

ARTICLE VIII HEARSAY

FEDERAL RULES OF EVIDENCE (effective as of Dec. 1, 2011)	FEDERAL RULES OF EVIDENCE (prior to Dec. 1, 2011 amendments)	ILLINOIS RULES OF EVIDENCE
Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay	Rule 801. Definitions	Rule 801. Definitions
	The following definitions apply under this article:	The following definitions apply under this article:
(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.	(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. “Declarant” means the person who made the statement.	(b) Declarant. A “declarant” is a person who makes a statement.	(b) Declarant. A “declarant” is a person who makes a statement.
(c) Hearsay. “Hearsay” means a statement that:	(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(1) the declarant does not make while testifying at the current trial or hearing; and		
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.		

Author’s Commentary to Ill. R. Evid. 801(c)

IRE 801(c) is identical to the pre-amended federal rule. See *People v. Carpenter*, 28 Ill. 2d 116 (1963) (offering the same definition of hearsay). Note that, except for the Rule 801(d)(1) analysis given below, the fact that the witness is both the out-of-court declarant and the witness is not relevant in hearsay analysis. In *People v. Lawler*, 142 Ill. 2d 548 (1991), well before Illinois adopted codified evidence rules, the supreme court said this about the non-admissibility of such evidence:

“The State argues that a statement from a witness as to his own prior out-of-court statement cannot violate the hearsay rule, because the witness will testify at trial with the safeguards

of an oath and cross-examination, reducing the risk of perjured testimony. Adoption of the State’s rationale would essentially obliterate a good portion of the hearsay rule. As has been noted, ‘[t]he presence or absence in court of the declarant of the out-of-court statement is * * * irrelevant to a determination as to whether the out-of-court statement is hearsay.’ M. Graham, Cleary & Graham’s Handbook of Illinois Evidence § 801.1, at 564-65 (5th ed. 1990). See *People v. Spicer* (1979), 79 Ill. 2d 173, 179, 402 N.E.2d 169 (where this court held that prior inconsistent hearsay statements of an in-court witness cannot be used as substantive evidence).”

In *People v. Lambert*, 288 Ill. App. 3d 450 (1997), also well before Illinois' adoption of codified evidence rules, the appellate court provided this explanation for the non-admission of out-of-court statements even when the declarant is the witness:

"Illinois follows the common-law rule that, where admission is allowed, a prior consistent statement is permitted solely for rehabilitative purposes and not as substantive evidence. The rationale for this common-law rule is that corroboration by repetition preys on the human failing of placing belief in that which is most often repeated. Credibility should not depend upon the number of times a witness has repeated the same story, as opposed to the inherent trustworthiness of the story. Where the common law applies and a prior consistent statement is admitted into evidence, an instruction from the court instructing the jury of its limited rehabilitative purpose is proper."

Lambert, 288 Ill. App. 3d at 457-58 (citations and internal quotation marks omitted). It should be noted that the quoted statement from *Lambert* is consistent with Illinois' common-law holdings on the non-admission, as substantive evidence, of prior consistent statements, which explains why FRE 801(d)(1)(B) was not codified in the Illinois evidence rules. Consistent with the quoted statement, in Illinois prior consistent statements, even those admitted "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," are admitted for rehabilitative purposes and not admitted substantively as non-hearsay or as an exception to the hearsay rule.

Note, however, that hearsay analysis is different under IRE 801(d)(1)(A) and (B) when the out-of-court declarant is also the witness. That is so because, under the first part of Rule 801(d)(1), an out-of-court statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the other

requirements of the rule are satisfied. In those instances, the fact that the out-of-court declarant and the in-court witness is the same person is relevant to admissibility.

When an out-of-court statement is offered for a proper purpose other than "to prove the truth of the matter asserted," it is not hearsay. See, e.g., *People v. Prather*, 2012 IL App (2d) 111104 (where defendant was charged with the offense of committing an aggravated battery on a victim whom he knew was pregnant, evidence from the victim that she showed defendant a home pregnancy test that indicated she was pregnant was not inadmissible as hearsay because it was not offered to establish that the victim was pregnant, but to prove that defendant had notice or knowledge of the substantial probability that the victim was pregnant when defendant committed the offense); *People v. Carpenter*, 190 Ill. 2d 116, 121(1963) (using Wigmore's example of witness A testifying that "B told me that event X occurred." If A's testimony is offered for the relevant purpose of establishing that B said this, it is admissible; if offered to prove that event X occurred, it is inadmissible).

When out-of-court statements are offered to provide context for other admissible statements, they are not hearsay because they are not admitted for their truth. See e.g., *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012) (citing other cases and holding that recorded statements of confidential informant admitted into evidence were not hearsay because they provided context for defendant's responsive statements in sale of crack cocaine prosecution, and thus did not violate Confrontation Clause under *Crawford* analysis).

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

Citing its own precedent and that of other federal circuits, the Seventh Circuit Court of Appeals has pointed out that a *question* is neither a “statement” or an “assertion” under Rule 801(c). *U.S. v. Love*, 706 F.3d 832 (7th Cir. 2013) (quoting the 1972 advisory committee’s note to FRE 801(a) that “nothing is an assertion unless intended to be one,” in holding that a question is not hearsay).

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

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

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

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

(d) Statements which are not hearsay. A statement is not hearsay if—

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

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

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

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

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

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

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

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

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

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

or at a trial, hearing, or
other proceeding, or in a
deposition, or

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

(C) identifies a person as
someone the declarant per-
ceived earlier.

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

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

Author's Commentary to Ill. R. Evid. 801(d)(1)

As indicated in the Author's Commentary to Ill. R. Evid. 801(c), **FRE** 801(d)(1)(B) has not been adopted, because Illinois does not allow such consistent statements to be admitted substantively, but only for rebuttal or rehabilitative purposes. See further commentary below.

FRE 801(d)(1)(A) applies both to civil and criminal cases. **IRE** 801(d)(1)(A)(1) is identical to pre-amended **FRE** 801(d)(1)(A), but it does not apply to civil cases. The Illinois rule applies only to criminal cases. Thus, in civil cases, prior inconsistent statements under oath are not substantively admissible as "not hearsay" in Illinois.

Both **IRE** 801(d)(1)(A)(1) and **IRE** 801(d)(1)(A)(2) represent the codification of section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1), which is provided in the appendix to this guide at **Appendix I**. For that reason, although **IRE** 801(d)(1)(A)(2) broadens the scope of **FRE** 801(d)(1)(A) in criminal cases, it does not represent a change in Illinois law.

In criminal cases, **IRE** 801(d)(1)(A)(1), like **FRE** 801(d)(1)(A), allows substantive admissibility (*i.e.*, admissible to prove the truth of the matter asserted) for prior inconsistent statements made under oath.

That is so because, under the rule, they are admissible as "not hearsay." In criminal cases, **IRE** 801(d)(1)(A)(2) also gives substantive weight, as "not hearsay," to a prior inconsistent statement of a witness that narrates, describes, or explains events or conditions about which the witness had personal knowledge, when (a) the statement is proved to have been written or signed by the witness, or (b) the witness acknowledges at the relevant proceeding or another proceeding or deposition having made the prior statement, or (c) the witness's prior statement is proved to have been accurately electronically recorded.

