wholesale judicial notice of everything that took place prior to the unfitness hearing is unnecessary and inappropriate." This holding is based largely upon the Juvenile Court Act's not limiting the admissibility of information presented at review hearings. A trial court's decision about whether a parent is unfit must be based only on evidence that is properly admitted or admissible at the fitness hearing.

If all ten instances listed in the appendix to Justice Steigmann's dissent (referring to evidence or documents from the review hearings that were not presented at the fitness hearing) were inadmissible, the mother's parental rights should have been terminated based only on evidence presented at the fitness hearing and items from the juvenile court proceedings that would have been properly judicially noticed in the fitness hearing. Justice Steigmann's appendix discussed instances about which no evidence was presented at the fitness hearing. However, Justice Steigmann failed to denote why many items in the appendix would not be admissible at the fitness hearing. The trial court could properly have taken judicial notice of items presented in the juvenile review hearings that would have been admissible in the fitness hearing.
All of the above notwithstanding, Justice Cook's majority opinion also correctly questioned why important evidence from the juvenile review hearings was not admitted at the fitness hearing. Justice Steigmann's Illinois Evidence Manual states in reference to the nature and scope of judicial notice, "Courts should at least know what everyone knows." *Steigmann, Illinois Evidence Manual* § 2:01. Both the State and the mother should have followed the Fourth District's admonition from *J.G.*:

If the State wishes the trial court to take judicial notice of portions of the court file in a particular unfitness proceeding, the State can make a proffer to the court of the material requested to be noticed. Defense counsel should then be allowed an opportunity to object to the State's request. Such a procedure would serve to focus the trial court's attention on only those matters that are admissible under the rules of evidence, as well as make it easier for a reviewing court to determine what the trial court actually relied on in making its decision of unfitness.

Lay Opinion Evidence

Objection

⇨ I object. The question calls for an opinion.

⇨ I move to strike the answer because it is stated in the form of an opinion.

Response

⇨ This is permissible opinion from a lay witness because it is **rationally based on the perception of the witness** and **would help the trial of fact to understand the witness's testimony and determine a fact in issue** in this case.

Leading Questions

Objection

⇨ I object to the question as leading.

Response

⇨ The question does not suggest the answer to the witness; or

⇨ Leading questions are permitted:

- ⇨ on preliminary matters; or
- ⇨ because the witness is hostile, is an adverse party, or is identified with an adverse party; or
- ⇨ the witness is a child or an adult with a communication problem;
- ⇨ the witness's recollection is exhausted; or
- ⇨ this is a redirect examination.

Explanation: See SCR 238(b) (witness who is hostile, unwilling or frightened); and 735 ILCS 5/1-1002 (adverse witness).

Regarding refreshing recollection, see *Reed v. Northwestern Publishing Co.*, 124 Ill.2d 495 (1988). Re redirect examination, see *Cruz v. Golf M. & O. Ry.*, 7 Ill.App.2d 209 (1955).

Rule 611 states:

> (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.

Misquoting the Witness

Objection

⇨ I object. Counsel is misquoting the witness. The witness testified to _____.

Response

⇨ The witness previously testified to _____.

Narrative Testimony

Objection

⇨ I object. The question calls for a narrative response.

Response

⇨ The witness is testifying to relevant and admissible matters.

Non-Responsive Answer (Objection of Questioning Counsel)

Objection

⇨ I move to strike the answer of the witness as non-responsive.

Response

⇨ The answer of the witness is responsive to the question. The question put to the witness was _____.

Explanation: The objection belongs to questioning counsel. Answers which exceed the scope of the question may be subject to a motion to strike on specific substantive grounds including an objection as to the narrative form of the testimony.

Offers of Proof

Form of the Offer

⇨ Ask the witness to state for the record what the witness's testimony would have been if the judge had not excluded it in question and answer format;

⇨ A statement by the counsel who attempted to offer the witness's statement, which provides the substance of what the witness's testimony would have been, but for the adverse ruling; or

⇨ A prepared written statement of the witness's testimony which would have been given, but for the adverse ruling.

Explanation: *IRMO Fields*, 283 Ill.App.3d 894 (4th Dist. 1996), GDR 96-69, included a discussion of offers of proof. The mother in *Fields*, as part of her visitation argument, argued that the trial court erroneously excluded evidence of two witnesses -- Kaine and McGee. Kaine was a former co-worker of the father. The appeals court held that the nature of Kaine's evidence was not obvious and the mother failed to make an offer of proof regarding Kaine's testimony, so the exclusion of Kaine's evidence was waived on appeal. The appellate court held that when the circumstances and the question itself sufficiently indicate the purpose and substance of the evidence sought, and when the question is in proper

form and clearly admits of a favorable answer, a formal offer of proof is not necessary.

