

The 2011 ILLINOIS RULES OF EVIDENCE

April 25, 2017

- ## Brief overview of the Rules
- Illinois Supreme Court
 - Justice Fitzgerald
 - Blue ribbon committee
 - Make it easier for judges and lawyers to locate the right rule

- ## Codification and Modernization
- Organize the rules as the law exists now
 - Suggested modernizations
 - All statutes governing evidence law remain intact

- ## Brand new rules
- Carry and cite
 - Cleary & Graham, DiVito, FRE case law
 - Appellate review?
 - Make a thorough record

- ## Motions in Limine
- Best tool for getting evidentiary rulings right
 - Consider the consequences of appeal
 - Bad facts make bad law

- ## Organization of Rules
- 100s preliminary questions
 - 200 Judicial Notice
 - 300 Burdens, presumptions
 - 400s Relevance and limits
 - 500 Privilege
 - 600s Examination of witnesses

Know your numbers

- 700s opinions
- 800s Hearsay
- 900s Authentication
- 1000s Requirements of Original (Best Evidence Rule)
- 1100s Miscellaneous

Illinois Rule of Evidence 102

- Elevator rule
- General rule of interpretation
 - > Secure fairness
 - > Truth
 - > Proceedings justly determined

IRE 103 Rulings on Evidence

- Contra to 2000 FRE amendment
 - > Renew objection
 - > State specific grounds
 - > Cautionary rule—ID all potential theories of admissibility

IRE 104(a)

- The judge is a grown up
- Codifies case law
- Better than citing Patterson case
 - > Bottom line—hearsay is admissible in pretrial hearing to determine admissibility
 - > Is it reliable?

IRE 105



IRE 105

- Doctrine of Limited admissibility
- Limiting instruction on request
- When one door is closed, many more are open

P. vs. Marley



IRE 106

- ⦿ Adopted rule of completeness
- ⦿ People v. Marley
- ⦿ Double murder, Sheriff and deputy
- ⦿ "I shot the sheriff...."
- ⦿ DVR rule
- ⦿ Only applies to writings or recorded statements—not conversations

Illinois Rule of Completeness

- ⦿ Broader than FRE
- ⦿ Covers related documents
- ⦿ Use this to your advantage
- ⦿ Arrange all statements by witness
- ⦿ Look for opposing counsel to misrepresent what witness said

Judicial Notice IRE 201

- ⦿ Adjudicative facts
- ⦿ Different effect in criminal cases
 - > Not mandatory—jury can ignore
 - > So not at any stage
 - > Use limiting instruction—tell the jury it can accept or reject the judicially noticed fact

Ways to prove character

- ⦿ Reputation
- ⦿ And now opinion
- ⦿ Still no Michelson impeachment allowed

OTHER ACTS EVIDENCE

- ⦿ IRE 404(b)
- ⦿ Plus statutes
- ⦿ And must provide notice IRE 404(c)
- ⦿ IRE 405(b) Lynch evidence
- ⦿ Specific acts by victim
- ⦿ Broader than the federal rule

Howard and Ashland White Hen Pantry 1984, "The usual?"



IRE 406 HABIT

- ⦿ Propensity, conforming conduct evidence to prove you act in a certain way without reflection
- ⦿ 2 requirements
 - > Frequency
 - > Particularity

IRE 406 HABIT

- ⦿ Identical with FRE 406
 - > Regardless of eyewitnesses
 - > No need for corroboration

Habit evidence

- ⦿ Not criminal tendencies
 - > Drunk
 - > Thief
 - > Also applies to routine practice of organization

Plea negotiations IRE 410

- ⦿ Narrower than federal rule—doesn't preclude admissibility in civil cases
- ⦿ Broader than the federal rule with respect to whom the negotiations can be made
- ⦿ Possible application to conversations with police

IRE 607 Impeachment

- ⦿ No vouching—anyone can impeach
- ⦿ But if you called witness—must show affirmative damage
- ⦿ If it is only offered to impeach

If impeaching statement comes in

- ⦿ Admission
- ⦿ Prior inconsistent statement under oath at proceeding
- ⦿ Prior consistent statement to rebut
- ⦿ Any 803 exception
- ⦿ No need to show affirmative damage