Note that to be admitted substantively under **IRE** 801(d)(1)(A)(1), a prior *under-oath* inconsistent statement of a witness, who is subject to cross-examination concerning the statement, need only be inconsistent with the witness's current testimony. Whether the prior *under-oath* inconsistent statement is based on what the witness was told by another, rather than what he personally perceived, is irrelevant. In contrast, to be admitted substantively under **IRE** 801(d)(1)(A)(2), prior statements of the witness that were not made under oath must narrate, describe or explain events or conditions about which the witness had "personal knowledge," not statements narrating what was told to him about

an event by another. For a case discussing the difference, see *People v. Wilson*, 2012 IL App (1st) 101038 (witness's entire prior inconsistent statement made under oath to the grand jury was substantively admissible although it was based in part on what the defendant told the witness; however, portions of audiotaped and handwritten statements of the witness that narrated what the defendant told the witness were inadmissible, while portions that narrated what the witness personally perceived were admissible). See also *People v. Harvey*, 366 Ill. App. 3d 910, 921-24 (2006) (same rulings concerning witnesses' grand jury testimony and their written statements). See also *People v. Morgason*, 311 Ill. App. 3d 1005 (2000) (though all other requirements of the statute were met, the witness's recorded statement did not narrate events within her personal knowledge, but what was told to her by defendant, and was therefore improperly admitted); *People v. McCarter*, 385 Ill. App. 3d 919 (2008) (in a handwritten statement and in a videotaped statement, some of what witness stated was told to her and thus not admissible substantively under the statute, and some of what she stated was personally seen by her and thus was substantively admissible).

The effect of these IRE 801(d)(1)(A) rules is to provide, when the rules' provisions are satisfied in criminal cases, not only impeachment value to prior inconsistent statements, but also substantive weight to such statements — in contrast to the earlier (pre-statute) holding in *People v. Collins*, 49 Ill. 2d 179, 194-95 (1971), where the supreme court refused to adopt an early *draft* of what was then FRE 801(d)(1) to extend substantive effect to prior inconsistent statements (even those not under oath), permitting their continued use only for impeachment purposes.

In plain terms, application of each rule means that the trier of fact is permitted to go beyond solely believing or disbelieving the witness's testimony at the relevant proceeding (which is the consequence of evidence that has only impeachment value), because the trier of fact may give substantive weight

even to the witness's prior inconsistent statement. It thus permits a prosecutor, in some cases where such evidence has been admitted, to avoid a directed verdict; and, in all cases where such evidence has been admitted, to argue that evidence substantively (rather than solely for impeachment purposes) in encouraging the trier of fact to base its decision upon the prior inconsistent statement.

It should be noted that, when prior inconsistent statements are not admitted as substantive evidence, they still have impeachment value (*i.e.*, for the purpose of attacking the credibility of the witness). But when a party impeaches its own witness (in either a civil or a criminal case), that party must be aware of and abide by the provisions of IRE 607, which prohibits use of a prior inconsistent statement to impeach one's own witness, except where there is "a showing of affirmative damage" — unless the prior inconsistent statement is substantively admissible. A party's mere disappointment in the testimony of the witness is an insufficient basis for allowing impeachment. Failure to support a party's case is inadequate; the witness's testimony must give positive aid to the other party's case. For a discussion of these principles, see *People v. McCarter*, 385 Ill. App. 3d 919 (2008).

Cases relevant to whether prior statements of witnesses are "inconsistent" include: *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989) ("determination of whether a witness' prior testimony is inconsistent with his present testimony is left to the sound discretion of the trial court"); *People v. Sykes*, 2012 IL App (4th) 100769 (trial court has discretion in determining whether a witness has acknowledged making a prior inconsistent statement); *People v. Dominguez*, 382 Ill. App. 3d 757, 770 (2008) (admissibility of prior inconsistent statements is not affected by witness's efforts to explain it; resolution of inconsistencies is for the trier of fact).

In *People v. Vannote*, 2012 IL App (4th) 100798, a split decision, the appellate court construed and applied section 115-10.1 of the Code of Criminal

Procedure of 1963, the statutory basis for IRE 801(d)(1)(A). In that case, the victim of the defendant's alleged offense of aggravated criminal sexual abuse was 9 years old at the time of the offense, and 11 years of age at the time of trial. He testified that he remembered none of the events of the day in question and did not remember a police interview or what he said during it. The trial court admitted into evidence both the videotaped interview, which was played for the jury, and its transcript. On appeal, the appellate court affirmed the conviction, holding that the recorded interview was properly admitted under section 115-10.1. The court relied on cases that held that prior statements do not need to directly contradict testimony given at trial to be considered inconsistent, and that the term "inconsistent" includes evasive answers, silence, or changes in position. The court concluded that the victim's previous statement, recorded the day after the incident, was inconsistent with his trial testimony and sufficient to constitute a prior inconsistent statement. The court also held that there was no confrontation violation because the victim was personally present during trial and was subject to cross-examination.

Note that **FRE** 801(d)(1)(B), which makes prior consistent statements of witnesses substantively admissible when "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," has not been adopted. That is so because, as stated *supra*, Illinois allows such statements to be admitted, but only for rebuttal or rehabilitative purposes, not substantively. See *People v. Harris*, 123 Ill. 2d 113 (1988) (to rebut a charge of recent fabrication, consistent statement made prior to the time when the witness had a motive to fabricate is admissible); *People v. Walker*, 211 Ill. 2d 317, 344 (2004) (prior consistent statement is not admissible substantively, but only for the limited purpose of rebutting inferences

that the witness is motivated to testify falsely or that the testimony is of recent fabrication); *People v. Johnson*, 2012 IL App (1st) 091730, ¶¶ 57-67 (holding that, because there was no allegation of recent fabrication or recent motive to lie, introduction of prior consistent statements was improper); *People v. Denson*, 2013 IL App (2d) 110652, ¶¶ 25-29 (defendant's cross-examination that witness's testimony about offender's height in deposition taken six years after the murder was more accurate than her trial testimony on that subject allowed State to properly elicit from witness, "to address the improper insinuations raised by the defendant," her statement to police immediately after the offense about offender's height).

The common-law rule continues to apply in Illinois: a prior consistent statement is admissible for rebuttal or rehabilitative purposes if it was made before the existence of an alleged motive to testify falsely or prior to an alleged fabrication; but it is not substantively admissible and thus does not qualify as "not hearsay" (as the federal rule provides) or as an exception to the hearsay rule.

IRE 801(d)(1)(B) (addressing substantive admissibility of evidence of prior identification), though bearing a different number designation, is identical to pre-amended **FRE** 801(d)(1)(C). It does not represent a change in Illinois law because section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12), which is provided in the appendix to this guide at **Appendix J**, also gives substantive weight to such identification evidence. Under the Illinois rule, it applies only in criminal cases.

For the Committee's views on these rules, see section (5) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

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

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

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

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

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

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

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

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. ~~The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).~~

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy, or (F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

Author's Commentary to Ill. R. Evid. 801(d)(2)

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

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

fine the statements that are covered by this hearsay exception.

Note also that, as is the case under IRE 801(d)(1), an out-of-court statement that satisfies IRE 801(d)(2) requirements is admitted substantively as “not hearsay,” not as an exception to the hearsay rule. Formerly, such statements were admissible substantively as exceptions to the hearsay rule. See *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998). As a matter of fact, in *People v. Denson*, 2013 IL App (2d) 110652, noting that the defendant cited to cases that contain holdings that “define coconspirator statements as an exception to the traditional definition of hearsay,” the appellate court pointed out that such holdings have “been radically modified by the Illinois Rules of Evidence.” The court explained: “Rather than continue to refer to such statements as an exception to the hearsay rule, and thus substantively admissible, the Rules have defined such statements as not hearsay.” *Denson*, at ¶ 5. The core issue addressed in *Denson* was whether certain statements made by coconspirators to non-conspirators were substantively admissible under the common law and under IRE 801(d)(2)(E). The appellate court found that some of the statements qualified as statements in furtherance of the conspiracy and thus were substantively admissible, while others were mere narrative and thus were not substantively admissible because they were not made in furtherance of the conspiracy.