Failure to allow a party to make an offer of proof may, in itself, constitute reversible error. *IRMO Marcello*, 247 Ill.App.3d 304 (1st Dist., 1993), GDR 93-55. The appellate court reversed. (This was the case with regular two year reviews of maintenance.)

The importance of making an offer of proof is illustrated by *IRMO Engelbach*, 181 Ill.App.3d 563 (2d Dist. 1989), GDR 89-30, involved a situation of the trial court's error in not allowing the wife the ability to rebut the criminal convictions of the wife's boyfriend for aggravated sexual assault of his own daughter. The appellate court ruled that the trial court erred in not allowing her to rebut the evidence of the criminal convictions but this was not subject to reversible error in light of the failure to make an offer of proof.

Where an offer of proof is necessary, it is error for the circuit court to refuse counsel's request to make one. *Blazina v. Blazina*, 42 Ill.App. 3d 159, 166 (2d. Dist., 2d Dist.1976). An offer of proof is unnecessary, however, when the nature of the proposed evidence is obvious. *Allen & Korkowski & Associates v. Pettit*, 108 Ill.App. 3d 384, 388 (4th Dist. 1982). See also, IRMO Suriano and LaFeber, 324 Ill.App.3d 839 (1st Dist., 2001), where the appellate court also rejected the offer of proof as to a settlement offer deeming the proposed evidence obvious.

The First District Appellate court addressed offers of proof in *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773,(2002): "A party claiming he has not been given the opportunity to prove his case must provide a reviewing court with an adequate offer of proof as to what the excluded evidence would have been." An adequate offer of proof apprises the circuit court of what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose. Pertinent to this case, the purpose of an offer of proof is to disclose to the circuit court and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether the exclusion of the evidence was proper. *Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 241 (1994); see also *People v. Andrews*, 146 Ill. 2d 413, 421 (1992).

The Supreme Court summarized in the 1992 *Andrews* decision summarized these basic principles and stated:

> An offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate. [Citation.] Neither will the unsupported speculation of counsel as to what the witness would say suffice. [Citation.] Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony. [Citation.] The offer serves no purpose if it does not demonstrate, both to the [circuit] court and to reviewing courts, the admissibility of the testimony which was foreclosed by the sustained objection." *Andrews*, 146 Ill. 2d at 421.

Informal Offers of Proof: In 2005, the Fourth District court addressed the mechanics of a proper offer of proof in the context of the trial court's limitation of the parties in a custody case to two non-party witnesses. See *IRMO Miller*, (Fourth Dist., 2005). This case addressed informal offers of proof, i.e., representations as to what a person's testimony would be. The trial court is within its discretion to allow a party to present an informal offer of proof. The case then states the standards the court uses in determining whether to accept a formal offer of proof or to require more detailed testimony:

A trial court may deem an informal offer of proof sufficient if counsel informs the court, with particularity, (1) what the offered evidence is or what the expected testimony will be, (2) by whom it will be presented, and (3) its purpose. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 451 (2004). However, an informal offer is inadequate if counsel (1) "merely summarizes the witness' testimony in a conclusory manner" (*Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003)) or (2) offers unsupported speculation as to what the witness would say (*People v. Andrews*, 146 Ill. 2d 413, 421 (1992)). In deciding whether to permit an informal offer of proof, the court should ask itself the following questions: (1) Are counsel's representations accurate and complete? and (2) Would a better record be made by requiring counsel to make a formal offer of proof, even though doing so might be inconvenient and require more time?

In addition, before deciding whether to accept counsel's representations in lieu of a formal offer, the trial court should ask opposing counsel if he objects to proceeding in that fashion, even though counsel's response in no way limits the court in exercising its discretion on this matter. If opposing counsel concedes the sufficiency of the offer or has no objection to proceeding by counsel's representations, then opposing counsel's client may not later challenge the court's decision to proceed by counsel's representations, rather than a formal offer. [Citations]

We emphasize that a trial court is never required to settle for less than a formal offer of proof, whatever the positions of the parties at trial may be. Whether to do so is left entirely to the court's discretion. Thus, if the trial court is not satisfied that counsel's representations alone are sufficient, the court may require counsel to place his witnesses on the stand and make a formal offer of proof.

But in December 2005, the Supreme Court issued a supervisory opinion regard regarding the *Miller* opinion. The supervisory opinion stated, “The appellate court is directed to vacate the judgment of the Circuit Court of Adams County granting custody of the parties' minor children to Dustin Miller, and to remand to the circuit court, directing the circuit court to hold a new custody hearing with a prior opportunity for the parties to request leave to present more than two witnesses and to make an offer of proof in support of said request(s).”

Original Document Rule (Best Evidence Rule) - Duplicates

Objection

⇨ I object. The preferred testimony (or exhibit) is secondary evidence of the contents of a writing.