Affirmative Damage

- ⦿ To impeach a witness you call
- ⦿ More than surprise
- ⦿ More than disappointment
- ⦿ Witness's testimony gives positive aid to an adversary's case
 - > Not failure to testify as expected or claims lack of recollection
 - > E.g., witness denies prior statement implicating accused and now says another person shot victim

Still no FRE 608(b) impeachment

- ⦿ *People v. Santos* 211 Ill.2d
- ⦿ But OK to ask about disreputable occupation of witness

Impeachment by conviction

- ⦿ Felony *Williams, Montgomery* still good law
- ⦿ 1971 version of FRE 609
- ⦿ Felony convictions to impeach defendant subject to 403 balancing test
- ⦿ Crimes of dishonesty—subject to 403 balancing test

Convictions admissible to impeach

- ⦿ Get pre-trial ruling
- ⦿ To preserve the issue on appeal the defendant must testify
- ⦿ 10 year limit
 - > Calculated from date of conviction or release from confinement whichever is later

IRE 611©

- ⦿ Leading questions on direct examination
- ⦿ As may be necessary to develop testimony
 - > Hostile or unwilling witness
 - > Party or agent of adverse party
 - > Narrower than FRE—still TC's discretion

Prior Inconsistent Statement



Impeachment with prior inconsistent statement

- IRE 613(a) method of questioning
- No need to show to witness at time of questioning

Proving the Inconsistent Statement

- IRE 613(b) Extrinsic evidence to prove up impeachment
 - > Witness must have opportunity to explain or deny
 - > Doesn't apply to admissions by party/opponent

Lay Opinion

- IRE 701(c) no lay opinion on areas where expert required
- Prevents discovery violations

IRE 703

- *Wilson v. Clark* survives
- Expert may state the underlying basis of opinion even if inadmissible (Hearsay)

Hearsay

- Still no present sense impression, learned treatise exceptions
- Past recollections recorded can be offered in by the party calling the forgetful witness
 - > *People v. Olson* 59 Ill.App.3d 643 (1978)

Public Records

- ⦿ 803(8) Public Records and Reports
 - > Activities of office or agency
 - > Matters observed pursuant to duty
 - Unlike FRE --No factual findings/conclusions

Ancient Documents

- ⦿ 20 is the new 30
- ⦿ Found in proper place
free of evidence of tampering

IRE 803(24)

- ⦿ Receipt or paid bill as prima facie evidence of payment
- ⦿ No federal analogy



IRE 806 Attacking hearsay declarant

- ⦿ Pretend the hearsay declarant took the stand
- ⦿ Same impeachment tools available
 - > Bias
 - > Sensory perception
 - > Character for truthfulness
 - Character witness (opinion or reputation)
 - Prior convictions

Impeaching hearsay Declarant

- ⦿ Prior inconsistent statement
- ⦿ Contradiction
 - > Prior inconsistent statement no opportunity to deny or explain
 - > Caveat—the party using the declarant's testimony can repair attacks as well

IRE 902 (11) Self-authenticating

- ⦿ Business records with an affidavit
 - > Written notice to opponent
 - > Copies of record and certificate from custodian/otherwise knowledgeable witness

IRE 1101(b)

- ⦿ Rules do not apply to
 - > IRE 104(a) preliminary questions of fact
 - > Grand jury
 - > Extradition, rendition, preliminary hearings, sentencing,
 - > Revoking probation
 - > Conditional discharge or supervision
 - > Issuing warrants
 - > Bail hearings
 - > Summary contempt

This means you can use hearsay

- ⦿ Has to be reliable
- ⦿ Has to be fair to let this evidence in
- ⦿ Caveat in probation violations

Revoking Probation

- ⦿ Probation violations—split in authority
- ⦿ Still must be reliable
- ⦿ Recommend using the rules unless proof of technical violation

Bottom Line

- ⦿ Numbered rules
- ⦿ Organized
- ⦿ Easily cited
- ⦿ Waiting on appellate interpretation
- ⦿ Check your theory of admissibility
- ⦿ Analyze all statements
- ⦿ Argue in the alternative