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Evidence

Leonard Cavise Professor
Assoc. Prof., DePaul College of Law

Scott C. Tomassi

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*Prof. Leonard Cavise**
*and Scott C. Tomassi***

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* Associate Professor of Law, DePaul College of Law, Director, Professional Skills Program at DePaul; A.B., 1967, Hamilton College; J.D., 1971, Georgetown University Law Center.

** B.B.A., 1985, Loyola University of Chicago; J.D. candidate, 1988, Loyola University of Chicago.

I. INTRODUCTION

Illinois has not adopted the Federal Rules of Evidence. Accordingly, the common law of Illinois continues to be the primary source of evidentiary rules. The purpose of this article is to inform the reader of significant evidentiary decisions of the Illinois supreme and appellate courts during the *Survey* year. When appropriate, state and federal legislation is also discussed.

II. WITNESSES

A. *Impeachment*

1. Right to Confrontation

In *People v. Triplett*,¹ the Illinois Supreme Court had the opportunity to delineate the permissible scope of cross-examination designed to impeach and demonstrate bias of a juvenile delinquent witness.² In *Triplett*, the State's only occurrence witness was a sixteen year old youth who testified that he observed the defendant commit an armed robbery.³ According to the testimony of the juvenile witness and police, he said nothing to the police until they told him that he would go to jail unless he told them what he knew.⁴ The witness's juvenile record indicated that he had contacts with police before the date of the crime in question.⁵ Moreover, during the period between the crimes and the defendant's trial,⁶ the State had filed eleven juvenile delinquency petitions against the witness.⁷ Finally, at the time of the defendant's trial, the witness was in the custody of the Department of Corrections after being adjudged delinquent based on a burglary charge.⁸ Although such factors might indicate bias and reflect poorly upon the witness's credibility, the trial court prohibited defense counsel from exposing those points on cross-examination.⁹

The *Triplett* court began its analysis by discussing impeachment

1. 108 Ill. 2d 463, 485 N.E.2d 9 (1985).

2. *Id.* at 481-83, 485 N.E.2d at 18.

3. *Id.* at 469-70, 485 N.E.2d at 12.

4. *Id.* at 470, 485 N.E.2d at 12.

5. *Id.* at 473, 485 N.E.2d at 14.

6. *Id.* The defendant's first conviction was reversed and the case was remanded for trial. *People v. Triplett*, 99 Ill. App. 3d 1077, 425 N.E.2d 1236 (1st Dist. 1981).

7. *Triplett*, 108 Ill. 2d at 474, 485 N.E.2d at 14. Three petitions were dismissed without prejudice on the State's motion and four petitions were stricken with leave to reinstate on the State's motion. *Id.*

8. *Id.* at 473-74, 485 N.E.2d at 14.

9. *Id.*

by evidence of other crimes and bias.¹⁰ The court explained that police contacts and arrests that tend to show the bias or interest of the witness may be exposed during cross-examination.¹¹ In the facts at issue, however, the court concluded that the witness's contacts with police did not indicate that the witness had anything to gain or lose by testifying.¹² Therefore, the trial court properly had prohibited defense counsel from revealing this information during cross-examination.¹³ In addition, the supreme court concluded that the evidence of police contacts was too remote, uncertain, and

10. *Id.* at 474, 485 N.E.2d at 14. The court noted that a "witness may be impeached by attacking his character by proof of conviction of an infamous crime. For this purpose, only convictions may be proved, and proof of arrests, indictments, charges or actual commission of a crime are not admissible." *Id.* at 475, 485 N.E.2d at 15 (quoting *People v. Mason*, 28 Ill. 2d 396, 400, 192 N.E.2d 835, 837 (1963)). Nevertheless, showing interest, bias or motive to testify is an accepted mode of impeachment. *Triplett*, 108 Ill. 2d at 475, 485 N.E.2d at 15. Thus, the fact that a witness has been arrested or charged with a crime may be introduced when it would show that his testimony might be influenced by interest, bias, or motive to falsely testify. *Id.* See also *Mason*, 28 Ill. 2d at 401, 192 N.E.2d at 837 (defendant allowed to cross-examine state witnesses about their suspensions as narcotic investigators); *People v. Wilkerson*, 87 Ill. 2d 151, 156, 429 N.E.2d 526, 528 (1981) (court should have allowed defendant to cross-examine state's witness about crimes with which she was charged); *People v. Barr*, 51 Ill. 2d 50, 51, 280 N.E.2d 708, 710 (1972) (defendant may inquire into the dropping of charges against a state witness.)

The court also added that it is immaterial whether the arrest or charge used in the impeachment involves the same occurrence for which the defendant is on trial. *Triplett*, 108 Ill. 2d at 475, 485 N.E.2d at 15 (citing *Mason*, 28 Ill. 2d at 401, 192 N.E.2d at 837). The court stated that when a cross-examiner impeaches a witness for interest, bias, or motive, the evidence must infer that the witness has something to gain or lose by his testimony. *Triplett*, 108 Ill. 2d at 475-76, 485 N.E.2d at 15. Therefore, the evidence may not be too remote or uncertain. *Id.* at 476, 485 N.E.2d at 15. Accord *People v. Gonzalez*, 104 Ill. 2d 332, 472 N.E.2d 417 (1984); *People v. Wilkerson*, 87 Ill. 2d 151, 429 N.E.2d 526 (1981); *People v. Handley*, 51 Ill. 2d 229, 282 N.E.2d 131 (1972); *People v. Barr*, 51 Ill. 2d 50, 280 N.E.2d 708 (1972); *People v. Mason*, 28 Ill. 2d 396, 192 N.E.2d 835 (1963); *People v. Merz*, 122 Ill. App. 3d 972, 977, 461 N.E.2d 1380, 1384 (2nd Dist. 1984); *People v. Phillips*, 95 Ill. App. 3d 1013, 420 N.E.2d 837 (1st Dist. 1981).

Moreover, to cross-examine a witness to show bias, interest, or motive, a defendant need not show that any promises of leniency have been made or expectations of special favor exist in the witness' mind. *Triplett*, 108 Ill. 2d at 476, 485 N.E.2d at 15. The defense also may inquire into those promises or expectations. *Id.*; *People v. Freeman*, 100 Ill. App. 3d 478, 481, 426 N.E.2d 1220, 1222 (2nd Dist. 1981).

11. *Triplett*, 108 Ill. 2d at 476, 485 N.E.2d at 16. Police contacts and arrests that do not lead to conviction nevertheless may be used to impeach a witness providing that they tend to show bias. *Id.* Ordinarily, bias can be shown when the witness has been arrested and the charge is still pending at the time of testimony. *Id.* at 475, 485 N.E.2d at 16-17.

12. *Triplett*, 108 Ill. 2d at 477, 485 N.E.2d at 16. The court's holding on this issue comports with the general rule in Illinois that "police contacts" and arrests are not the proper subjects of impeachment unless they result in felony convictions or misdemeanors in which the crime reflects dishonesty. M. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 609.3 (1983).

13. *Triplett*, 108 Ill. 2d at 477, 485 N.E.2d at 16.

speculative to be allowed into evidence.¹⁴

The court, however, reversed the defendant's convictions because the trial court had precluded the cross-examination of the witness concerning his juvenile record of delinquency petitions and custodial status.¹⁵ Relying upon the United States Supreme Court case of *Davis v. Alaska*,¹⁶ the Illinois Supreme Court held that a juvenile record is not forever closed and that it may be opened to impeach the credibility of a juvenile witness whose bias is in question.¹⁷ Accordingly, the court held that defense counsel should have been allowed to cross-examine the witness about his custodial status at the time of his trial testimony and about pending juvenile petitions which were stricken by the state with leave to reinstate.¹⁸

Perhaps the most significant aspect of this case is that the court predicated its holding on the sixth amendment's right to confrontation clause.¹⁹ Had the holding been limited solely to the issue of the scope of impeachment or cross-examination, it would have been incumbent upon the court to evaluate the prejudice flowing from an error of lesser magnitude. By basing its holding on the confrontation clause, the *Triplett* court, a priori, found "constitutional error of the first magnitude and no amount of showing of want of prejudice [could] cure it."²⁰

14. *Id.*

15. *Id.* at 481-83, 485 N.E.2d at 18-19. The supreme court held that the defendant was denied his right to confront the witness when the trial court denied the cross-examination of the witness to show that the witness was in custody when he testified. *Id.* at 481, 485 N.E.2d at 18. This holding was based in part on section 210(1)(c) of the Juvenile Court Act which provides in relevant part:

Evidence and adjudications in proceedings under this Act shall be admissible:

.....

(c) . . . in criminal proceedings in which anyone who has been adjudicated delinquent under Section 2-2 is to be a witness, and then only for purposes of impeachment and pursuant to the rule of evidence for criminal trials.

ILL. REV. STAT. ch. 37, para. 702-10(1)(c) (1985).

Although the court did not speculate how the witness's credibility might be affected when the jury learned that he was in custody, it did state that every effort must be made to allow a jury to assess accurately a witness's reliability. *Triplett*, 108 Ill. 2d at 485, 485 N.E.2d at 20. For more information regarding evidentiary considerations of prior crimes, see M. GRAHAM, *supra* note 12, § 608.