A tacit or implied admission by a defendant in a criminal case is an example of an 801(d)(2)(B) statement. The elements of such an admission are: (1) the defendant heard the incriminating statement, (2) the defendant had an opportunity to reply and remained silent, and (3) the incriminating statement was such that the natural reaction of an innocent person would be to deny it. *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003), citing *People v. Goswami*, 237 Ill. App. 3d 532, 536 (1992), which in turn cited *People v. McCain*, 29 Ill. 2d 132, 135 (1963).

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

Rule 802. The Rule Against Hearsay

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

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

Rule 802. Hearsay Rule

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

Rule 802. Hearsay Rule

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

Author's Commentary to Ill. R. Evid. 802

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

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

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

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

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

Author's Commentary to Non-Adoption of Fed. R. Evid. 803(1)

In Estate of Parks v. O'Young, 289 Ill. App. 3d 976 (1997), the court noted that it was unaware of any Illinois case that applied the present sense impression exception; see also *People v. Stack*, 311 Ill. App. 3d 162 (1999) (citing *O'Young*). But note that in *People v. Alsup*, 373 Ill. App. 3d 745 (2007), the

court relied on the present sense exception, as well as the business records and the excited utterance exceptions, to approve admission of ISPERN radio communications during a police chase of a stolen vehicle that resulted in a homicide.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Author's Commentary to Ill. R. Evid. 803(2)

IRE 803(2) is identical to the pre-amended federal rule. This exception to the hearsay rule generally has been referred to in Illinois cases as the "spontaneous declaration" exception. For case interpretation, see *People v. Sutton*, 233 Ill. 2d 89, 107 (2009) ("there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence"); *People v. Williams*, 193 Ill. 2d 306,

352 (2000); *People v. Damen*, 28 Ill. 2d 464 (1963); *People v. Burton*, 399 Ill. App. 3d 809 (2010). For a recent case applying this exception, see *People v. Connolly*, 406 Ill. App. 3d 1022 (2011), where, in reviewing a conviction for domestic battery, the appellate court held that (1) the out-of-court statements of the defendant's wife qualified as excited utterances and sufficiently justified the conviction, despite the wife's contrary testimony at trial, and (2) the wife's excited utterance was not a "testimonial statement" and thus did not violate the

Confrontation Clause pursuant to the holding in *Crawford v. Washington*, 541 U.S. 36 (2004).

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

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

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

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

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

Author's Commentary to Ill. R. Evid. 803(3)

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

IRE 803(3)(B) (concerning the non-admissibility of one declarant's state of mind, emotion, sensation, or physical condition to prove another declarant's state of mind, emotion, sensation, or physical condition) is added merely to clarify what is implicit in the federal rule and explicit in Illinois. See, e.g., *People v. Lawler*, 142 Ill. 2d 548, 559 (1991) (evidence of complainant's statement improperly admitted where State did not use the statement solely as evidence of complainant's state of mind regarding whether she consented to intercourse, and State's closing argument showed that statement

was used as substantive evidence of its contents — that defendant had a gun and that she could not get away); *People v. Cloutier*, 178 Ill. 2d 141, 155 (1997) (statements of declarants that defendant displayed victim's body to them in effort to force them to submit to his wishes were inadmissible on issue of whether defendant's sexual conduct with victim was achieved by use of force — defendant was not the declarant and the declarants' statements had no bearing on defendants' state of mind when he killed victim). As the supreme court pointed out in *Cloutier*, "Under [the state of mind] exception, an out-of-court statement of a declarant is admissible when that statement tends to show the declarant's state of mind at the time of utterance. [Citation]

In order to be admissible, the *declarant's* state of mind must be relevant to a material issue in the case." *Cloutier*, 178 Ill. 2d at 155. For a recent appellate case applying IRE 803(3)(B) in holding that a statement was not admissible under this state-of-mind exception to the hearsay rule, see *People v. Denson*, 2013 IL App (2d) 110652, (holding that the statement was improperly admitted as shown by the General Commentary of the Committee (see the last sentence of the Commentary to IRE 803 on page 6 of this guide): "Consistent with prior Illinois law, Rule 803(3)(B) provides that the hearsay exception for admissibility of a statement of intent as tending to prove the doing of the act intended applies only to the statements of intent by a declarant to prove her future conduct, *not the future conduct of another person.*" (Emphasis added by the court.)) *Denson*, at ¶ 23.

Note that, though the Illinois rule is substantively identical to its federal counterpart, the placement of it as an 803 rule (where the availability of the declarant as a witness is immaterial) represents a substantive change. That is so because Illinois decisions had required the unavailability of the out-of-

court declarant in order to trigger the rule's application, which would have required its placement as an 804 rule. Note, too, that this codification alters the requirement in previous cases that there be a reasonable probability that the statement was truthful. See the thorough discussion of this issue in section (b) under the "Recommendations" discussion in the Committee's general commentary on pages 5 through 7 of this guide.

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

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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

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

(B) in a prosecution for violation of sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, or 11-1.60 of the Criminal Code of 1961 (720 ILCS 5/11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60), or for a violation of the Article 12 statutes in the Criminal Code of 1961 that previously defined the same offenses, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Author's Commentary to Ill. R. Evid. 803(4)

IRE 803(4)(A) is identical to pre-amended FRE 803(4) as it applies to statements made for treatment purposes but, consistent with Illinois common law, the Illinois rule differs from the federal rule in not allowing, as an exception to the hearsay rule, statements made for medical diagnosis solely to prepare for litigation or to obtain testimony for trial. Note, however, that the rule allows the non-substantive admissibility of statements made to a health care provider, even one "consulted solely for the purpose of preparing for litigation or obtaining testimony for trial," under the provisions of IRE 703. For more on this subject, see *People v. Anderson*, 113 Ill. 2d 1 (1986), discussed in the Author's Commentary to Ill. R. Evid. 703.

IRE 803(4)(B) is a near-verbatim reproduction of section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13; provided at **Appendix K**). Both section 115-13 and IRE 803(4)(B) provide for the admission of statements made to medical personnel, by a victim of the offenses whose section numbers are listed, concerning the source of

the victim's symptoms for medical diagnosis or treatment.

Note that the original version of IRE 803(4)(B) was amended by the supreme court in M.R. 24138, effective April 26, 2012. The rule amendment occurred because, in Public Act 96-1551, effective July 1, 2011, the General Assembly amended section 115-13 by adding section numbers (while retaining section numbers that had been repealed), and it also altered the section numbers of numerous statutes that relate to sex offenses in the Criminal Code of 1961. As relevant here, Public Act 96-1551 moved sex offenses from Article 12 (which addresses "Bodily Harm" offenses) to Article 11 (which addresses "Sex Offenses"), thus renumbering the statutes listed in the original version of IRE 803(4)(B). Specifically, the statute that addresses the offense of **criminal sexual assault**, formerly section 12-13, is now section 11-1.20 (720 ILCS 5/11-1.20); the statute that addresses **aggravated criminal sexual assault**, formerly section 12-14, is now section 11-1.30 (720 ILCS 5/11-1.30); the statute that addresses the offense of **predatory criminal**

sexual assault of a child, formerly section 12-14.1, is now section 11-1.40 (720 ILCS 5/11-1.40); the statute that addresses the offense of **criminal sexual abuse**, formerly section 12-15, is now section 11-1.50 (720 ILCS 5/11-1.50); and the statute that addresses the offense of **aggravated criminal sexual abuse**, formerly section 12-16, is now section 11-1.60 (720 ILCS 5/11-1.60). Both the pre-amended and amended section 115-13 are provided in the appendix to this guide at **Appendix K**.