Responses

⇨ The original is not required because I am attempting to prove a fact or event by using a writing. The testimony (or exhibit) is offered to prove _____; or

⇨ I am trying to prove a fact or event by using the contents of a writing, although I do not have the original;

⇨ The original is not required under Rule 1004 because:

⇨ Original lost or Destroyed: the original has been shown to be lost or have been destroyed. Original Not Obtainable: the original cannot be obtained by any available judicial process or procedure; or

⇨ Original in Possession of Opponent: the original is in the possession of an opposing party against whom the contents are offered, that party has failed to produce it, and that party has been put on notice, by pleadings or otherwise, that the contents would be subject of proof at trial, or

⇨ Collateral Matters: the matter is collateral.

Explanation: The scheme of the best evidence rule applies only when the proponent seeks to prove a fact or event by using a writing. Typical documents that fall within the rule are written contracts such as premarital agreements when the lawsuit is about the interpretation of such documents. On the other hand, a party may prove a conversation by resort to oral testimony, even if the conversation has been recorded.

See, *IRMO Perry*, 2012 IL App (1st) 113054. Admission of electronic photographs on a flash drive was proper.

> Further, "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" is sufficient for authentication. Ill. R. Evid. 901(b)(9).

Perry commented that under Rule of Evidence 1001, a duplicate is defined as "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." Ill. R. Evid. 1001(4).

Admissibility of Duplicates - Rule of Evidence 1003: "[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." Ill. R. Evid. 1003.

IRMO Collins, 154 Ill.App.3d 655 (2nd Dist. 1987), GDR 87-21, involved the application of the best evidence rule to the issue of attorney's fees petitions. The attorneys' petition for fees alleged that various attorneys in the firm rendered services. The services in the petition were described in general terms. An attachment to the petition showed a summary of hours expended by the various attorneys, showing the date and initials of the person performing the service. The number of hours was then multiplied by an hourly rate for a total amount of fees. An objection to the attorneys' testimony on the basis of the best evidence rule was sustained, the trial court finding that absent the billing statements upon which the summary was based, the petition would be denied." The appellate court held that the best evidence rule was not applicable and that the court erred in barring the lawyers' testimony on that grounds.

Presumptions

Form of Motion

⇨ I move for a directed verdict on (the fact presumed) because my opponent has failed to come forward with sufficient evidence to rebut it.

Response

⇨ A directed verdict is inappropriate because we have produced sufficient evidence to rebut the presumption

Explanation: Presumptions in divorce cases include:

Presumption that property acquired during marriage is marital is canceled by the competing presumption that transfer from parent to child is gift, leaving court to determine under the manifest weight of the evidence if property is marital or nonmarital. See, e.g., *In Re Didier*, 318 Ill.App. 3d 253 (1st Dist., 2000); *IRMO Hagshenas*, 234 Ill.App.3d 178 (2nd Dist. 1992) (which involved conflicting presumptions created by receiving a gift from a parent during the marriage); *IRMO Wesselhoft*, 228 Ill.App.3d 269 (3d Dist. 1992).

IRMO Landfield, 209 Ill.App.3d 678 (1st Dist., 5th Div. 1991) (The presumption that property acquired during the marriage is marital property does not disappear when the party claiming the property to be non-marital introduces some evidence as to its non-marital source under the "bursting bubble" theory of presumptions. The party claiming that property acquired during the marriage is non-marital has the burden of proving it.)

Privileges

Objection

⇨ I object to the admission of evidence on the ground that it is privileged pursuant to _____.

Responses

⇨ This evidence is admissible because:

- ⇨ it does not fall within the privilege; or
- ⇨ if privileged, such privilege has been waived.

Explanation: Privileges include:

- ⇨ **Mental Health Privilege**: 740 ILCS 110/10 – Mental Health and Developmental Disabilities Act (Mental Health Act). (In IMDMA proceeding, mental health only introduced if recipient or a witness on his behalf first testifies concerning the record of communication. Provisions for in camera examination of testimony/documents and determination whether relevant, probative, not unduly prejudicial or inflammatory or otherwise clearly admissible and that other satisfactory evidence is demonstrably unsatisfactory as evidence fo facts sought to be established by the evidence.)

- ⇨ **Physician Patient Privilege**: 735 ILCS 5/8-802; [*Reagan v. Searcy, et al.*] (1st Dist. 2001).
- ⇨ **Public Accountant's Privilege**: 225 ILCS 450/27;
- ⇨ **Reporter's Privilege**: 735 ILCS 5/8-901-909;
- ⇨ **Social Worker Privilege**: 225 ILCS 20/16.
- ⇨ **Abused and Neglected Child Reporting Act**: 325 ILCS 5/1 et seq.