16. 415 U.S. 308 (1974).

17. 108 Ill. 2d at 480-84, 485 N.E.2d at 17-19.

18. *Id.* at 486, 485 N.E.2d at 20.

19. *Id.* at 479, 485 N.E.2d at 17.

20. *Id.* (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

2. Contradiction by Other Evidence

The Illinois Supreme Court case of *People v. Gorney*,²¹ decided during the *Survey* period, presented the issue of whether a defendant may impeach a rape victim's testimony by introducing evidence of prior false accusations of rape. At trial, the defendant sought to impeach the victim's credibility by introducing evidence of a statement made by the victim five months earlier which revealed her intent to fabricate attempted rape.²² The trial court, however, excluded this evidence on the grounds that it was speculative and non-probative.²³ Although the supreme court indicated that this evidence was admissible, it concluded that the trial court's error, if any, was harmless.²⁴

3. Prior Inconsistent Statements

In *People v. King*,²⁵ the Illinois Supreme Court addressed the issue of whether a witness's prior inconsistent statement about the defendant's guilt is admissible when made outside the defendant's presence. The court held that such statements appropriately were admitted into evidence.²⁶

In *King*, police arrested the defendant for the murder and armed robbery of a retail store clerk.²⁷ During questioning, the defendant confessed to the crime in question and to another restaurant robbery.²⁸ At trial, however, a defense witness testified that the defendant was not involved in the robbery.²⁹ That witness then denied the truthfulness of grand jury testimony in which he implicated the defendant in the retail store crimes.³⁰ Cross-examination

21. 107 Ill. 2d 53, 481 N.E.2d 673 (1985).

22. *Id.* at 58-59, 481 N.E.2d at 675 (1985). The defendant stood trial for, and was convicted of, home invasion, attempted rape, and aggravated battery. *Id.* at 55, 481 N.E.2d at 673.

23. *Id.*

24. *Id.* at 61, 481 N.E.2d at 676. The *Gorney* court reaffirmed the right to cross-examine a witness to show prejudice or other factors which might influence testimony, but placed firmly within the discretionary province of the trial court the right to exclude evidence when its relevancy is so speculative that it is of little probative value. *Id.* at 60, 481 N.E.2d at 675. *Accord* *People v. Lynch*, 104 Ill. 2d 194, 470 N.E.2d 1018 (1984); *People v. Manion*, 67 Ill. 2d 564, 367 N.E.2d 1313 (1974); *People v. Mikel*, 73 Ill. App. 3d 21, 391 N.E.2d 550 (4th Dist. 1979). For a further discussion of contradiction by other evidence, see M.GRAHAM, *supra* note 12, § 607.8.

25. 109 Ill. 2d 514, 488 N.E.2d 949, *cert. denied*, 107 S. Ct. 249 (1986).

26. *Id.* at 530-31, 488 N.E.2d at 958.

27. *Id.* at 521, 488 N.E.2d at 953.

28. *Id.* at 521-23, 488 N.E.2d at 953-54.

29. *Id.* at 527, 488 N.E.2d at 956.

30. *Id.*

of the defense witness and rebuttal testimony of an assistant state's attorney revealed details of the grand jury testimony.³¹ The supreme court noted that the defense witness's grand jury testimony, which was made under oath, would be admissible under current Illinois law.³²

Thus, the Illinois Supreme Court again attempted to put to rest the notion that statements inculpatory of the defendant must be made in the defendant's presence if they are to be introduced at trial. In fact, no such limitation had ever existed. Instead, the real concern is whether the jury will be able to distinguish the proper from the improper use of evidence. In these circumstances, a court should caution the jury when the evidence is to be used solely for its effect on credibility and not for its substance.³³

4. Prior Bad Acts³⁴

The *King* court also considered whether evidence of a defendant's prior bad acts could be admitted to establish voluntariness of

31. *Id.* at 526-27, 488 N.E.2d at 956.

32. *Id.* at 530, 488 N.E.2d at 957. Pursuant to statute, prior inconsistent statements made by a witness can be admitted into evidence under the following conditions:

- (a) the statement is consistent with his testimony at the hearing or trial, and
- (b) the witness is subject to cross-examination concerning his statement, and
- (c) the statement—
 - (1) was made under oath at a trial, hearing or other proceeding, or
 - (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
 - (A) the statement is proved to have been written or signed by the witness, or
 - (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence is being sought, or at a trial, hearing, or other proceeding, or
 - (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar means of sound recording.

Nothing in this section shall render a prior inconsistent statement inadmissible for the purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

ILL. REV. STAT. ch. 38, para. 115-10.1 (1985).

33. The trial judge in *King* had instructed the jury that the testimony was not evidence that the defendant had made a confession to the defense witness as the details of the grand jury testimony might suggest. *King*, 109 Ill. 2d at 528-30, 488 N.E.2d at 957.

34. Common law historically has permitted inquiries into the associations and personal history of a witness, including misconduct which tends to discredit his character, even though it has not been the basis for the conviction of a crime. C. J. MCCORMICK, EVIDENCE (1984). See also FED. R. EVID. 608(b); 3A Wigmore, Evidence § 981-87 (Chadbourn rev. 1970);

Evidence of the prior crimes is admissible if for some purpose other than to establish the defendant's propensity to commit crime. See e.g., FED. R. EVID. 404(b); *People v.*

a confession. In addition to confessing to the charged armed robbery and murder, the *King* defendant had confessed to another restaurant robbery.³⁵ At trial, the court admitted the other crimes evidence on the theory that it rebutted the defendant's claim that the police had coerced his confession and that it was relevant to establish the accuracy of the confession.³⁶ The supreme court affirmed the trial court's ruling.³⁷

King broadened the use of "other crimes" evidence in criminal cases. Normally, other crimes of a defendant or witness may not be used except to impeach credibility. The concern is that the other crimes will be used to show a character propensity which the jury would then use to the prejudice of the defendant. A long recognized exception to that rule is that the other crimes may be used substantively when the intent is not to show character but rather to show a specific relevant purpose such as showing *modus operandi*, motive, knowledge, intent preparation, plan, identity, or absence of mistake or accident.³⁸ Ordinarily, the other crime or act admitted must be of a signature-like similarity to the crime on trial. In *King*, however, the court admitted the witness' admission of his own involvement in the robbery on the theory that the admission would "corroborate the defendant's statements in his confession concerning the two offenses."³⁹ Apparently, the rationale for the admissibility of "other crimes" must now be expanded to include those other crimes which corroborate evidence offered at trial against the defendant.

In *People v. Buggs*,⁴⁰ the Illinois Supreme Court also expanded the permissible extent of the use of prior bad act evidence. In *Buggs*, the court considered whether the admission of testimony regarding a defendant's prior bad acts denied him a fair evaluation of his insanity defense.⁴¹ During the cross-examination of a defense psychiatrist, the State presented the fact that the defendant

King, 109 Ill. 2d at 530, 488 N.E.2d at 958; *People v. Bartall*, 98 Ill. 2d 294, 456 N.E.2d 59 (1983).

35. *King*, 109 Ill. 2d at 523, 488 N.E.2d at 953.

36. *Id.* at 531, 488 N.E.2d at 958. Additionally, the other crimes evidence undermined the defendant's claim of coercion by validating a defense witness's testimony which implicated the defendant. See *supra* notes 78-86 and accompanying text.

37. *King*, 109 Ill. 2d at 552, 488 N.E.2d at 968.

38. M. GRAHAM, *supra* note 12, at § 404.6.

39. *King*, 109 Ill. 2d at 531, 488 N.E.2d at 958.

40. 112 Ill. 2d 284, 493 N.E.2d 332 (1986).

41. *Id.* at 288, 493 N.E.2d at 333. The charge stemmed from a fight in which the defendant splashed his wife with gasoline and lit her on fire. *Id.* at 287-88, 493 N.E.2d at 333.

previously had stabbed a woman and had shot a revolver between his son's legs.⁴² The court rejected defendant's argument that the evidence of the prior bad acts had no probative value, noting that almost every aspect of a defendant's life is relevant when he raises the insanity defense.⁴³ Accordingly, the court held that the trial court properly had admitted the bad acts evidence.⁴⁴

Illinois courts traditionally have declined to permit cross-examiners to question a witness as to any "bad acts" committed in the past, felony convictions and misdemeanor *crimen falsi*⁴⁵ notwithstanding.⁴⁶ In *Buggs*, the court allowed cross-examination as to the prior bad acts of the defendant, not during the impeachment of the defendant or a reputation witness, but rather during the cross-examination of a defense expert testifying as to the defendant's insanity at the time of the offense. *Buggs*, therefore, does not alter existing Illinois law on impeachment.⁴⁷ Rather, *Buggs* clarifies the permissible scope of cross-examination of an expert in an insanity case by holding that such examination may include past acts of the defendant even if those same acts would not have been admissible during the cross-examination of the defendant or any lay witness.⁴⁸

B. Opinions and Expert Testimony

1. Lay Opinions

The trend in Illinois has been to follow the lead of the Federal Rules of Evidence and liberalize the rules governing admissibility of opinion testimony. Having previously held that an expert is not prohibited from offering an opinion as to the ultimate issue, the Illinois Supreme Court in *Freeding-Skokie Roll-Off Service v. Hamilton*⁴⁹ faced the question of whether a lay witness should be permitted to offer an opinion on the ultimate issue. In *Freeding-*

42. *Id.*

43. *Id.* at 290, 493 N.E.2d at 334. *Accord* *People v. Vanda*, 111 Ill. App. 3d 551, 444 N.E.2d 609 (1st Dist. 1982); *People v. Burress*, 1 Ill. App. 3d 17, 272 N.E.2d 390 (4th Dist. 1971). Relevancy, however, remains a prerequisite for the admission of any evidence. *See, e.g., People v. Free*, 94 Ill. 2d 378, 413, 447 N.E.2d 218 (1983).