In *People v. Cant*, 58 Ill. 2d 178 (1974), before the adoption of the Federal Rules of Evidence, the supreme court held that statements made by a patient to a doctor for treatment purposes are substantively admissible.

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

In *People v. Falaster*, 173 Ill. 2d 220 (1996), the supreme court held that section 115-13 of the Code of Criminal Procedure, which is a codification of the common-law rule that admits statements concerning medical treatment, and which does not distin-

guish between treatment and diagnosis, permitted admissibility of a victim's statement to medical personnel about sexual history, including the identification of the offender who was the victim's father, where the statement was relevant to the medical treater's opinion regarding whether the victim had been sexually abused. In *People v. Freeman*, 404 Ill. App. 3d 978 (2010), the appellate court recognized the conflict between section 115-3, which allows admissibility, and the rape shield statute (725 ILCS 5/115-7(a); provided at **Appendix E**, and discussed in this guide in the Author's Commentary on Illinois Statutes that are Counterparts to Fed. R. Evid. 412), which denies admissibility. The court held that the statement that she had not had previous sexual intercourse, made to a doctor by the 12-year-old victim of a sex offense, was admissible because it was relevant to the issue of whether, based on the physical examination of the victim by the doctor, a sexual assault had occurred.

In *People v. Spicer*, 379 Ill. App. 3d 441 (2008), the appellate court upheld, as an exception to the hearsay rule, the admission of the victim's statement to a doctor that she had been "tied and raped," over the defendant's contention that she had not sought treatment, but only evidence collection. The court held that the statement by the elderly victim, who was unable to be present for trial because of a medical condition, was admissible as an exception to the hearsay rule, based on *Falaster's* holding that section 115-13 does not distinguish between treatment and diagnosis. The court held, however, that there had been a violation on the separate issue of the Sixth Amendment Confrontation Clause, but that the error was harmless because of the strong corroborating nature of the defendant's confession.

(5) Recorded Recollection. A record that:

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

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

(C) accurately reflects the witness's knowledge.

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

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. ~~If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.~~

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

Author's Commentary to Ill. R. Evid. 803(5)

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

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

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

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

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

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

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

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), ~~Rule 902(12), or a statute permitting certification,~~ unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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

Author’s Commentary to Ill. R. Evid. 803(6)

IRE 803(6) is identical to the pre-amended federal rule, except for the deletion of “FRE 902(12), or a statute permitting certification” because that rule was incorporated into IRE 902(11) and therefore was not separately adopted, and except for medical records in criminal cases, which are excluded by section 115-5(c)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(c)(1)). The rule adopts the certification requirement of IRE 902(11), thus providing an alternative to the prior foundational requirement of the testimony of the custodian of the records, and thereby constituting

a substantive change in the procedure for admission. Except for the provision allowing certification, the rule is consistent with the provisions of section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5), as well as of Supreme Court Rule 236, which applies in civil cases. Section 115-5 and Supreme Court Rule 236 are provided in the Appendix to this guide at **Appendix L**.

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

For a significant case involving this business record exception to the hearsay rule and whether, in a criminal case, an autopsy report is inadmissible as “testimonial hearsay” under the theory that the right to confrontation under the Sixth Amendment may be implicated, see *People v. Leach*, 2012 IL 111534. In that case, the supreme court held that either this rule or IRE 803(8) provided a proper foundation for the introduction of autopsy reports as provided by section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1; provided at **Appendix M**). As relevant to this rule, the supreme court held that an autopsy report is not a “medical record” for the simple reason that a deceased person is not a patient and the medical examiner is not the deceased person’s doctor. *Leach*, 2012 IL 111534 at ¶ 71. For more on the statute and the *Leach* opinion, see the Author’s Commentary to Ill. R. Evid. 803(8).

A statute relevant to this exception to the hearsay rule is section 8-401 of the Code of Civil Procedure (735 ILCS 5/8-401), which addresses the admissibility of account books and records.

For an example of a recent case affirming the admission of an insurance carrier’s claim file related to a workers’ compensation claim under this exception to the hearsay rule, see *Holland v. Schwan’s Home Service, Inc.*, 2013 IL App (5th) 110560. In that case, the appellate court considered the admission of the claim file as a business record, rejecting objections based on (1) hearsay within hearsay; (2) attorney-client privilege; (3) preparation in anticipation of litigation; and (4) work-product protection. *Holland*, at ¶¶ 177-206.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

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

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

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

(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.

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

Author’s Commentary to Ill. R. Evid. 803(7)

IRE 803(7) is identical to the pre-amended federal rule.

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

(A) it sets out:

- (i) the office's activities;
- (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
- (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

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

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

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness.

Author's Commentary to Ill. R. Evid. 803(8)

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

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

For a recent case applying IRE 803(8), see *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245 (holding that an IRS Report and a Waiver were admissible under this public records exception

to the hearsay rule (and self-authenticating under IRE 902(1)), and thus reversing a grant of summary judgment for defendant and granting summary judgment in favor of plaintiff).

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

Note also that section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1), which is provided in the appendix to this guide at **Appendix M**, makes admissible as an exception to the hearsay rule, in both civil and criminal actions, records kept in the ordinary course of business related to medical examinations on deceased persons or autopsies, when they are “duly certified by the county coroner, or chief supervisory coroner’s pathologist or medical examiner.” The reports that are admissible include but are not limited to certified pathologist’s protocols, autopsy reports, and toxicological reports. The statute provides that the preparer of the report is subject to subpoena but, if that person is deceased, a duly authorized official from the coroner’s office may offer testimony based on the reports.

A number of appellate court cases have applied and upheld the statute against attacks in criminal cases premised on the Confrontation Clause in general and the decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) (barring testimonial hearsay), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009) (barring certificates of analysis that substance was cocaine), in particular. The Illinois Appellate Court cases include *People v. Antonio*, 404 Ill. App. 3d 391 (2010); *People v. Cortez*, 402 Ill. App. 3d 468 (2010); *People v. Pitchford*, 401 Ill. App. 3d 826 (2010); *People v. Leach*, 391 Ill. App. 3d 161 (2009) (appeal allowed on January 26, 2011, No. 111534); *People v. Moore*, 378 Ill. App. 3d 41 (2007). See also *Fatigato v. Village of Olympia Fields*, 281 Ill. App. 3d 347 (1996) (holding that a toxicology report was a business record), but see also *People v. Lovejoy*, 235 Ill. 2d 97 (2009), where the supreme court based its approval of a pathologist’s reliance on a toxicology report, where the toxicologist did not testify, not on the basis that it was admitted substantively as a business record, but that it contained data reasonably relied upon by expert pathologists in determining cause of death. (Note also that in a case that predates the *Crawford* decision, *People v. Nieves*, 193 Ill. 2d 513 (2000), the supreme court affirmed the testimony, in a murder prosecution, of the chief

medical examiner about the cause of death of the decedent on whom the autopsy was performed by a retired pathologist who was out of the country at the time of trial. The testimony was based on the autopsy report of the absent pathologist, before the effective date of the statute discussed above. There, the supreme court’s approval of the admission of the chief medical examiner’s testimony was based on the reasonable reliance standard of Rule 703, and not on the business record exception.)