Mental Health Privilege: See *IRMO Troy S. and Rachel S.*, 319 Ill.App. 3d 61 (3d Dist., 2001) holding that written consent of only one parent is necessary for disclosure in a child custody proceeding of confidential records and communications under the Mental Health Act. For a child under twelve, one parent may waive the child's confidentiality and have the child's therapist testify. See also, *IRMO Markey*, 223 Ill.App.3d 1055, 1059 (1991). *IRMO Kerman*, 253 Ill.App.3d 492, 497 (1993).

DCFS Reports and Testimony of Investigators: The relevant provisions of the Abused and Neglected Child Reporting Act (325 ILCS 5/1 et seq. are:

> All records concerning reports of child abuse and neglect... shall be confidential and shall not be disclosed except as specifically authorized by this Act or other applicable law. 325 ILCS 5/11.
>
> Any person who makes a report or who investigates a report under this Act shall testify fully in any judicial proceeding resulting from such report. 325 ILCS 5/10.

Disclosure of records to the court is authorized when the court:

> Upon its finding that access to such records may be necessary for the determination of an issue before such court. 325 ILCS 5/11.1(8)(a).

IRMO Troy S. and Rachel S. addressed the issue of whether such records were necessary for the determination of custody and essentially agreed with the trial court that the evidence was cumulative.

Lawyer/Client Privilege and Crime-Fraud Exception: The fact of consultation or employment of the lawyer, the identity of the client (together with his address and occupation); the scope or object of the employment are outside of the privilege's scope, except where application of the privilege will substantially harm the client.

IRMO Decker, 153 Ill.2d 298 (1992) involved the Illinois Supreme Court's considering the crime/fraud exception where the lawyer refused to disclose where the client was located when the client was suspected of abducting the child. Regarding this slippery slope, the Supreme Court commented, "'In order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper." Regarding the narrow focus of this exception, the Court stated, "if in fact respondent met with contemnor and sought her services in furtherance of criminal activity, child abduction, knowing such action was illegal, the communication would not be privileged under the well-established crime-fraud exception to the attorney-client privilege. Thus, contemnor could not refuse to disclose, by asserting the

attorney-client privilege, the non-privileged contents of that communication after being ordered to do so by the court.... We conclude that an attorney must, when directed by final court order, and after the court has properly determined that information is not privileged, disclose the information to the court." This case should be reviewed as to the procedure to be used to determine the status of attorney client information (reasonable basis to believe objective is fraudulent).

Accountant's Privilege: "A public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant." 225 ILCS 450/27. The language of the statute appears to support the conclusion that this privilege inures to and can be claimed only by the accountant. It only protects information received by the accountant from the client in confidence. Since a client who has the accountant prepare tax returns provides information to his accountant with the understanding that it may be disclosed to third parties, a client's tax returns and the accountant's work papers used to prepare the return are not confidential nor protected by the privilege. *In re October 1985 Grand Jury No. 746*, 124 Ill.2d 466 (1988).

Waiver of Privilege and Procedure: Waiver of a privilege is limited to the subject matter of the confidential communication that was voluntarily disclosed.153 Ill.2d 298 (1992). [Addressing attorney client privilege and the burden and procedure to reach the crime-fraud exception. Procedure to be used may include court's in camera examination of the potentially privileged material. "Good faith belief by a reasonable person,' [citation] that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." "Dictum: it would be prudent, where possible, to have another trial judge conduct the in camera inspection once the initial threshold has been met and the court has determined that an in camera inspection is proper."

Re all privileges for confidential matters, no matter what their origin, the privilege is waived on voluntary disclosure or consent to disclosure of a significant part of the privileged matter. See *Gottemoller v. Gottemoller*, 37 Ill.App.3d 689 (3d. Dist.1976) (written consent to psychiatrist to release records.) See, *Clearly & Graham*, 7th Edition, p. 346 (Sec. 506.1).

Privilege for Law Enforcement Investigatory Information: A post-divorce case addressing the issue of privilege is *IRMO Daniels*, 240 Ill.App.3d 314 (1992), involving the issue of law enforcement investigatory privilege in a case where the ex-husband was suspected of shooting the wife but whether the children were turned over to the ex-husband believing that the wife was "in the line of fire." The case then curiously commented upon the similarity between discovery procedures and FOIA exemptions because clearly the investigative work was not subject to a FOIA request. This case stated, "although not dispositive, "the relation between discovery procedures and FOIA exemptions is well-established." (citations omitted). The case then stated, "Thus, legislation and caselaw in Illinois point to Illinois' recognition of the existence of a qualified privilege for law enforcement investigatory information." This privilege extends both to documents and testimony about the contents of investigatory files. Regarding the minimum showing required before the court must balance the interests the case stated:

> The party seeking to invoke the privilege bears the burden of justifying its application. The government must specify `which documents or class of documents are privileged and for what reasons.' This threshold showing must explain the reasons for nondisclosure with particularity, so that the court can make an intelligent and informed choice as to each requested piece of information. `Unless the government, through competent declarations,

> shows the court what interests [of law enforcement or privacy] would be harmed, how disclosure under a protective order would cause the harm, and how much harm there would be, the court cannot conduct a meaningful balancing analysis.' If the police make no such showing, the court has `no choice but to order disclosure.'" (citations omitted).