44. *Buggs*, 112 Ill. 2d at 289, 493 N.E.2d at 334.

45. *Crimen falsi* refers to crimes in the nature of perjury, false statement, criminal fraud, or other crimes which involve deceitfulness. BLACK'S LAW DICTIONARY 712 (5th ed. 1979).

46. *See, e.g., People v. Norwood*, 54 Ill. 2d 253, 296 N.E.2d 852 (1973); *People v. Celmars*, 332 Ill. 113, 163 N.E. 421 (1928).

47. Compare the *Buggs* decision with impeachment in federal courts. *See* FED. R. EVID. 608(b).

48. The Illinois Appellate Court for the Fourth District discussed prior bad acts in *People v. Hendricks*, 145 Ill. App. 3d 71, 495 N.E.2d 85 (4th Dist. 1986).

49. 108 Ill. 2d 217, 483 N.E.2d 524 (1985).

Skokie, the plaintiffs sought recovery of damages to their truck allegedly caused by the defendant's negligence.⁵⁰ Over the defendant's objection, the trial court admitted opinion testimony of the plaintiff driver and an occurrence witness that the plaintiff could not have avoided the accident.⁵¹ Despite the court's previous adoption of Federal Rules of Evidence 702, 703, and 705,⁵² the *Freeding-Skokie* court refrained from explicitly adopting Federal Rule of Evidence 704.⁵³ Instead, the court decided the issue based on the bottom-line consideration in all opinion testimony rulings: whether or not the opinion would be helpful to the jury.⁵⁴ Because the lay opinions were not helpful to the understanding of the witness's testimony, the court held that the trial court erroneously had admitted them.⁵⁵

2. Basis of Opinion Testimony by Experts

Since the Illinois Supreme Court's 1981 decision in *Wilson v. Clark*,⁵⁶ adopting Federal Rules of Evidence 703⁵⁷ and 705,⁵⁸ Illinois courts have been grappling with questions about the admissibility of expert testimony. In *Wilson*, the court held that experts' opinions need not be based solely upon facts which are admissible into evidence.⁵⁹ The opinions need only be based upon facts or

50. *Id.* at 218, 483 N.E.2d at 524.

51. *Id.* at 219, 483 N.E.2d at 525.

52. *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981) (adopting FED. R. EVID. 702, 703, 705). *Accord* *J.L. Simmons Co. v. Firestone T. & R. Co.*, 126 Ill.App.3d 859, 467 N.E.2d 327 (1984).

53. Prior to *Freeding-Skokie*, the Illinois Supreme Court had not addressed the issue of whether a lay witness may present an opinion on the ultimate issue. Many of the federal and state courts which allow lay opinion testimony on an ultimate issue rely on Federal Rule of Evidence 704. Federal Rule of Evidence 704 provides in relevant part that: "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

54. *Freeding-Skokie*, 108 Ill. 2d at 222-23, 383 N.E.2d at 527.

55. *Id.* at 223, 383 N.E.2d at 527.

56. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

57. FED. R. EVID. 703 provides:

The facts or data in which the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

58. FED. R. EVID. 705 provides:

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

59. *Wilson*, 84 Ill. 2d at 192, 417 N.E.2d at 1325.

data perceived by or made known to the expert when those facts or data are of the type "reasonably relied upon" by experts in the field in forming opinions or inferences.⁶⁰ The fact that the expert's opinion in *Wilson* was based, in part, upon hospital records which, under Supreme Court Rule 236 should not have been admitted into evidence, was not of consequence because the records were of the type reasonably relied upon by experts in similar situations.⁶¹

Wilson has left a number of unanswered questions which will continue to pose doctrinal difficulties for Illinois courts. For example, how is the trial judge to determine whether or not particular facts or data are of the type reasonably relied upon in the field? The trend is clearly to allow experts "great liberality" in determining the basis of the opinion,⁶² and to encourage trial judges to exercise their discretion in favor of admissibility, with the fact-finder left to determine the weight of the testimony. In that regard, experts have been allowed to base conclusions upon conversations with the defendant himself,⁶³ the content of which may be disclosed in court as the basis for the conclusion, or upon conversations with IRS agents about the defendant's sanity,⁶⁴ or upon notations made by unskilled or untrained persons.⁶⁵ The focus of the trial judge's inquiry on the threshold admissibility question should be whether or not the facts or data relied upon possess some indicia of reliability or trustworthiness.⁶⁶ If there is no showing of unreliability, the court does not abuse its discretion when it admits the opinion evidence and leaves it to the jury to determine what weight to accord the evidence.⁶⁷

The second pending issue after *Wilson* concerns whether and to what extent the facts or data reasonably relied upon by the expert can be disclosed to the jury, particularly when those facts or data would not otherwise be admissible. That issue formed the centerpiece of the Illinois Supreme Court's recent holding in *People v. Anderson*.⁶⁸ In *Anderson*, the Illinois Supreme Court determined the extent to which a defendant's expert witness could disclose the

60. *Id.* at 193, 417 N.E.2d at 1326.

61. *Id.* at 192, 417 N.E.2d at 1325.

62. *See, e.g.,* *Mannino v. International Mfg. Co.*, 650 F.2d 846, 852 (6th Cir. 1981).

63. *See, e.g.,* *People v. Anderson*, 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

64. *See, e.g.,* *United States v. Sims*, 514 F.2d 147 (9th Cir. 1975).

65. *See, e.g.,* *Manning v. Mock*, 119 Ill. App. 3d 788, 457 N.E.2d 447 (4th Dist. 1983).

66. *Henry v. Brenner*, 138 Ill. App. 3d 609, 486 N.E.2d 934 (3rd Dist. 1985).

67. *Manning v. Mock*, 119 Ill. App. 3d 788, 457 N.E.2d 447 (4th Dist. 1983).

68. 113 Ill. 2d 1, 485 N.E.2d 485, *cert. denied*, 107 S. Ct. 658 (1986).

basis of his diagnosis to the jury.⁶⁹ The court held that an expert may reveal the contents of material upon which he reasonably relied to explain the basis of his opinion.⁷⁰

In *Anderson*, the defendant was found guilty of murder.⁷¹ At trial, the defense called as an expert witness a psychiatrist who had reviewed various criminal and psychiatric records.⁷² The expert testified that the defendant could not conform his conduct to the law at the time of the shooting.⁷³ The lower court, however, prohibited the expert from revealing on direct examination the facts or opinions contained in reports upon which he relied in making his diagnosis.⁷⁴ The reports included evaluations by psychiatrists, doctors, and counselors of the defendant.⁷⁵ The trial court allowed the expert to say only that he used the reports.⁷⁶

In deciding the issue before it, the supreme court in *Anderson* analyzed the holdings of two landmark cases in Illinois law, *People v. Ward*⁷⁷ and *Wilson v. Clark*.⁷⁸ In *Ward*, the supreme court had

69. *Id.* at 7, 495 N.E.2d at 487.

70. *Id.* at 9, 495 N.E.2d at 488.

71. *Id.* at 3, 495 N.E.2d at 486. After the defendant was sentenced to death, the case came before the supreme court on direct appeal. The only material issue at trial was the defendant's sanity. On appeal, the defendant raised thirty-five issues, two of which the court addressed. The defendant contended that he was denied a fair trial when the lower court allowed the State to introduce the defendant's response to the *Miranda* warnings in order to establish his sanity. *Id.* at 5, 495 N.E.2d at 486. The court reversed the convictions and remanded the cause for a new trial. *Id.* at 7, 495 N.E.2d at 487 (citing *People v. Stack*, 112 Ill. 2d 301, 493 N.E.2d 339 (1986); *Wainwright v. Greenfield*, 106 S. Ct. 634 (1986)).

72. *Anderson*, 113 Ill. 2d at 4, 495 N.E.2d at 486.