Subsequent to the above cases, the United States Supreme Court decided *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705 (June 23, 2011). In that case, the Court applied *Melendez-Diaz* in holding that the testimony of a forensic analyst, who testified instead of the forensic analyst who had actually tested and reported on the blood-alcohol concentration of the DWI defendant but who was on “un-compensated leave,” constituted a violation of the Confrontation Clause. In *People v. Dobbey*, 2011 IL App (1st) 091518, the first appellate court case addressing the issue of the admissibility of autopsy reports after the decision in *Bullcoming*, the court adhered to the holdings in the appellate court cases listed above, and distinguished the case at bar from *Melendez-Diaz* (which dealt with proof of the specific fact that material connected to the defendant was cocaine) and *Bullcoming* (which dealt with proof of the specific fact that the defendant’s blood-alcohol content was above a certain limit), on the basis that those cases involved reports prepared “solely for an ‘evidentiary purpose’” and made in “aid of a police investigation,” which made them testimonial in nature. *Dobbey*, ¶¶ 75-76.

In *People v. Leach*, 2012 IL 111534, on review of one of the appellate court decisions listed above, the Illinois Supreme Court affirmed the appellate court’s judgment, but “for reasons other than those offered in the appellate court opinion.” *Leach*, ¶ 158. The supreme court therefore did not accept the appellate court’s rationale for the admissibility of the autopsy report on the bases that: (1) business records are historically nontestimonial and thus excluded from the *Crawford* rule related to

the Confrontation Clause, and (2) the report was admissible as reasonably relied upon by experts to explain the bases of their opinions under IRE 703. *Leach*, ¶ 48.

The *Leach* court noted the plurality opinion in *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221 (2012), but distinguished that opinion from the case at bar, pointing out that, “in *Williams*, the ‘report itself was neither admitted into evidence nor shown to the factfinder.’ The expert witness ‘did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.’” In contrast, the court noted that in the case at bar, the testimony of the expert witness (who was not the pathologist who performed the autopsy and prepared the report) included the contents of the autopsy report and the report itself was admitted into evidence. *Leach*, ¶¶ 56-57. The court therefore needed to determine (1) whether the autopsy report was hearsay offered for the truth of the matters inserted therein; (2) if hearsay, whether the report was admissible under a hearsay exception; and (3) if admissible under a hearsay exception, whether the report was testimonial in nature and thus violated the confrontation clause in violation of the *Crawford* holding. The answers to the first and second inquiries were “yes,” the autopsy report was hearsay, but was admissible under both IRE 803(6) and IRE 803(8), as well as the statutory provisions of section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1; provided at **Appendix M**).

As for the third inquiry concerning the Confrontation Clause, the supreme court concluded that the designation of a document as a business record does not automatically make it nontestimonial. The court then engaged in an in-depth analysis of the evolving reasoning of the United States Supreme Court

in general, and its members in particular, related to the Court’s holdings from *Crawford*, through *Malendez-Diaz* and *Bullcoming*, to *Williams*. The court concluded that, in analyzing the “primary purpose” concerning extrajudicial statements that animates the views of the members of the U.S. Supreme Court, “the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case.” *Leach*, ¶ 122. The court held that, even when foul play is suspected and the medical examiner’s office is aware of this suspicion, because the autopsy might reveal that the deceased died of natural causes, an autopsy report is not prepared to provide evidence against a targeted person. *Leach*, ¶ 126. The court therefore concluded that, because the autopsy report did not constitute testimonial hearsay and thus did not violate the Confrontation Clause, it was properly admitted.

Note that section 8-2201 of the Code of Civil Procedure (735 ILCS 5/8-2201), in contrast to the statute in the Code of Criminal Procedure discussed above, which applies to both civil and criminal cases and addresses *records* related to autopsies, prohibits admissibility of evidence related to a coroner’s *verdict* to prove any fact in controversy in a civil action.

For more on the *Crawford* decision and its holding concerning a criminal defendant’s right to confrontation, see the discussion of *Williams v. Illinois* in the Author’s Commentary to Ill. R. Evid. 703 *supra*, and the discussion of *Crawford* and its progeny in connection with various Illinois statutory hearsay exceptions in the Author’s Commentary to Ill. R. Evid. 807 *infra*.

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

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

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

Author's Commentary to Ill. R. Evid. 803(9)

IRE 803(9) is identical to pre-amended FRE 803(9), except for the clarifying addition of "Facts contained in" at the beginning of the rule.

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

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

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

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

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

Author's Commentary to Ill. R. Evid. 803(10)

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

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

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

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

Author's Commentary to Ill. R. Evid. 803(11)

IRE 803(11) is identical to the pre-amended federal rule.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Author's Commentary to Ill. R. Evid. 803(12)

IRE 803(12) is identical to the pre-amended federal rule.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

Author's Commentary to Ill. R. Evid. 803(13)

IRE 803(13) is identical to the pre-amended federal rule. This codification eliminates certain prerequisites contained in *Sugrue v. Crilley*, 329 Ill. 458 (1928). See section (7) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

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

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

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

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

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

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

Author's Commentary to Ill. R. Evid. 803(14)

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

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

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

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

Author's Commentary to Ill. R. Evid. 803(15)

IRE 803(15) is identical to the pre-amended federal rule. See section (8) under the "Modernization" discussion in the Committee's general commentary on page 3 of this guide.

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

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(16) Statements in Ancient Documents. Statements in a document in existence 20 years or more the authenticity of which is established.

Author's Commentary to Ill. R. Evid. 803(16)

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

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

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

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Author's Commentary to Ill. R. Evid. 803(17)

IRE 803(17) is identical to the pre-amended federal rule.

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

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

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

(18) Reserved. [Learned Treatises]

Author's Commentary to Reservation of Ill. R. Evid. 803(18)

IRE 803(18) is reserved because the adoption of FRE 803(18) would have represented a substantive change in Illinois law. Illinois common law is consistent in its rejection of this hearsay exception. Learned-treatise evidence therefore is not admitted substantively. Although not admitted substantively (*i.e.*, to prove the truth of the matter asserted), such evidence is allowed for impeachment purposes on cross-examination, usually with limiting instructions.

During its public hearing in Chicago in May 2010, the Committee was informed that trial courts throughout the State differ radically in their treatment of learned-treatise evidence on direct examination. Although trial courts uniformly do not allow learned-treatise evidence to be admitted substantively in direct examination, the Committee was told that there is no uniformity concerning whether a learned treatise might be referred to at all; whether a learned treatise could be referred to as data or information relied upon by an expert, with or without quotes from the treatise; whether the contents

of a learned treatise can be disclosed to the jury; and whether jurors are allowed to review a learned treatise in instances where the court has allowed some evidence about it.

Trial courts that prohibit admissibility on direct examination do so on the basis that Illinois has refused to accept the learned treatise exception to the hearsay rule, and that information garnered from such treatises are therefore hearsay and not substantively admissible. On the other hand, trial courts that allow admission of evidence related to learned treatises on direct examination do so pursuant to Rule 703, which allows admission of facts or data reasonably relied upon by experts even though they are not substantively admissible. These courts give limiting instructions to juries to explain the use of such evidence.

Following is a summary of Illinois Supreme Court cases and a few appellate court cases that are relevant to what Illinois courts of review have held on the issue of learned treatises. A review of these

cases may bring perspective to the status of such evidence in Illinois, and may help explain the lack of uniformity in dealing with learned-treatise evidence on direct examination.

In *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326 (1965), the supreme court approved the use of learned treatises in the cross-examination of expert witnesses for impeachment purposes, even where experts did not purport to base their opinions on such authorities. Because the issue was not before it, the court did not address whether an expert could testify about reliance on a learned treatise in direct examination.

In *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 557 (1976), the supreme court approved of an expert basing his opinion on "a detailed study of all the clinical studies that have been published in the literature." Without stating the significance of the observation, the court noted that the expert "did not mention the reports by name, nor did he recite the empirical data drawn from the reports or the conclusions of the researchers."