The case then stated common law has generally recognized, " (1) a privilege protecting information gathered in the course of an enforcement investigation or proceeding, (2) a privilege against disclosing the identity of informers, and (3) a privilege for information which might compromise the effectiveness of novel investigative techniques." The case then applied a 10 part test regarding application of the privilege in the case

Refreshing Present Recollection

Objection

⇨ I object to the attempt to refresh recollection in the absence of a demonstrated failure of memory.

⇨ I object to the witness's reading from the exhibit used to refresh his recollection because it is not in evidence and because it s hearsay.

Responses

⇨ The witness has shown a failure of memory and I am attempting to refresh his recollection.

Rule 612 states:

> 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 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.

Relevance: Exclusion of Relevant Evidence on Grounds of Prejudice, Waste of Time, or Statutory Exclusion

Objection

- ⇨ I object on the ground that this evidence is inadmissible because its probative value is substantially outweighed by the *prejudicial* effect of the evidence.
- ⇨ The evidence should be excluded due to
  - ⇨ undue delay
  - ⇨ waste of time
  - ⇨ Needless presentation of cumulative evidence.
- ⇨ I object because the evidence is inadmissible because it shows marital misconduct which is not allowed under:
  - ⇨ Section 504(a) of the IMDMA (maintenance) and Section 503(d) property or Section 602(a) custody.

Responses

- ⇨ This is a non-jury family law case. The probative value is not substantially outweighed by the danger of unfair prejudice.

- ⇨ The evidence is corroborative of an issue central to the case.

- ⇨ This evidence is admissible because it demonstrates dissipation of marital or non-marital property;

- ⇨ This evidence is admissible because it demonstrates physical violence or the threat of physical violence by the child's potential custodian that was directed toward a person other than the child pursuant to Section 602(b) of the IMDMA.

Explanation: See Ill. R. Evid. 403.

The probative / prejudicial value balancing rule is usually set forth in criminal cases. We have arguments in family law cases as to exclude evidence on grounds of relevance in custody portion of the statute, maintenance portion of the statute and the property portion of the statute.

Relevance as to Custody: Section 602(b) provides: "The court **shall not consider conduct of a present or proposed custodial that does not affect his relationship to the child**." However, Section 602(a)(6) provides that a relevant factor in determining custody is, "the **physical violence** or **threat of physical violence** by the child's potential custodian, **whether directed against the child or directed against another person**." This provision is similar but more lenient than the standards of Section 602(a)(7) which allows the court to consider the occurrence of "ongoing abuse" as defined in the IDVA "whether directed against the child or directed against another person. Often, in a custody dispute a party will attempt to "backdoor" evidence of misconduct not directed toward a child by asserting that it demonstrates physical violence or the threat of physical violence directed against another person. See, *IRMO Perry*.

See *IRMO Gustafson*, 187 Ill.App.3d 551 (4th Dist. 1989), which held that while hearsay evidence of the children's custodial preference (limited to state of mind and emotional state exceptions) may be allowed

as an exception to the general rule, evidence of parental misconduct should not be admitted through hearsay.

Relevance as to Property: The provision of 503(d) states that the court shall "divide marital property **without regard to marital misconduct**" after considering the statutory factors, one of which is the dissipation factor (503(d)(2)).

Relevance as to Maintenance: A similar provision is contained in Section 504(a) which provides that the court shall determine maintenance "**without regard to marital misconduct**."

Relevance: Rule of Completeness

Objection

- ⇨ I object to the admissibility of the proffered writing unless other portions of the writing or recording are also admitted. These other portions are necessary to explain or put in context the proffered writing (or recording).
- ⇨ I object to the admissibility of the proffered writing (or recording) unless other related writings are also admitted. These are necessary to explain or put in context the proffered writing.
- ⇨ The evidence is merely cumulative.

Responses

- ⇨ The proffered statement does not need explanation or context. Other portions of the statement or additional writings are not necessary to a fair understanding of the proffered statement.
- ⇨ The evidence is corroborative of an issue central to the case.

Explanation:

The balancing rule is usually set forth in criminal cases. We have arguments in family law cases as to exclude evidence on grounds of relevance in custody portion of the statute, maintenance portion of the statute and the property portion of the statute.