73. *Id.*

74. *Id.* at 7, 495 N.E.2d at 487. On appeal, the defendant argued that the trial court should have allowed the psychiatrist to recount certain statements made by the defendant himself. *Id.* Federal Rule of Evidence 705 does not provide clear guidance on this issue because that rule was designed to allow cross-examiners to bring out the facts upon which the expert opinion is based and does not directly address whether the factual basis can be brought out on direct examination.

75. *Id.* at 7, 495 N.E.2d at 487.

76. *Id.*

77. 61 Ill. 2d 559, 338 N.E.2d 171 (1975). In *Ward*, the Illinois Supreme Court held that expert medical opinion on the issue of insanity based on records compiled by others which was not admitted into evidence was permissible if the reports were of a type customarily used in the medical profession. *Id.* at 568, 338 N.E.2d at 177. *Ward*, however, did not expressly hold that a psychiatrist could reveal the contents of the report. A majority of appellate cases have interpreted *Ward* as meaning that the underlying facts and opinions could be disclosed. *Anderson*, 113 Ill. 2d at 10, 495 N.E.2d at 489. *Accord* *Henry v. Brenner*, 138 Ill. App. 3d 609, 613, 486 N.E.2d 934 (3rd Dist. 1985). *See also* *People v. Castro*, 113 Ill. App. 3d 265, 446 N.E.2d 1267 (1st Dist. 1983) (physician's testimony based upon records prepared by another person held admissible); *In re Germich*, 103 Ill. App. 3d 626, 431 N.E.2d 1092 (1st Dist. 1981) (psychiatric expert allowed to rely on a medical center staff intake report).

held that expert medical opinions based on records compiled by others which were not admitted into evidence were permissible if the reports were of a type customarily used in the medical profession.⁷⁹ The *Anderson* court concluded that the logic of Federal Rule of Evidence 703, *Wilson*, and *Ward* required that an expert be permitted to reveal the contents of material upon which he reasonably relied to explain the basis of his opinion.⁸⁰ The court explained that to prevent an expert from referring to the contents of material upon which he relied "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."⁸¹ Although much of the underlying basis for the expert's opinion would have constituted inadmissible hearsay if left standing alone, the court reiterated that such evidence is not hearsay when considered in connection with the testimony of an expert.⁸² The court held that data in the underlying reports should be admitted, not for their truth, but for the limited purpose of explaining the basis for the expert witness's opinion.⁸³

The court rejected the argument that juries cannot distinguish between the permissible use of the evidence for evaluation of the expert, and the impermissible use for substantive proof of the matters discussed in the statements.⁸⁴ In that event, counsel should argue that the jury is being misled and any resultant prejudice out-

78. 84 Ill.2d 186, 417 N.E.2d 1322 (1981).

79. *Ward*, 61 Ill.2d at 568, 338 N.E.2d at 177.

80. *Anderson*, 113 Ill. 2d at 9, 495 N.E.2d at 488. See also M. GRAHAM, *supra* note 12, § 703.1; P. ROTHSTEIN, *RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* 289 (2d ed. 1985); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 671 (1986); ABA SECTION OF LITIGATION, *EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE* 209, 214-15; Diamond and Loisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1353-54 (1965); Dieden & Gasprich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CALIF. L. REV. 543, 544 (1964).

81. *Anderson*, 113 Ill. 2d at 10-11, 495 N.E.2d at 490 (quoting *State v. Meyers*, 159 W. Va. 353, 358, 222 S.E.2d 300, 304 (1976)).

82. *Anderson*, 113 Ill.2d at 7, 495 N.E.2d at 487.

83. *Id.* at 12, 495 N.E.2d at 490. *Accord* *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984); *United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984). In effect, the court again has held that the hearsay rule does not apply to evidence reasonably relied upon by experts because the importance of the evidence to the jury primarily is in evaluating the strength or weakness of the opinion and not the truth of the matters contained in the out-of-court statements relied upon.

84. *Anderson*, 113 Ill. 2d at 12, 495 N.E.2d at 490. A judge's limiting instruction advising the jury to consider the statements only to evaluate the basis of the opinion should prevent misuse of information. *Id.* *Accord* *United States v. Madrid*, 673 F.2d 1114, 1122 (10th Cir. 1982); *United States v. Harper*, 450 F.2d 1032, 1037 (5th Cir.

weighs the probative value of the evidence. The court acknowledged that a "savvy" defendant could manipulate the disclosure rule to force the admission of his own statements without having to take the stand or undergo cross-examination.⁸⁵ The expert, nonetheless, must undergo cross-examination which allows the prosecution to explore the self-serving nature of the defendant's statements to the expert.⁸⁶

The Illinois Supreme Court also ruled upon the admission of psychiatric expert testimony in *People v. Wright*.⁸⁷ At issue was whether the trial court prejudiced the defendant's insanity defense by allowing the State's rebuttal witness, a psychiatrist, to state his opinion that the defendant's fifteen-year hospitalization resulted from a treatable personality disorder rather than a mental disease.⁸⁸ The expert admitted that he had not considered reports prepared during the hospitalization period or discussed the hospitalization with treating psychiatrists and that he reached his opinion about the defendant's sanity based solely upon police reports, a transcript of the defendant's taped confession, materials from previous incarcerations, and a two-hour interview with the defendant.⁸⁹ He further testified that it is not unusual to institutionalize persons with mere personality disorders absent any proof of mental illnesses.⁹⁰

Once again, the court relied on *Wilson* and held that the psychiatrist's testimony was fully admissible.⁹¹ The expert's examination of the defendant and his review of the other materials provided a sufficient factual basis to form an opinion as to why the defendant was hospitalized.⁹² Because the jury was aware of the basis of the doctor's testimony, the jury could determine the weight and credibility of the evidence.⁹³ Again, the trial judge's role is to determine the threshold question of admissibility and reserve for the cross-examiner the responsibility of disclosing any weaknesses in the basis for the conclusion.⁹⁴

1971); *Brown Mechanical Contractors, Inc. v. Centennial Insurance Co.*, 431 So. 2d 932, 944 (Ala. 1983).

85. *Anderson*, 113 Ill. 2d at 13, 495 N.E.2d at 490.

86. *Id.*

87. 111 Ill. 2d 128, 490 N.E.2d 640 (1985).

88. *Id.* at 152, 490 N.E.2d at 649.

89. *Id.* at 153, 490 N.E.2d at 649.

90. *Id.*

91. *Id.* at 154, 490 N.E.2d at 649.

92. *Id.* at 154, 490 N.E.2d at 650.

93. *Id.* *Accord* *People v. Bilyew*, 73 Ill. 2d 294, 302, 383 N.E.2d 212, 215-16 (1978).

94. Other recent cases addressing *Wilson* include *Thomas v. Brandt*, 144 Ill. App. 3d

In *Wright*, the court also considered whether a lay witness may offer an opinion as to a person's sanity. The defense counsel in *Wright* asked the only eyewitness to the crimes whether she thought that the defendant had acted in an "irrational," "crazy," or "abnormal" manner.⁹⁵ Counsel also asked whether she thought the specific acts performed by the defendant were "normal."⁹⁶ The trial court sustained objections to those questions but allowed defense counsel to ask whether the witness had ever seen anyone act like that before.⁹⁷ The supreme court held that a lay witness may give an opinion about an individual's mental condition but that the opinion must be based on personally observed facts stated in detail.⁹⁸ In *Wright*, the court said that the witness stated those facts in detail and thus the trial judge possessed discretion to rule on the scope of cross-examination in this area.⁹⁹

The Illinois Appellate Court for the Fourth District was less inclined to broaden *Wilson* in *Melecosky v. McMarthy Brothers Co.*¹⁰⁰ In *Melecosky*, decided prior to *Anderson*, the court affirmed the trial court's ruling rejecting the plaintiff's attempt to introduce the doctor's deposition in which the doctor expressed an opinion based upon the plaintiff's statements.¹⁰¹ As the basis for excluding the expert opinion, the court noted that the subjective, self-serving complaints of the plaintiff to a nontreating physician were not inherently reliable.¹⁰² In light of the holding in *Anderson* that the self-serving nature of a defendant's statements to an expert are more appropriate when considering the weight rather than admis-

95, 493 N.E.2d 1142 (5th Dist. 1986); *In re Village of Bridgeview*, 139 Ill. App. 3d 744, 487 N.E.2d 1109 (1st Dist. 1985); *Johnson v. Commonwealth Ed.*, 133 Ill. App. 3d 472, 478 N.E.2d 1057 (1st Dist. 1985).

95. *Wright*, 111 Ill. 2d at 147, 490 N.E.2d at 646-47.

96. *Id.* at 148, 490 N.E.2d at 647. When the trial judge inquired into defense counsel's questioning, counsel explained that he was "trying to get [the witness] to show the jury that the specific acts that [defendant] performed—that none of the specific acts he performed were normal." [sic] *Id.* at 149, 490 N.E.2d at 647. The defendant raised the insanity defense based upon a shoe fetish and testified at trial that he was looking for women's shoes at the time of the offenses. *Id.* at 140, 490 N.E.2d at 643.

97. *Id.* at 147-48, 490 N.E.2d at 647.