In *Walski v. Tiesanga*, 72 Ill. 2d 249 (1978), the supreme court noted that learned treatises are not admissible as substantive evidence in Illinois and, because the plaintiff had not sought to admit the treatise as substantive evidence, it refused to consider whether a learned treatise used to cross-examine the defendant doctor who recognized the treatise as an authority, should have been admitted substantively.

In *People v. Anderson*, 113 Ill. 2d 1 (1986), in a criminal case involving the insanity defense, the supreme court held that facts and data from other sources, such as psychiatrists, doctors and counselors, if reasonably relied upon by experts in forming opinions, although not admissible as substantive evidence, could be disclosed to the jury. The court held that "expert witnesses may disclose the contents of otherwise inadmissible materials upon which they reasonably rely." *Anderson*, 113 Ill. 2d at 9. The court went on to state:

"To prevent the expert from referring to the contents of materials upon which he relied in arriving at his conclusion 'places an unreal stricture on him and compels him to be not only less than frank with the jury but also *** to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be.' [Citation.] Absent a full explanation of the expert's reasons, including underlying facts and opinion, the jury has no way of evaluating the expert testimony [citation] and is therefore faced with a 'meaningless conclusion' by the witness [citation]."

Anderson, 113 Ill. 2d at 10-11. In *Anderson*, because the hearsay statements relied upon by the expert were not from learned treatises, the court did not explicitly address the issue of the admissibility of learned treatises under Rule 703.

In *Roach v. Springfield Clinic*, 157 Ill. 2d 29 (1993), the supreme court refused to consider whether FRE 803(18) should be adopted and thus learned treatises should be given substantive admissibility because, as in *Walski*, the issue had not been properly preserved in the trial court.

In *Mielke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42 (1984), citing and relying upon other appellate court cases that refused to allow learned treatises as substantive evidence, the appellate court approved the trial court's refusal to allow an expert witness to read from his notes about the subject of treatises or to read from the treatises themselves. This case provides the foundation for the general principle that, in direct examination, experts may not quote from learned treatises or summarize findings of studies contained within them.

The appellate court case of *Schuchman v. Stackable*, 198 Ill. App. 3d 209 (1990), is worthy of note because of its application of the holding in *Mielke*, but even more for the dissenting judge's views on why the supreme court's holding in *Anderson* implicitly overruled the holding in *Mielke* and why, in his view, *Mielke* was wrongly decided. See also

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (1993) (recognizing that “this area of the law is evolving toward more openness in the presentation of evidence,” but refusing “to go as far” as the dissenting judge in *Schuchman*, while approving of the admission of articles because of its conclusion that the literature was not used to support or bolster the expert’s opinion, but rather as the underlying facts for the expert’s opinion). See also *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 1021 (2001) (holding it was error, justifying in part the trial court’s grant of a new trial,

for defendant to provide evidence from its expert about a statement in a medical treatise that was consistent with defendant’s theory and contradicted what plaintiff’s expert had said about the statement in his discovery deposition, when plaintiff’s expert admitted at trial that he had erred in testifying at the deposition that the treatise supported his opinion, because the testimony of defendant’s expert was not impeaching of the plaintiff’s expert’s testimony at trial and could not be admitted for substantive purposes).

(19) Reputation Concerning Personal or Family History. A reputation among a person’s family by blood, adoption, or marriage—or among a person’s associates or in the community—concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(19) Reputation concerning personal or family history. Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(19) Reputation Concerning Personal or Family History. Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Author’s Commentary to Ill. R. Evid. 803(19)

IRE 803(19) is identical to the pre-amended federal rule. See section (8) under the “Modernization” dis-

cussion in the Committee’s general commentary on page 3 of this guide.

(20) Reputation Concerning Boundaries or General History. A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

Author’s Commentary to Ill. R. Evid. 803(20)

IRE 803(20) is identical to the pre-amended federal rule. See section (8) under the “Modernization” dis-

cussion in the Committee’s general commentary on page 3 of this guide.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

Author's Commentary to Ill. R. Evid. 803(21)

IRE 803(21) is identical to the pre-amended federal rule. This rule, and the common law before its codification, permits "reputation" testimony (*i.e.*, what people say about a person) concerning a person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (~~but not upon a plea of nolo contendere~~), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Author's Commentary to Ill. R. Evid. 803(22)

IRE 803(22) is identical to the pre-amended federal rule, except for the deletion of "(but not upon a plea of nolo contendere)," which likely excludes such pleas from the hearsay exception it provides.

For a related case, see *American Family Mutual Ins. Co. v. Savickas*, 193 Ill. 2d 378 (2000) (abrogating the holding in *Thornton v. Paul*, 74 Ill. 2d 132 (1978), and adopting the "modern trend" in hold-

ing that collateral estoppel barred recovery from insurer for wrongful death and survivor actions based on negligence, where insured had been convicted of first degree murder and insurance policy excluded coverage for bodily injury “expected or intended by any insured”).

Note that the rule makes admissible, as an exception to the hearsay rule, evidence of certain convictions. It does not address whether such convictions should be given preclusive effect in subsequent

litigation, the general rule being that a prior conviction is rebuttable and may be explained and contradicted. For a relevant discussion of the general practice in Illinois related to pleas of guilty, see the recent Seventh Circuit Court of Appeals decision of *Wells v. Coker*, 707 F.3d 756 (7th Cir. 2013) (holding that entry of summary judgment was erroneous given what it refers to as Illinois’ inconsistent general practice regarding preclusion in convictions based upon pleas of guilty).

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

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

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

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Author’s Commentary to Ill. R. Evid. 803(23)

IRE 803(23) is identical to the pre-amended federal rule. See section (8) under the “Modernization” dis-

cussion in the Committee’s general commentary on page 3 of this guide.

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

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

(24) Receipt or Paid Bill. A receipt or paid bill as prima facie evidence of the fact of payment and as prima facie evidence that the charge was reasonable.

Author’s Commentary to Ill. R. Evid. 803(24)

Former FRE 803(24) has been transferred to FRE 807. IRE 803(24) has no counterpart in the federal rules. It is adopted to codify Illinois common law. See *Arthur v. Catour*, 216 Ill. 2d 72, 82 (2005) (“When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment

rendered and that the bill has been paid, the bill is prima facie reasonable.”). See also *Wills v. Foster*, 229 Ill. 2d 393 (2008) (clarifying the holding in *Arthur* and adopting the “reasonable-value approach,” not the “benefit-of-the-bargain approach,” and holding that “defendants are free to cross-ex-

amine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the

services. Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule.").

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

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

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

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

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

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

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

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

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

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

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

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

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

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

exception under Rule 804(b)
(1) or (6); or

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

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

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

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

Author's Commentary to Ill. R. Evid. 804(a)

IRE 804(a) is identical to pre-amended FRE 804(a). For a relevant case, see *People v. Garcia*, 2012 IL App (2d) 100656, where the appellate court quoted and relied on the rule's provisions concerning "unavailability," in affirming the trial court's ruling that denied admissibility of the plea of guilty of cocaine possession by the passenger in defendant's truck,

where the State's theory was that the defendant and his passenger jointly possessed the cocaine and the defendant sought admissibility of the plea under IRE 804(b)(3), Statement Against Interest, the appellate court holding that the passenger was not "unavailable" under the rule.