Requests to Admit

Since January 1, 2011, there are new rules addressing requests to admit facts. Remember, there must be a warning on the first page of the request (in 12 point or larger boldface type) reminding the recipient of the 28 day deadline to respond. The number of requests for admission is now limited to 30. Requests to admit must be separated from all other discovery. So, a new section (g) provides:

> (g) **Special Requirements**. A party must: (1) prepare a separate paper which contains only the requests and the documents required for genuine document requests; (2) serve this paper separate from other papers; and (3) put the following warning in a prominent place on the first page in 12-point or larger boldface type: "WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this paper, all the facts set forth in the requests will be deemed true and all the documents described in the

requests will be deemed genuine."

As stated the other key limitation is (f) providing:

> (f) **Number of Requests**. The maximum number of requests for admission a party may serve on another party is *30, unless a higher number is agreed to by the parties or ordered by the court for good cause shown*. If a request has subparts, *each subpart counts as a separate request*.

Purpose of Request to Admit is Disputed Ultimate Facts or Facts Needed to Establish a Case or Defense: A request to admit may call for matters to be deemed admitted and therefore not subject to an objection. *Szczeblewski and Meyers v. Gossett* addresses whether, "a Rule 216 request to admit can be used to establish the causal connection between a defendant's conduct and a plaintiff's injuries, the necessity and reasonableness of the medical services received by that plaintiff, and the reasonableness of the cost of the medical services received by that plaintiff." The appellate court stated:

> The Illinois Supreme Court's decision in *P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224 (1998), [PRS] holds the key. According to the holding in P.R.S. International, Inc., a party's failure to respond to a request for admissions may be deemed an admission if the request relates to '"disputed ultimate facts' " or " 'any contested facts needed to establish one's case or defense.' " *P.R.S. International, Inc.*, 184 Ill. 2d at 233 (quoting *P.R.S.*, 292 Ill. App. 3d 956, 963 (1997)). The court explained the language of Rule 216 allowing requests for the admission " 'of the truth of any specified relevant fact.' " (Emphasis omitted.) P.R.S., 184 Ill. 2d at 236 (quoting 134 Ill. 2d R. 216(a)). The court then stated: "[W]hether a fact is an 'ultimate' fact is irrelevant for purposes of this rule. The key question is whether a requested admission deals with a question of fact. Accordingly, requests for legal conclusions are improper; however, requests for admissions of factual questions which might give rise to legal conclusions are not improper." (Emphasis in original.) *P.R.S.*, 184 Ill. 2d at 236. A defendant's conduct as the cause of the occurrence, the necessity and reasonableness of the medical services a plaintiff received to treat his or her injuries, and the reasonable cost of the medical services received are all facts that are proper subjects for a Rule 216 request to admit. See *Hubeny v. Chairse*, 305 Ill. App. 3d 1038, 1043-45 (1999) [Note Hubeny was a decision by Justice Susan Fayette Hutchinson -- previously a trial judge in McHenry County -- where I practice.].

Then the appellate court addressed, "whether a party is required to avail himself of the knowledge of his attorneys or agents before admitting, denying, or making a claim of insufficient knowledge to admit or deny a request to admit." *** "The purpose of a request to admit is not to discover facts but, rather, to establish some of the material facts in a case without the necessity of formal proof at trial. P.R.S., 184 Ill. 2d at 237. The proper use of requests to admit results in a substantial savings of time and expense, both for the parties and the court. *Branch Banking & Trust Co. v. Deutz-Allis Corp*., 120 F.R.D. 655, 657 (E.D.N.C. 1988)." Thus, the appellate court stated, "To ensure that the laudable purpose of Rule 216 is accomplished, a party has a good-faith obligation to make a reasonable effort to secure answers to requests to admit from persons and documents within the responding party's reasonable control."

Hubeny: The above quoted *Hubeny* decision explained that according to PRS, "Only if the request seeks the admission of a conclusion of law will a trial on the issue be required despite the opposing party's

failure to respond." *Hubeny* contained an excellent discussion about the breadth of a request to admit as to legal conclusions versus factual allegations when it stated:

> In other words, a request for admissions is proper if a finder of fact must take some analytical step, no matter how small, from the contents of the admissions to the final conclusion that the party seeks to establish. Whether an action was taken, an event occurred, or a consequence resulted is a question of fact. Even if the admission of that fact plainly requires the fact finder to conclude that a party breached a contract or was negligent as a matter of law, a request for that admission is proper and the failure to respond to it is binding. In accordance with this reasoning, we conclude that paragraph seven of plaintiffs' requests for admissions properly sought the admission of a fact. The paragraph asserted that Janet's failure to observe a red traffic light and the resulting collision caused plaintiffs to suffer bodily injuries requiring over $9,900 in medical expenses and property damage as well. Although Janet may have lacked sufficient knowledge to either admit or deny this assertion, the request still called for the admission of a fact.