98. *Id.* at 148, 490 N.E.2d at 647. *Accord* *People v. Smothers*, 55 Ill. 2d 172, 302 N.E.2d 324 (1973); *People v. Williams*, 38 Ill. 2d 115, 230 N.E.2d 224 (1967); 4 CALLAGHAN'S ILLINOIS EVIDENCE § 7.27 (1983); M. GRAHAM, *supra* note 12, § 704.3.

99. *Wright*, 111 Ill. 2d at 149, 490 N.E.2d at 647. *Accord* *People v. Brisbon*, 106 Ill. 2d 342, 362, 478 N.E.2d 402, 411 (1986); *People v. Owens*, 102 Ill. 2d 88, 103, 464 N.E.2d 261, 268 (1984).

100. 141 Ill. App. 3d 84, 489 N.E.2d 1115 (4th Dist. 1986).

101. *Id.*

102. *Id.* at 89, 489 N.E.2d at 1118. *See also* *Jensen v. Elgin, Joliet & Eastern Ry. Co.*, 24 Ill. 2d 383, 389, 182 N.E.2d 211, 214-15 (1962) (doctor secured for purpose of testifying not allowed to testify regarding subjective complaints).

sibility of the opinion, this aspect of *Melecosky* conceivably could be decided differently today.

The *Melecosky* court, however, also based its result on hearsay considerations. The court explained that statements regarding pain, symptoms, and the cause of injury when made by a patient to his doctor for the purpose of diagnosis and treatment usually are admissible as an exception to the hearsay rule.¹⁰³ The court, however, noted that the supreme court had not yet held that statements made to a physician consulted for purposes of testifying could be brought before the fact finder under the *Wilson* edict.¹⁰⁴ The court believed that allowing a nontreating physician to testify about statements made by the plaintiff as a basis for an opinion would, in effect, adopt Federal Rule of Evidence 803(4).¹⁰⁵ Thus, because Illinois courts traditionally have held that statements to a nontreating physician are hearsay, the court refused to allow a nontreating physician to testify about a plaintiff's statements.¹⁰⁶

3. Locality Rule

In *Hansborough v. Kasyak*,¹⁰⁷ the Illinois Appellate Court for the Fourth District held that a doctor will not be disqualified as an expert for his lack of familiarity with local medical practices when national minimum standards of care exist.¹⁰⁸ In *Hansborough*, the plaintiff brought a medical malpractice suit to recover damages following a mastectomy.¹⁰⁹ The defendants were Hoopeston Commu-

103. *Melecosky*, 141 Ill. App. 3d at 89, 489 N.E.2d at 1118. *Accord* *Shell Oil Co. v. Industrial Comm.*, a Ill. 2d 590, 602, 119 N.E.2d 224, 231 (1954); *Greineke v. Chicago City Ry. Co.*, 234 Ill. 565, 572, 85 N.E. 327, 330 (1908).

104. *Melecosky*, 141 Ill.App.3d at 90, 489 N.E.2d at 1118.

105. *Id.* FED. R. EVID. 803 provides in relevant part:

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

....
 (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.

106. The court's analysis here is predicated upon the use of the hearsay rule which, as discussed above, ordinarily does not apply to the expert witness situation, simply because the facts and data are not offered for their truth but only for the limited purpose of showing the basis of the opinion. The distinction between treating and non-treating physicians, for purposes of expert testimony, also has been largely eroded by recent Illinois law.

107. 141 Ill. App. 3d 538, 490 N.E.2d 181 (4th Dist. 1986).

108. *Id.* at 545, 490 N.E.2d at 186.

109. *Id.* at 541, 490 N.E.2d at 183.

nity Memorial Hospital and two surgeons who practiced in Hoopeston.¹¹⁰ The plaintiff presented the affidavit of an expert witness who stated that he reviewed the record of the plaintiff's medical and surgical care and, based on his personal knowledge, believed that the defendant doctors lacked sufficient training, knowledge, and experience to perform the surgery.¹¹¹ His affidavit stated that according to the "standard of care, nationwide, and in Illinois," the operation should have been performed by "surgeons trained in plastic and reconstructive surgery."¹¹² The trial court struck the affidavit.¹¹³

On appeal, the court recognized that Illinois follows a modified version of the "locality rule."¹¹⁴ A medical expert must then demonstrate his familiarity with the standard of care under the locality rule before his testimony may establish the standard of care.¹¹⁵ As the court stated, the term "locality" has no precise meaning.¹¹⁶ If, however, there is only one uniform standard for treatment, then the national and community standards may be the same.¹¹⁷ More importantly, "a doctor will not necessarily be disqualified as an expert even if he is unfamiliar with the practices of a particular community as long as there are certain minimum standards of care uniform throughout the country for the particular practice."¹¹⁸ The court concluded that the plaintiff's expert, a surgeon and professor from Chicago, was not so unfamiliar with the medical practice in Hoopeston or similar communities that he could not state an opinion concerning the applicable standard of care.¹¹⁹

110. *Id.*

111. *Id.* at 542, 490 N.E.2d at 184.

112. *Id.* at 543, 490 N.E.2d at 184.

113. *Id.*

114. *Id.* at 544, 490 N.E.2d at 185. The modified locality rule requires a doctor to exercise such care and diligence as a good practitioner in a same or similar community would render under the same or similar circumstances. *Bartimus v. Paxton Community Hospital*, 120 Ill. App. 3d 1060, 1066, 458 N.E.2d 1072, 1077 (4th Dist. 1983).

115. *Hansbrough*, 141 Ill. App. 3d at 544, 490 N.E.2d at 185. *Accord* *Thompson v. Webb*, 138 Ill. App. 3d 629, 631-32, 486 N.E.2d 326, 327-28 (4th Dist. 1985).

116. *Hansbrough*, 141 Ill. App. 3d at 545, 490 N.E.2d at 186. *Accord* *Stogsdill v. Manor Convalescent Homes, Inc.*, 35 Ill. App. 3d 634, 653-54, 343 N.E.2d 589, 603-04 (2nd Dist. 1976).

117. *Hansbrough*, 141 Ill. App. 3d at 545, 490 N.E.2d at 186. *Accord* *Hunter v. Sukkar*, 111 Ill. App. 3d 169, 175-76, 443 N.E.2d 774, 778-79 (4th Dist. 1982).

118. *Hansbrough*, 141 Ill. App. 3d at 545, 490 N.E.2d at 186. *Accord* *Purtill v. Hess*, 111 Ill. 2d 229, 247, 489 N.E.2d 867, 876 (1986).

119. *Hansbrough*, 141 Ill. App. 3d at 545, 490 N.E.2d at 186.

III. HEARSAY

A. Computer Generated Information

During the *Survey* year, the Illinois Supreme Court, continuing the examination of computer records as business record exceptions to the hearsay rule, drew an important distinction between computer stored and computer generated data. In *People v. Holowko*,¹²⁰ the supreme court held that records produced by computerized phone-tracing equipment are not hearsay and are admissible into evidence.¹²¹ In *Holowko*, police charged the defendant with harassment by telephone¹²² after the complainant informed local police about harassing phone calls which he had received at home.¹²³ During its investigation, the police requested that the Illinois Bell Telephone Company place a trap or tracer on the complainant's phone.¹²⁴ This device generated information which revealed that the complainant had received a call from a phone owned by the defendant.¹²⁵ The trial court found these records were inadmissible under section 115-5 of the Code of Criminal Procedure because they were made "during an investigation."¹²⁶ The appellate court affirmed.¹²⁷

In reversing the lower courts, the supreme court determined that the printout of results of computerized telephone-tracing equip-

120. 109 Ill. 2d 187, 486 N.E.2d 877 (1985).

121. *Id.* at 193, 486 N.E.2d at 879.

122. ILL. REV. STAT. ch. 134, para. 16.4-1(1) (1981).

123. *Holowko*, 109 Ill. 2d at 189, 486 N.E.2d at 877.

124. *Id.* A "trap" or "tracer" is an electronic device whereby a computer automatically records the telephone numbers of incoming calls. *Id.*

125. *Id.*

126. *Id.* Section 115-5 of the Illinois Code of Criminal Procedure provides in relevant part:

- (a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transactions, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within reasonable time thereafter.

- (c) No writing or record made in the regular course of any business shall become admissible as evidence by the application of this section if:

- (2) Such writing or record has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind.