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

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

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

Author's Commentary to Ill. R. Evid. 804(b)

IRE 804(b) is identical to pre-amended FRE 804(b). Note that there are a number of Illinois statutes in the Code of Criminal Procedure of 1963 that provide exceptions for hearsay statements of absent witnesses in criminal cases but are not listed in IRE 804. These statutory provisions supplement the well accepted hearsay exceptions addressed in the 804 rules. Because of the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), however, the constitutional validity of many of them is questionable. They might be referred to as residual exceptions, and are discussed in the Author's Commentary to Fed. R. Evid. 807 *infra*. They include: section 115-10, hearsay exceptions related to specified offenses committed on children under 13 years of age or

on mentally retarded persons (725 ILCS 5/115-10); section 115-10.2, hearsay exception when a person refuses to testify despite a court order to do so (725 ILCS 5/115-10.2); section 115-10-2a, hearsay exception admitting prior statements in domestic violence prosecutions when the witness is unavailable (725 ILCS 5/115-10.2a); section 115-10.3, hearsay exception involving elder adults suffering from mental or physical disability who are victims of specified offenses (725 ILCS 5/115-10.3); section 115-10.4, hearsay exception when the witness, who has testified under oath regarding a material fact and was subject to cross-examination, is deceased (725 ILCS 5/115-10.4).

(1) Former Testimony. Testimony that:

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

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

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

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

Author's Commentary to Ill. R. Evid. 804(b)(1)

IRE 804(b)(1)(A) is identical to pre-amended FRE 804(b)(1), except for the change in the phrase “in a deposition” to “in an evidence deposition.” This was done, and IRE 804(b)(1)(B) was added, because in Illinois, unlike in the federal system, depositions are not admissible unless permitted by a rule such as IRE 801(d)(2) (and Supreme Court Rule 212(a)(2)), which allows admission of out-of-court statements by party-opponents (and those made by specified persons for whose statements a party-opponent is accountable) as not hearsay, or by a rule such as Supreme Court Rule 212(a)(5), which allows admission at trial of the discovery deposition of a deponent who is unable to attend the trial because of death or infirmity and who is not a controlled expert witness.

Note that the supreme court amended Rule 212(a)(5), effective January 1, 2011, by retaining the exclusion related to a controlled expert's discovery deposition, while deleting the prior exclusion related to a party's discovery deposition. The effect of the amendment is that, in addition to the admissibility of the discovery deposition of a mere unavailable witness, the discovery deposition of an unavailable party (even one who is the proponent of admissibility and not a party-opponent), where the witness or the party is unavailable due to death or infirmity, is admissible. But note that the Committee Comments to the rule state that, as applied to a party's discovery deposition, the amendment “applies to cases filed on or after the effective date” of January 1, 2011, and that it refers to “rare, but compelling circumstances” where it should be permitted and that “it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited.” Note, too, that the discovery deposition testimony of an absent or deceased (or even an available) party opponent is admissible (under IRE 801(d)(2) and under Supreme Court Rule 212(a)(2)), and was admissible even before these codified rules and the amendment to Rule 212(a)(5); see *In re Estate of Rennick*, 181 Ill. 2d 395 (1998).

The former-testimony exception to the hearsay rule is often invoked by the State when a witness who had testified at a preliminary hearing in a criminal case is unavailable for trial testimony. In *People v. Torres*, 2012 IL 111302, without referring to the codified rule, the supreme court addressed the issues presented by this hearsay exception in criminal cases. The court began its analysis by noting that (at least in a criminal case) “constitutional considerations are inextricably intertwined” with an evidentiary analysis on the question of admissibility. *Torres*, ¶47. This is so because of a criminal defendant's Sixth Amendment right of confrontation. See *Crawford v. Washington*, 541 U.S. 36, 57-58 (2004). Consistent with United States Supreme Court and its own holdings in prior cases, the supreme court noted the two prerequisites for the admission of former testimony: (1) the unavailability of the witness who testified at the prior hearing, and (2) an adequate opportunity for effective cross-examination during the prior testimony. Regarding the “unavailability” requirement, the court stressed the need for the prosecution to undertake good-faith efforts prior to trial to locate and present the witness. *Torres*, ¶¶ 54-55. Although the court questioned whether unavailability was adequately shown in this case by the State's *allegation* that the absent witness had been deported (noting that “simply establishing the fact of deportation, in support of unavailability, may no longer be enough to establish that requisite for admission”), it concluded that the record reflected that the defendant appeared to have stipulated to the witness's unavailability, or conceded it or had forfeited the issue. *Torres*, ¶¶ 55-56. Regarding the “adequacy of cross-examination” requirement, the court held that factors that must be considered include: (1) that the cross-examination of the witness had the same “motive and focus” as the cross-examination at the subsequent proceeding, and (2) that the opposing party had an opportunity for adequate cross-examination of the witness. As to the requirement of adequacy, the court noted that “what counsel knows while conducting the cross-examination may, in a given case, impact counsel's

ability and opportunity to effectively cross-examine the witness at the prior hearing.” *Torres*, ¶ 62 (emphasis in original). In applying these factors to the case under review, the supreme court held that the trial court had erred in admitting the absent witness’s preliminary hearing testimony, based on its conclusions that at the earlier hearing: (1) defense counsel was not privy to certain inconsistent statements the witness had given to the police, (2) counsel did not know of the witness’s status as an alien or the circumstances of his departure from this country, and (3) there were time and scope restrictions placed by the circuit court on counsel at the earlier hearing. *Torres*, ¶¶ 63-65. Clearly, knowledge of the requirements provided by the *Torres* decision is essential for proper application of IRE 804(b)(1) in determining the admissibility of former testimony as a hearsay exception.

In *People v. Starks*, 2012 IL App (2d) 110273, the State appealed the trial court’s grant of defendant’s motion *in limine* that excluded the deceased complainant’s testimony from an earlier sex-offense trial, in which convictions had been reversed and the case remanded. Citing section 115-10.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.4, which allows admission of a statement of a deceased declarant — see **Appendix R**), IRE 804(b)(1), and other relevant cases (not including *Torres*, which had been decided 12 days earlier), the appellate court upheld the trial court’s ruling, stating that at the first trial, “defendant did not have an adequate opportunity or similar motive to cross-examine complainant, because defendant was pro-

vided with incorrect serology test results, did not know about exculpatory DNA tests, and *** was improperly barred from asking complainant about prior sexual conduct.” *Starks*, ¶ 28.

People v. Rice, 166 Ill. 2d 35 (1995), is an example of a case where the supreme court determined that the State had an inadequate opportunity to cross-examine a defendant’s codefendant during a hearing on a motion to suppress evidence because of the limited focus at such a hearing. The court thus reversed the appellate court’s reversal of the trial court’s non-admission of the codefendant’s prior testimony during the trial at which the codefendant invoked his fifth amendment privilege against self-incrimination. For an example of a case where the supreme court determined that the defendant had ample opportunity in a prior trial to cross-examine a witness as well as the same motive and focus, thus affirming the admission of the deceased witness’s prior testimony during a retrial, see *People v. Sutherland*, 223 Ill. 2d 187 (2006). *People v. Lard*, 2013 IL App (1st) 110836, is a recent case where the appellate court approved the admission at trial of the preliminary hearing testimony of a deceased police officer who testified to identifying the defendant as one of two men he observed at a burglary scene, despite the defendant’s contention that his attorney did not possess knowledge during the preliminary hearing examination that the deceased officer had responded hours earlier to a break-in at the same location, that offense being irrelevant to the case at bar.

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

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

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

Author's Commentary to Ill. R. Evid. 804(b)(2)

IRE 804(b)(2) is identical to pre-amended FRE 804(b)(2), except for the deletion of the phrase "or in a civil action or proceeding" because, in Illinois, statements under belief of impending death are admissible only in homicide cases. The historical acceptance of this "dying declarations" exception to the hearsay rule was recognized in *Crawford v. Washington*, 541 U.S. 36 (2004).