Request to File Late Answer to Request to Admit -- Prejudice Irrelevant: A good recent article reviewing the *Vision Point Sale* case below is www.luc.edu/law/activities/publications/lljdocs/vol39_no4/raab.pdf. Also, see January 2008 Illinois Bar Journal article addressing this decision.

We now have two key Illinois Supreme Court cases addressing this issue: The 1995 *Bright* decision and 2007 *Vision Point Sale* decision. The high court first seemed to present a *Bright* line rule that "prejudice was mere absence of inconvenience or prejudice to the opposing party is not sufficient to establish good cause under Rule 183 . . . . The moving party must assert some independent ground for why his untimely response should be allowed." Later appellate court cases were mixed and seemed designed to "soften" the sometimes harsh results of following what seemed to be a strict construction of the *Bright* Case.

In 2007 the Illinois Supreme Court addressed whether the trial court can consider facts and circumstances that go beyond the reason for noncompliance. In *Vision Point of Sale, Inc. v. Haas*, the Illinois Supreme Court ruled:

> We hold that in determining whether good cause exists under Rule 183 to support an extension of time allowing a party to comply with a deadline set forth in our rules, the circuit court may not take into consideration facts and circumstances in the case that go beyond the reason for noncompliance. Accordingly, we reverse the judgment of the appellate court and remand this cause to the circuit court for further proceedings consistent with this opinion. *** *** In our view, the assessment of whether a delinquent party has established good cause to allow the circuit court to excuse that party's noncompliance with the deadlines set forth in Rule 216 may not be so broad as to include the entire "totality of the circumstances" of the case up to that point, including the unrelated conduct of the nonmoving party. To hold otherwise would transform the Rule 183 good-cause determination into an open-ended inquiry allowing matters irrelevant to the discovery process to improperly permeate the analysis. Rather, we believe the better approach is one where the delinquent party presents objective reasons to the court as to why the deadline

was not met.

The *Vision Point Sale* court then provides a good summary of Illinois appellate court cases addressing late answers to requests to admit:

> [O]ur appellate court over time has melded our narrow holding in *Bright*–that the mere absence of inconvenience or prejudice to the nonmoving party alone is insufficient to satisfy the good-cause requirement–with a second, broader, harsher, and apparently inflexible standard that "mistake, inadvertence, or attorney neglect" on the part of the moving party can never serve as the sole basis for establishing good cause to support an extension pursuant to Rule 183. This, in turn, means that under this line of case law, unless the party can present evidence separate and apart from mistake, inadvertence, or attorney neglect to support an argument that there was good cause for the initial delay in compliance, the extension will not be granted. Because Rule 216 provides that failing to respond to a request to admit deems the requested facts admitted, in most instances this result may prove fatal to the case of the delinquent party. *** we believe the problems identified by plaintiff are best resolved by this court today clarifying that we have never held in this context that "mistake, inadvertence, or attorney neglect" is automatically excluded from the trial court's consideration in determining whether good cause exists to grant an extension of time pursuant to Rule 183. Accordingly, those appellate court decisions which have grafted this standard onto the analysis we set forth in *Bright* are overruled.

A recent case to emphasize that prejudice is not relevant in ruling on a late answer to a request to admit is *IRMO Holthaus*, (Second Dist., 2008). The wife argued in this case that the trial court erred in refusing to allow her late response to her husband's request to admit, and thus in striking her response, because there was no demonstrable prejudice to Nicholas as a result of her late response. The appellate court stated:

> Pursuant to Supreme Court Rule 183, a trial court is permitted to extend the time for responding to a request to admit, "for good cause shown." 134 Ill. 2d R. 183; Bright v. Dicke, 166 Ill. 2d 204, 208 (1995). "Although Rule 183 does give judges discretion to allow responses [to requests to admit] to be served beyond the 28-day time limit, that discretion does not come into play under the rule unless the responding party can first show good cause for the extension." Bright, 166 Ill. 2d at 209. The absence of prejudice alone is insufficient to establish good cause under Rule 183. Whether good cause exists is fact-dependent and rests within the sound discretion of the trial court; thus, the trial court's determination will not be disturbed absent an abuse of discretion. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54 (2007).

Another issue is whether a party can object to the form of the questions following the expiration of the 28 day period. In a pre-*Vision Point Sale* case, *Moy* stated:

> Finally, the plaintiffs argue that Ms. Wong's request to admit facts was improper in form and in scope and, therefore, she should be barred from using any of the admissions. However, the plaintiffs failed to object to the request to admit facts as required by Rule 216 and therefore waived any objection to the request. See *Banks v. United Insurance Co.*

> *of America*, 28 Ill. App. 3d 60 (1975) (failure to return written objections to the requesting party with the 28-day period permitted for reply waived any otherwise valid objection to the relevancy of the admissions requested in the notice).