ILL. REV. STAT. ch. 38, paras. 115-5(a),(c)(2) (1985).

127. *Holowko*, 109 Ill. 2d at 189, 486 N.E.2d at 877.

ment is not hearsay evidence, but "represents a self-generated record of its operation."¹²⁸ Therefore, the court held that the proponent of such records need only satisfy the foundational requirements of showing the recording method of the information and the proper functioning of the device.¹²⁹ To reach this result, the court distinguished computer generated data from computer stored data.¹³⁰ In this context, the court concluded that printouts of the computer stored data constituted hearsay because they represented statements that had been fed into a computer by out-of-court declarants.¹³¹ On the other hand, computer generated data, such as the tracer information, represent information generated by a computer's internal operations and without the aid of a human.¹³² Hence, the court concluded that the rationale of excluding untrustworthy business records made by a person in preparation for litigation did not apply to computer generated information.¹³³

B. Hearsay Exceptions

1. Business Records¹³⁴

The Illinois Appellate Court for the Second District recently grappled with another application of the hearsay rule to computer records. The court in *Victory Memorial Hospital v. Rice*¹³⁵ did not resort to the computer generated and computer stored data distinc-

128. *Id.* at 192, 486 N.E.2d at 879 (quoting *State v. Armstead*, 432 So.2d 837, 840 (La. 1983)). In *Holowko*, the State had contended that computer records do not qualify as possible exceptions to the hearsay rule, but rather as exhibits of "demonstrative evidence of a scientific test or experiment." *Holowko*, 109 Ill. 2d at 191, 486 N.E.2d at 878. The court did not address the State's novel theory. The effect of this theory would be to categorize the computer records as facts or data relied upon by an expert which, in and of themselves, would not necessarily be admitted into evidence.

129. *Holowko*, 109 Ill. 2d at 193, 486 N.E.2d at 879.

130. *Id.*

131. *Id.*

132. *Id.* For a discussion of computer stored information and the hearsay rule, see *infra* notes 184-92 and accompanying text.

133. *Holowko*, 109 Ill. 2d at 192, 486 N.E.2d at 879. The court also ruled that the accuracy and reliability of computer generated information is judicially noticeable, requiring only proof of the accuracy and proper operation of the device under consideration. *Id.* See also *People v. Donahoo*, 54 Ill. App. 3d 375, 369 N.E.2d 546 (5th Dist. 1977) (accuracy of Doppler radar held judicially noticeable).

134. An exception to the hearsay rule exists for entries made in the regular course of business. In order to qualify as an exception, an entry must 1) be made in the regular course of business, 2) be part of a system of entries, 3) be contemporaneous with the transaction recorded, 4) lack a motive to misrepresent, and 5) be written. II J. WIGMORE, ON EVIDENCE § 518 (1904).

135. 143 Ill. App. 3d 621, 493 N.E.2d 117 (2nd Dist. 1986). See notes 120-33 and accompanying text.

tion crafted by the supreme court in *Holowko*.¹³⁶ In *Victory*,¹³⁷ the Illinois Appellate Court for the Second District held that computer generated hospital bills are admissible into evidence as business records provided that the proper foundation is presented.¹³⁸ In *Victory*, a hospital suing for the payment of medical and hospital bills challenged a trial court's ruling that computerized hospital bills could not be allowed into evidence under the business records exception to the hearsay rule.¹³⁹

In reversing the lower court's decision, the court explained that business records supplied by a computer could be admitted into evidence without the testimony of persons who made the entries if the following conditions are met: (1) the electronic computing equipment is recognized as standard; (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded; and (3) the foundation testimony satisfies the court that the sources of information, method, and time of preparation indicates the trustworthiness of the evidence and justifies its admission.¹⁴⁰ Applying this test, the court held that the plaintiff had presented a proper foundation to support the bill's trustworthiness by producing some documents of original entry.¹⁴¹

Victory signifies an expansion of the business records exception to the hearsay rule because the court not only exempted the proponent from producing the person who fed the information into the computer, but it also allowed all of the billing statements and other records which formed the basis for the data processed material into evidence. The court predicated this holding on the fact that requiring production of all of the documents of original entry would be too time consuming.¹⁴² Thus, the court allowed the defendants to present approximately thirty slips of paper indicating hospital services, although those slips were not actually used when entering the data.¹⁴³

136. *Holowko*, 109 Ill. 2d 187, 486 N.E.2d 877.

137. 143 Ill. App. 3d 621, 493 N.E.2d 117 (2nd Dist. 1986).

138. *Id.* at 627, 493 N.E.2d at 121.

139. *Id.* The billings in *Victory* obviously were computer stored data emanating from information supplied by the out-of-court declarants.

140. *Id.* at 626, 493 N.E. 2d at 120. *Accord* *Grand Liquor Co. v. Department of Revenue*, 67 Ill. 2d 195, 202, 367 N.E.2d 1238, 1242 (1977); *People v. Morman*, 97 Ill. App. 3d 556, 565, 422 N.E.2d 1065, 1073 (1st Dist.1981); K. North, *Computer Evidence in Illinois*, 71 ILL. B.J. 590 (1983).

141. *Victory*, 143 Ill. App. 3d at 627, 493 N.E.2d at 121.

142. *Id.* at 626-27, 493 N.E.2d at 120.

143. *Id.* at 626-27, 493 N.E.2d at 121.

A more traditional application of the business record exception to the hearsay rule was at issue in *Birch v. Township of Drummer*.¹⁴⁴ That case involved the issue of whether a record made in response to an act which previously had not occurred could be admitted into evidence under the business record exception. The Illinois Appellate Court for the Fourth District held that such a record qualifies if made in the regular course of business.¹⁴⁵

In *Birch*, the plaintiff brought a negligence action against a township and its highway commissioner for failing to warn her deceased husband about a dangerous roadway condition which contributed to her husband's fatal accident.¹⁴⁶ At trial, a civil engineer and highway superintendent testified that he had hired an engineering firm to perform a safety survey of all county roads.¹⁴⁷ The plaintiff claimed that the exhibit and superintendent's testimony constituted hearsay.¹⁴⁸ After a verdict for the defendant, the plaintiff appealed.¹⁴⁹

In affirming the lower court's decision, the court noted that the business record exception to the hearsay rule depends upon a routine of accuracy.¹⁵⁰ The *Birch* court further noted that a record made in response to an act which previously has not occurred may still be admitted into evidence if it was made in the regular course of business.¹⁵¹ In response to plaintiff's complaint that the highway superintendent was not associated with the firm which prepared the exhibit, the court held that a witness could produce business records even though he did not make the original entries.¹⁵² In this context, the court ruled that any one familiar with the business and procedure may establish the foundation for the records.¹⁵³ Finally, the court held that Illinois Supreme Court

144. 139 Ill. App. 3d 397, 487 N.E.2d 798 (4th Dist. 1985).

145. *Id.* at 407, 487 N.E.2d at 805-06.

146. *Id.* at 399-400, 487 N.E.2d at 801.

147. *Id.* at 406, 487 N.E.2d at 805.

148. *Id.*

149. *Id.* at 399, 487 N.E.2d at 801.

150. *Id.* at 407, 487 N.E.2d at 805.

151. *Id.* at 408, 487 N.E.2d at 805-06. See also M. GRAHAM, *supra* note 12, § 803.10; Newark Electronics Corp. v. City of Chicago, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1970) (compilation-computation of water damaged property prepared by a merchandiser held admissible even though flooding may have occurred only once).

152. *Birch*, 139 Ill. App. 3d at 407, 487 N.E.2d at 806.

153. *Id.* See also *Thomas v. Police Bd.*, 90 Ill. App. 3d 1101, 414 N.E.2d 11 (1st Dist. 1980) (evidence properly admitted after court clerk testified that records were kept in ordinary course of business); *Central Steel & Wire Co. v. Coating Research Corp.* 53 Ill. App. 3d 943, 369 N.E.2d 140 (5th Dist. 1977) (salesman's testimony concerning billing statement held admissible. The *Birch* court stated that the motive to falsify the high-

Rule 236(a) did not require exclusion of the survey because it contained opinions.¹⁵⁴ The appellate court in *Birch* concluded that the nature of the study should affect the weight to be attributed to the survey, rather than the question of admissibility.¹⁵⁵

2. Public Records¹⁵⁶

In *Connor v. Shaw*,¹⁵⁷ the Illinois Appellate Court for the Fifth District held that the Illinois Department of Public Aid's ("IDPA" or the "Department") certification of medical expense payments was admissible as a public record exception to the hearsay rule.¹⁵⁸ In *Connor*, the plaintiff won a jury verdict for damages resulting from a car accident.¹⁵⁹ Before a trial on the issue of damages, IDPA intervened.¹⁶⁰ During an adjudication of the Department's lien against plaintiff's settlement recovery, the Department offered into evidence its certification of medical payments made on the plaintiff's behalf.¹⁶¹ The trial court refused to admit this evidence and found for the plaintiff.¹⁶² The Department appealed.¹⁶³

The evidence offered consisted of a certification made by the Department's director that IDPA made certain medical payments on the plaintiff's behalf. The certification included photocopies of IDPA records listing the payments, some of which contained hand notations.¹⁶⁴ IDPA contended that the certification and documents were admissible under section 10-13.4 of the Public Aid Code ("Code") which provides, in sum, that records of the Depart-

way report was nonexistent because it was prepared three months before the accident and was useless unless accurate. *Birch*, 139 Ill. App. 3d at 407, 487 N.E.2d at 806.

154. *Birch*, 139 Ill. App. 3d at 407, 487 N.E.2d at 806.