(3) Statement Against Interest. A statement that:

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

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

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Author's Commentary to Ill. R. Evid. 804(b)(3)

FRE 804(b)(3), provided in the middle column above, is the version that existed before its amendment effective December 1, 2010, and it thus served as the model for IRE 804(b)(3). The version in the column on the left above is the rule that had been amended effective December 1, 2010, unchanged by the December 1, 2011 amendments, except for replacing lower case letters in its title with upper case letters. IRE 804(b)(3) is identical to FRE 804(b)(3) before its December 1, 2010 effective date, except for the change in the second sentence from the specific, "to exculpate the accused," to the general, "in a criminal case," a change also made in the federal rule's December 1, 2010 amendment. The rule applies to both civil and criminal cases, and the change in the Illinois version makes it clear that the rule applies both to the State and to the defendant in a criminal case, and that the requirement of trustworthiness likewise applies to both parties in a criminal case. (See section (10) under the "Modernization" discussion in the Committee's general commentary on page 4 of this guide.)

The rule has both “sword and shield” attributes. When invoked by the defendant in a criminal case, it is intended to exculpate. When invoked by the State, on the other hand, it is for the purpose of inculcating the defendant. That is so because, when statements of an out-of-court declarant satisfy the requirements of the rule, they frequently inculcate the defendant on trial. Such against-the-interest-of-the-declarant statements are admissible as an exception to the hearsay rule against an implicated defendant if they pass the trustworthiness test. For an example of such a case, see *U.S. v. Watson*, 525 F.3d 583 (7th Cir. 2008) (statement of a codefendant implicating the defendant met trustworthiness test of FRE 804(b)(3) and its admission did not violate the Confrontation Clause as a “testimonial statement” under *Crawford v. Washington*, 541 U.S. 36 (2004)). In applying the rule when it is invoked by the State, it must be recognized that a declarant might seemingly (and sometimes unknowingly) implicate himself in the commission of an offense while trying to shift primary responsibility to the defendant, thus making the trustworthiness of the statement questionable. See, for example, *People v. Caffey*, 205 Ill. 2d 52 (2001), where the supreme court observed that “a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and, accordingly, fail to qualify as against interest.” *Caffey*, 205 Ill. 2d at 99, citing *Williamson v. United States*, 512 U.S. 594, 601-02 (1994).

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the United States Supreme Court provided four factors for providing indicia of reliability: (1) whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2)

whether the statement is corroborated by other evidence; (3) whether the statement was self-incriminating and against the declarant’s penal interest; and (4) whether there was an adequate opportunity to cross-examine the declarant. In *People v. Bowell*, 111 Ill. 2d 58 (1980), the Illinois Supreme Court held that these factors were “regarded simply as indicia of trustworthiness and not as requirements of admissibility.” For an Illinois Supreme Court case discussing both *Chambers* and the application of the rule before its codification, see *People v. Rice*, 166 Ill. 2d 35 (1995). See also *People v. Luna*, 2013 IL App (1st) 072253, where the appellate court held that the trial court’s denial of the defendant’s motion to admit the out-of-court statements of two persons under this exception to the hearsay rule was proper, where neither of them implicated themselves in the offenses, but merely asserted that they were present at the crime scene. Citing *People v. Tenney*, 205 Ill. 2d 411, 436 (quoting *People v. Keene*, 169 Ill. 2d 1, 29 (1995)), the court stated that statements must be self-incriminating and against penal interest (see *Chambers’* factor (3) above), and that the supreme court has directed that “‘a statement of such a nature is the bedrock for the exception, that factor, obviously, *must be present.*’” (Emphasis added by the court.) *Luna*, at ¶ 145.

See also the Author’s Commentary to IRE 804(a), discussing the holding in *People v. Garcia*, 2012 IL App (2d) 100656, where the plea of guilty to the offense of possession of cocaine (the same substance which formed the basis of the charge, under a theory of joint possession, against the defendant) of the passenger in defendant’s truck was held to be inadmissible on the basis that the passenger was not “unavailable” as required by IRE 804(a) in order to trigger application of IRE 804(b)(3).

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

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

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

(4) Statement of personal or family history.

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

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

(4) Statement of Personal or Family History.

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

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

Author's Commentary to Ill. R. Evid. 804(b)(4)

IRE 804(b)(4) is identical to pre-amended FRE 804(b)(4).

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

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

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

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

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

Author's Commentary to Ill. R. Evid. 804(b)(5)

IRE 804(b)(5) is identical to pre-amended FRE 804(b)(6), former FRE 804(b)(5) "Other Exceptions," having been transferred to FRE 807. Note that the rule applies both to civil and criminal cases.

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

For an early relevant Illinois Supreme Court case on forfeiture by wrongdoing, one that provides a thorough analysis of the common-law rule and its application in Illinois, see *People v. Stechly*, 225 Ill. 2d 246 (2007). See also *People v. Hanson*, 238 Ill. 2d 74 (2010) (both testimonial and nontestimonial statements are admissible under the doctrine; reliability of statement not a factor concerning admissibility). See also section 115-10.6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.6), which makes admissible the statements of a declarant who was murdered by the defendant to prevent the declarant from testifying in a criminal or civil case, and section 115-10.7 of the same Code (725 ILCS 5/115-10.7), which makes admissible the statements of any unavailable witness whose absence was wrongfully procured. Both of those statutes are provided in the appendix at **Appendix N**.

In *People v. Peterson*, 2012 IL App (3d) 100514-B, the appellate court reviewed a trial court decision that rendered inadmissible certain out-of-court statements made by the defendant's deceased third wife and missing fourth wife, statements deemed inadmissible despite the trial court's determination, by a preponderance of the evidence, that the defendant had murdered them and that he did so to make them unavailable as witnesses. The trial court

had based its rulings barring the hearsay on its conclusion that the State had failed to establish the reliability of the excluded out-of-court statements as required by section 115-10.6 of the Code of Criminal Procedure of 1963. See 735 ILCS 5/115-10.6(e)(2); available as the first statute provided at **Appendix N**. In reversing the trial court's judgment, the appellate court held that: (1) the statutory provisions relied upon by the trial court specifically did not preclude the common-law doctrine of forfeiture by wrongdoing (see 725 ILCS 5/115-10.6(g); available as the first statute provided at **Appendix N**), and (2) the common-law doctrine of forfeiture by wrongdoing (as codified in both IRE 804(b)(5) and FRE 804(b)(6)) is not conditioned on proof that the out-of-court statements are trustworthy or reliable. The court thus held that, because the trial court had already determined that the defendant had murdered his wives to cause their unavailability as witnesses, and because reliability of the out-of-court statements is not a consideration in applying the common-law (and codified) hearsay exception for forfeiture by wrongdoing, the excluded statements should have been admitted.

Note that in reaching its decision, the appellate court in *Peterson* resolved the apparent conflict between the common-law rule (as well as the codified rule) and the statute, by relying on IRE 101's provision that "[a] statutory rule of evidence is effective *unless in conflict with a rule or decision of the Illinois Supreme Court*." See *Peterson*, 2012 IL App (3d) 100514-B, ¶ 24 (emphasis in appellate court opinion). Although the appellate court concluded that the language of IRE 101 meant that the conflict between the common law and the statute had to be "resolved in favor of the pronouncements of our supreme court" (*id.*), given that the relevant statute specifically states that it "in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing" (725 ILCS 5/115-10.6(g)), it appears that there is no actual conflict between the common-law rule and the