Waivers and Facts Judicially Admitted: A danger at trial is adducing facts already judicially determined based upon a request to admit. The rule is that where facts have been admitted pursuant to a Rule 216 request and the party presents evidence at trial to prove those facts, the admissions are waived and the party must rely on the strength of the evidence adduced at trial." *Magee v. Walbro, Inc.*, 171 Ill. App. 3d 774, 780 (1988). *Hubeny* contains an excellent discussion as to the argument for waiver in this regard.

Regarding the interplay of a trial court's improperly allowing late answers and the waiver issue, the *Moy* court stated:

> Where facts have been admitted pursuant to a Rule 216 request and the party presents evidence at trial to prove those facts, the admissions are waived, and the party must rely on the strength of the evidence produced at trial. *Magee*, 171 Ill. App. 3d at 780. However, it would be unjust to apply that rule where a trial court erroneously has allowed an untimely and improper response to a request to admit facts, since the party requesting the admissions is left with little choice but to present evidence at trial. See *Magee*, 177 Ill. App. 3d at 780.

How is the Answer to Request to Admit to be Signed?: *Moy v. Ng*, 793 N.E.2d 919 (1st Dist. 2003), had held that the signature must be that of the party (not the lawyer) and that the copy that is served is the one that must be signed (and not the one filed). The *Vision Point Sale* is one more decision emphasizing that a verified signature constitutes a sworn statement:

> Adding an unsworn signature to a document that is already sworn to under oath by virtue of the section 1–109 verification by certification does nothing to make that document more binding or effective. We therefore hold that the section 1–109 verification constituted the very "sworn statement" that Rule 216 requires. To the extent that the *Moy* case holds otherwise, that decision is overruled.

Vision Point Sale also noted that local rules regarding requests to admit cannot in essence trump the requirements of the Supreme Court Rules (Circuit courts, however, "are without power to change substantive law or impose additional substantive burdens upon litigants." So, the court emphasized that was critical was service and not filing of the request to admit. An apt discussion states:

> Rule 216(c) only requires that responses to requests for admissions be served on the opposing party within the specified time period. When a response is filed with the court is irrelevant. Indeed, filing is not even necessary under the rule. The only purpose it serves is to help document when a responding party has acted within the rule's time limits." (Emphasis in original.) *Bright*, 166 Ill. 2d at 207.

Robbins v. Allstate, (2005) addressed the effect of an imperfect response to a request to admit and held that the trial court properly considered matters as deemed admitted when the party does not submit a sworn statement denying the matters. The case states, "Plaintiff, however, fails to show good cause for

allowing a late, conforming response to be served upon defendant." "Case law clearly establishes that 'good cause' is not simply mistake, inadvertence, or neglect. *Glasco*, 347 Ill. App. 3d at 1073. Nor is it an absence of prejudice to the opposing party. *Bright*, 166 Ill. 2d at 209. (1995). These rules apply even where a party represented himself, pro se.

> It is well established that parties proceeding pro se must follow all of the rules of procedure to which attorneys are held. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 528 (2001); *People v. Vilces*, 321 Ill. App. 3d 937, 940 (2001); *Athens v. Prousis*, 190 Ill. App. 3d 349, 356 (1989). A litigant is not entitled to the application of a more lenient standard simply because he or she is not represented by counsel. In re A.H., 215 Ill. App. 3d 522, 529-30 (1991); *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 450-51 (1983). This rule is necessary, for, without it, litigation involving unrepresented parties would frequently grind to a halt, as courts undid mistakes made by pro se litigants. Thus, that the rule involved here is somewhat technical, that plaintiff was unrepresented at the time, and that he may not have fully understood the rule are irrelevant.

Speculative Evidence

Objection

⇨ Objection. Speculative.
⇨ I move to strike the testimony since it is based upon speculation of the witness.

Explanation: Case law discussing speculative evidence includes the *Parks* case discussed above. See also, *Butler v. Kent*, 275 Ill.App. 3d 217 (1st. Dist., 1995) (court may reject evidence that is not helpful in proving a matter in controversy when the inference to be drawn is too vague or conjectural).

Summaries

Objection

⇨ Objection. To introduce a summary, the originals, or duplicates, must have been made available for examination or copying, or both prior to introduction. In addition, the party seeking the admission of the summaries must be able to provide the testimony of a competent witness who have seen the original documents and can testify to the facts contained therein. This has not been done.

Explanation: See Rule 1006 and case law such as *DeLarco* (cited above).

12 Critical Objections

Most objections will fall within one of the following categories. See the Objection Trial Simulation Series.

Argumentative
Best Evidence
Conclusion
Facts Assumed
Hearsay
Irrelevant
Leading
Multiple
Privileged
Repetitive
Speculative
Vague

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