155. *Id.*

156. Public records are a widely recognized exception to the hearsay rule and are admissible as evidence of the facts recited in them. This exception to the hearsay rule is based on their usual reliability and the inconvenience of requiring public officials to testify as to their subject matter. C. MCMORMICK, *supra* note 34, § 315. See generally 5 J. WIGMORE, *supra* note 34, §§ 1630-84.

157. 138 Ill. App. 3d 429, 485 N.E.2d 1184 (5th Dist 1985).

158. *Id.* at 433, 485 N.E.2d at 1186.

159. *Id.* at 430, 485 N.E.2d at 1186.

160. *Id.* at 43, 485 N.E.2d at 118. The Department intervened pursuant to section 11-22 of the Public Aid Code. ILL. REV. STAT. ch. 23, para. 11-22 (1985). The Public Aid Code allows the Department a charge or lien "upon all claims, demands, and causes of action for injuries [to a public aid recipient] for the total amount of medical assistance provided the recipient from the time of injury to the date of recovery upon such claim, demand, or cause of action." *Id.*

161. *Connor*, 138 Ill. App. 3d at 430-31, 485 N.E.2d at 1186.

162. *Id.*

163. *Id.*

164. *Id.*

ment shall be admitted into evidence subject only to the attestation of the Director.¹⁶⁵ The court, however, did not discuss whether this provision of the Code was intended to carve a special exception to the normal foundational requirements for the public records exception or whether the provision was intended to apply to proceedings at law outside an administrative context. In holding for the Department, the Fifth District urged that courts consider certification made under the statute reliable because a public official attested to them in connection with performance of his statutory duties.¹⁶⁶ Hence, the evidence was admissible as an exception to the hearsay rule.¹⁶⁷

IV. RELEVANCY AND ITS LIMITS

A. *Habit Testimony*¹⁶⁸

In *Bradfield v. Ill. Central Gulf Railroad Co.*,¹⁶⁹ the Illinois Appellate Court for the Fifth District considered the issue of whether habit testimony may be admitted into evidence even when eyewitnesses are present. Notwithstanding Illinois precedent to the contrary, the court held that habit testimony could be admitted regardless of the presence of eyewitnesses.¹⁷⁰

In *Bradfield*, defendant's train and plaintiff decedent's car collided at a train crossing marked only by a "crossbuck" sign.¹⁷¹ At trial, the train crew testified that it began blowing the train's whistle when they were one-quarter mile from the crossing.¹⁷² The decedent's widow, whose home was located next to the tracks, testified that she heard a whistle blow only immediately before the crash.¹⁷³ The widow and the decedent's son also testified that other train crews had failed to sound the whistle when approaching

165. ILL. REV. STAT. ch. 23, para. 10-13.4 (1985).

166. *Connor*, 138 Ill. App. 3d at 432, 485 N.E.2d at 1187. *Accord* Department of Public Aid v. Estate of Wall, 81 Ill. App. 3d 394, 400, 401 N.E.2d 639, 641-43 (5th Dist. 1980).

167. *Connor*, 138 Ill. App. 3d at 433, 485 N.E.2d at 1186.

168. Habit testimony concerns a particular activity, routine, or response that is repeated frequently over a period of time. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 121 (1978). Viewed as such, habit testimony is less general than character testimony and typically is admissible as circumstantial evidence to prove particular conduct. *Id.*

169. 137 Ill. App. 3d 19, 484 N.E.2d 365 (5th Dist. 1985).

170. *Id.* at 23, 484 N.E.2d at 367-68.

171. *Id.* at 20, 484 N.E.2d at 366.

172. *Id.* at 21, 484 N.E.2d at 366.

173. *Id.*

that crossing on previous occasions.¹⁷⁴

On appeal, the court rejected the defendant's contention that this testimony was erroneously allowed.¹⁷⁵ Prior to *Bradfield*, habit testimony could be received into evidence only in wrongful death cases when no one had witnessed the occurrence.¹⁷⁶ After considering the criticism of the no eyewitness predicate for the admission of habit testimony,¹⁷⁷ the court specifically adopted Federal Rule of Evidence 406¹⁷⁸ which rejects the eyewitness requirement.¹⁷⁹ Subsequent to the *Survey* period, the Illinois Supreme Court affirmed the appellate court's judgment.¹⁸⁰

B. Demonstrative Evidence: Photographs, Motion Pictures

In *Amstar Corp. v. Aurora Fast Freight*,¹⁸¹ the Illinois Appellate Court for the Third District held that a videotape of an accident scene may be inadmissible when its vantage point significantly differs from that of a witness to the accident.¹⁸² During the trial of a suit for damages arising from a collision of two semi-trailer trucks, the trial court did not allow the defendants to introduce a video-

174. *Id.*

175. *Id.* at 23, 484 N.E.2d at 368.

176. *Id.* at 22, 484 N.E.2d at 367. See e.g., *Gardner v. Geraghty*, 98 Ill. App. 3d 10, 15, 423 N.E.2d 1321, 1324-25 (1st Dist. 1981).

177. *Bradfield*, 137 Ill. App. 3d at 22-23, 484 N.E.2d at 367. For discussion of the trends regarding habit testimony, see *Glatt v. Feist*, 156 N.W.2d 819 (N.D. 1968); G. LILLY, AN INTRODUCTION TO THE LAWS OF EVIDENCE 121-24 (1978); W. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 337 (1981).

178. *Bradfield*, 137 Ill. App. 3d at 22-23, 484 N.E.2d at 367. FED. R. EVID. 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

179. *Bradfield*, 137 Ill. App. 3d at 23, 484 N.E.2d at 368. See C. MCCORMICK, EVIDENCE § 195, at 463-64 (1972). Nonetheless, the court held that no prejudicial error occurred in the case. *Bradfield*, 137 Ill. App. 3d at 23, 484 N.E.2d at 368. The defendant also contended that the trial court erred in refusing to allow a professional engineer to testify about the sight distances at the crossing. *Id.* at 21-23, 484 N.E.2d at 368. In supporting the trial court's decision, the appellate court restated the well-settled rule that expert opinions are not admitted unless the subject is difficult to comprehend or explain. *Id.* at 24, 484 N.E.2d at 368. *Accord Hernandez v. Power Construction Co.*, 73 Ill. 2d 90, 99, 382 N.E.2d 1201, 1205 (1978).

180. *Bradfield v. Ill. Central Gulf R.R. Co.*, No. 62509, slip op. at 4 (March 1986). On appeal to the supreme court, the defendant contended that the circuit court erred on admitting the habit testimony. *Id.* at 2. The court refused to decide this issue after concluding that the defendant had failed to preserve the issue for review. *Id.* at 3.

181. 141 Ill. App. 3d 705, 490 N.E.2d 1067 (3rd Dist. 1986).

182. *Id.* at 709, 490 N.E.2d at 1070.

tape of the accident scene which was taken from a moving car.¹⁸³

The *Amstar* court stated that motion pictures and videotapes could be admitted into evidence providing that they are material and relevant.¹⁸⁴ The court, however, concluded that the videotape could be excluded from evidence if it might confuse or mislead the jury.¹⁸⁵ Specifically, the appellate court noted that when a photograph depicted a vantage point different from a witness whose testimony was sought to be impeached, the photo could be excluded.¹⁸⁶ In the facts at issue, the court concluded that the vantage point from the videotape camera aimed through an automobile windshield and the actual view of a driver in a semitractor would be significantly dissimilar and potentially misleading.¹⁸⁷ Thus, the appellate court ruled that the trial court had acted within its discretion when it excluded the evidence.¹⁸⁸

V. RULE OF COMPLETENESS¹⁸⁹

In *People v. Williams*,¹⁹⁰ the Illinois Supreme Court addressed the issue of whether a criminal defendant may play the actual audio tape-recorded statements to a jury after police officers have already testified about the taking of the statements.¹⁹¹ The court held that the recordings should be admitted if they have independent relevance.¹⁹²

In *Williams*, police officers twice interrogated the defendant after arresting him for murder.¹⁹³ At trial, the officers who interviewed the defendant testified during the State's case in chief

183. *Id.* at 708, 490 N.E.2d at 1070.

184. *Id.*

185. *Id.* See also *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1st Dist. 1956) (motion pictures and photographs of a washing machine alleged to have caused plaintiff's injuries not allowed into evidence because they had no demonstrative value); *People v. Rolan*, 71 Ill. App. 3d 746, 390 N.E.2d 107 (1st Dist. 1979) (photographs which were taken from a vantage point different from that of a witness might confuse a jury).

186. *Amstar*, 141 Ill. App. 3d at 708, 490 N.E.2d at 1070.

187. *Id.* at 709, 490 N.E.2d at 1070.

188. *Id.*

189. The rule of completeness provides that "if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury." *Lawson v. G.D. Searle & Co.*, 64 Ill.2d 543, 356 N.E.2d 779 (1976). See also *FED. R. EVID.* 106; *C. MCCORMICK*, *supra* note 34, § 21; 4 *CALLAGHAN'S ILLINOIS EVIDENCE* §§ 535, 599 (1967); 2 *GARD, ILLINOIS EVIDENCE RULES* § 15:31 (1979); *M. Graham*, *supra* note 12, § 1002.2.

190. 109 Ill. 2d 327, 487 N.E.2d 613 (1985).

191. *Id.* at 330, 487 N.E.2d at 614.

192. *Id.* at 335, 487 N.E.2d at 618.

193. *Id.* at 331, 487 N.E.2d at 615.

concerning the defendant's statements.¹⁹⁴ Although the defendant's statements were tape recorded, the State did not play the tapes.¹⁹⁵ During his case, the defendant attempted to play the recordings of the statements.¹⁹⁶ The trial court, however, refused to admit the tape recorded statements, finding that the tapes would be cumulative and might confuse the jurors who already had heard police officers' testimony about the interviews.¹⁹⁷

The Illinois Supreme Court reversed on the grounds that the due process considerations, as well as the rule of completeness, dictated that the defendant be allowed to place before the jury "all that the defendant said."¹⁹⁸ The court held that cross-examination of the officers did not limit a defendant's right to later disclose all of a conversation.¹⁹⁹ The court further noted that when one party offers evidence of a conversation, the tape recording of the conversation may have independent relevance.²⁰⁰ The supreme court also emphasized that testimony of the police officers did not remedy the trial court's refusal to admit the tape recording because the defendant's demeanor and voice inflections could have affected the jury's assessment of the statement's credibility.²⁰¹ Accordingly, the court held that the tape is admissible, subject to the establishment of an adequate foundation.²⁰²

194. *Id.*

195. *Id.* at 331, 487 N.E.2d at 615.

196. *Id.* at 333, 487 N.E.2d at 616.

197. *Id.*

198. *Id.* at 334, 487 N.E.2d at 616. This could be done by cross-examining the officers or through the defendant's own witnesses. *Id.*

199. *Id.* at 335, 487 N.E.2d at 617.

200. *Id.* See, e.g., *People v. Henenberg*, 55 Ill. 2d 5, 302 N.E.2d 27 (jury allowed to view photographs of crime victim after witnesses testified orally about victim's condition); *People v. Robinson*, 104 Ill. App. 3d 20, 432 N.E.2d 340 (3rd Dist. 1982) (jury allowed to hear recorded telephone conversation because it bolstered other evidence); *People v. Nahas*, 9 Ill. App. 3d 570, 292 N.E.2d 466 (3rd Dist. 1973) (jury allowed to hear recorded evidence after identical oral testimony).

201. *Williams*, 109 Ill. 2d at 337, 487 N.E.2d at 618.

202. *Id.* at 338, 487 N.E.2d at 618. To establish an adequate foundation, a witness must testify that the tape accurately portrays the conversation in question. *United States v. Buzzard*, 540 F.2d 1383, 1386 (10th Cir. 1976); *People v. McCommon*, 79 Ill. App. 3d 853, 867, 399 N.E.2d 224, 234 (1st Dist. 1979); *People v. Spicer*, 61 Ill. App. 3d 748, 758, 378 N.E. 2d 169, 177 (5th Dist. 1978), *rev'd on other grounds*, 79 Ill. 2d 173, 403 N.E.2d 221 (1979). The court in *Williams* ruled that the defendant was not required to establish chain of custody when the tape had been in the exclusive control of the State. *Williams*, 109 Ill.2d at 338, 487 N.E.2d at 618.

VI. BURDENS OF PROOF AND PRESUMPTIONS

A. *Administrative Hearings*

In *Bd. of Educ. of Chicago v. State Bd. of Educ.*,²⁰³ the Illinois Supreme Court held that the preponderance of the evidence standard of proof is proper in tenured teacher dismissal proceedings even though the charged conduct may have been criminal in nature.²⁰⁴ In the case at issue, the Chicago Board of Education sought to dismiss a tenured schoolteacher for cause, based, in part, on his offering a student money to kill school officials and his failure to report a sale of cocaine.²⁰⁵ The lower courts had held that the hearing officer erred in applying the preponderance standard rather than a clear and convincing standard.²⁰⁶ The supreme court reversed, explaining that a uniform standard of proof in all tenured teacher dismissal proceedings was necessary to provide the litigants and hearing officers with certainty in standards of proof.²⁰⁷ The court, however, was careful to state that this holding should not be expanded to all administrative proceedings or even to all cases involving public agencies.²⁰⁸

The supreme court also asserted that its result comported with due process.²⁰⁹ In determining the extent of process due, the court applied a three part balancing test which weighed the following factors: (1) the private interests of the teacher; (2) the risk of error created by the chosen procedure; and (3) any countervailing governmental interests supporting the use of a particular burden of proof.²¹⁰ Weighing the interests at hand, the court held that the private loss was not overwhelming because it was not necessarily permanent in nature.²¹¹ The court also explained that any stigma involved in the loss of a teaching position did not implicate a fun-

203. 113 Ill. 2d 173, 497 N.E.2d 484 (1986).

204. *Id.* at 189, 497 N.E.2d at 990.

205. *Id.* at 176-79, 497 N.E.2d at 485-86. A hearing officer held that the Board failed to sustain its charge by clear and convincing evidence. *Id.* at 177, 497 N.E.2d at 985. The circuit court held that the preponderance of evidence standard was proper. *Id.* The appellate court, however, held that the clear and convincing standard was appropriate. *Id.*

206. *Id.* at 177, 497 N.E.2d at 985. To the contrary, the lower courts found that the hearing officer's error was harmless in light of the fact that his findings were not against the manifest weight of the evidence. *Id.* at 203, 497 N.E.2d at 985.

207. *Id.*

208. *Id.*

209. *Id.* at 194, 497 N.E.2d at 993.

210. *Id.* at 192-94, 497 N.E.2d at 992-93. Although not cited by the *Bd. of Educ.* court, this test finds its genesis in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

211. *Bd. of Educ.*, 113 Ill. 2d at 193, 497 N.E.2d at 992. The court contrasted the teacher's private interests with attorney disciplinary proceedings in which the clear and

damental interest.²¹² Consequently, the court concluded that the private interests involved failed to outweigh the school board's legitimate interest in protecting students, faculty, and administrators from harm.²¹³ Finally, the court opted for the preponderance standard because it was less likely to allow an "unfit individual" to continue to teach.²¹⁴

VII. PRIVILEGE

A. Hospital Records

In *Poole v. Moline Public Hospital*,²¹⁵ the Illinois Appellate Court for the Third District considered the limited issue of whether a child is entitled to a hospital's labor and delivery room records relating to his birth. The court ordered the delivery of the hospital records sought by the child.²¹⁶

In *Poole*, the plaintiff was born brain damaged at the defendant's hospital.²¹⁷ The trial court denied the plaintiff's request for the hospital to release the labor and delivery room records concerning his birth.²¹⁸ The hospital asserted that the records contained privileged information about the noncustodial mother.²¹⁹ Although the court allowed the plaintiff's attorney to see the records concerning the actual birth, it prohibited access to the mother's records from the time she entered the hospital until the birth.²²⁰

The appellate court observed that the labor and delivery room records of the mother and child contained substantially relevant and material birth information.²²¹ In addition, the court concluded that giving preference to the mother's privacy over the child's right to his birth information would serve no public or private interest.²²² Accordingly, the court ordered the hospital to re-

convincing standard is more appropriate because disbarment is a permanent punishment.
Id.

212. *Id.*

213. *Id.* at 194, 487 N.E.2d at 993.

214. *Id.*

215. 138 Ill. App. 3d 20, 485 N.E.2d 502 (3rd Dist. 1985).

216. *Id.* at 22, 485 N.E.2d at 504.

217. *Id.* at 21, 485 N.E.2d at 503.

218. *Id.*

219. *Id.* at 21-22, 485 N.E.2d at 503.

220. *Id.*

221. *Id.* at 22, 485 N.E.2d at 503. The court referred to data such as the infant's fetal heart tones, dilation, and position in the birth canal from the beginning of labor until birth. *Id.*

222. *Id.* at 21, 485 N.E.2d at 503. The child's right to the information is based upon an Illinois statute which provides:

Every private and public hospital shall, upon the request of any patient who has

lease the requested records.²²³

VIII. CONCLUSION

During the *Survey* year, Illinois supreme court and appellate court decisions addressed several issues affecting Illinois evidentiary law. Of particular significance, supreme court decisions delineated the permissible use of evidence for the impeachment of witnesses and liberalized the rules concerning opinion testimony. Both the supreme and appellate courts considered the admissibility of computerized information. Finally, the Illinois Appellate Court for the Fifth District adopted Federal Rule of Evidence 406.

been treated in such hospital and after his or her discharge therefrom, permit the patient, his or her physician or authorized attorney to examine the hospital record, including but not limited to the history, bedside notes, charts, pictures and plates, kept in connection with the treatment of such patient and permit copies of such records to be made by him or her or his or her physician or authorized attorney. A request for examination of the records shall be in writing and shall be delivered to the administrator of such hospital.

ILL. REV. STAT. ch. 110, para. 8-2001 (1985).

223. *Poole*, 138 Ill. App. 3d at 22, 485 N.E.2d at 504.